

Originally Processed With FOIA(s):
1998-0206-F[1]

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OA/ID Number: 45254
Folder ID Number: 45254-005

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DAVID H. SOUTER
(ANALYSIS)

JUDGE DAVID H. SOUTER, WHERE DOES HE STAND?

A Preliminary Review of his Judicial Record

President Bush's nominee for the Supreme Court, David H. Souter, has been called a "mystery man" and a "blank slate." It is likely that he was chosen precisely because he has not written or spoken out on the most controversial issues before the Court.

With this preliminary report, we hope to fill in some of the blanks. As New Hampshire's Attorney General and as then-Governor John Sununu's choice for the State Supreme Court—where he served from 1983-1989 and wrote 221 opinions—Judge Souter does have a record.

Supreme Court Watch examined Judge Souter's New Hampshire Supreme Court record in the following areas:

- **Abortion**
- **Criminal Procedure**
- **Due Process and Equal Protection**
- **Freedom of the Press**
- **Freedom of Speech**

Judge Souter's role as Attorney General in prosecuting protesters of the Seabrook nuclear power plant and in supporting the Governor's proclamation to fly flags on public buildings at half mast on Good Friday is also examined.

Supreme Court Watch raises a number of concerns about the prospect of Judge Souter sitting on the Supreme Court. He is described by his supporters as a "strict constructionist," a well-known euphemism for a deeply conservative jurist. His decisions generally support this conclusion and indicate that



"TO DESERVE A SEAT ON THE SUPREME COURT, JUDGE SOUTER MUST BE ABLE TO DEMONSTRATE TO THE SENATE AND THE AMERICAN PEOPLE A LIFELONG COMMITMENT TO EQUAL JUSTICE AND THE BILL OF RIGHTS."

he very narrowly construes constitutional protections of individual rights.

There is also grave concern about what we don't know. Most major Supreme Court decisions last term were decided by a 5-4 vote. Before Judge Souter is given a life term on the Supreme Court and the chance to tip the balance of power on the current Court, the American people have the right to know Judge Souter's view of the Constitution, the function of the Supreme Court in protecting fundamental constitutional rights, and where he stands on vital constitutional questions central to American life.

The President and supporters of Judge Souter are staking out a position which suggests that the Senate does not have the right to question the nominee about these and other specific issues. We disagree.

The Senate has co-equal constitutional responsibility with the President to determine who sits on the Supreme Court. Before confirming Judge Souter, the Senate must insist that he provide the answers to these fundamental questions.

To deserve a seat on the Supreme Court, Judge Souter must be able to demonstrate to the Senate and the American people a lifelong commitment to equal justice and the Bill of Rights.

ABORTION

By CONSTANCE DeMARTINO

Constance DeMartino is a legal intern at Supreme Court Watch and a law student at CUNY Law School at Queens College, New York.

The New Hampshire Supreme Court has never dealt directly with the constitutionality of restrictions on a woman's right to obtain an abortion. In Judge Souter's only state Supreme Court decision on the crucial question of abortion, he authored a special concurrence to a majority decision, which upheld a wrongful birth claim by the mother of a child born with congenital defects as a result of her exposure to German measles during pregnancy. *Smith v. Cole*, 513 A. 2d 341 (N.H. 1986).

Here the mother's physician had failed to test for German measles and inform the mother of her exposure until the second trimester of her pregnancy. He further failed to inform her of genetic testing procedures which could detect possible fetal defects. As a consequence, the child suffered from heart disease, blindness, motor retardation and significant hearing impairment. The mother claimed that had she been informed of the possible birth defects and the availability of genetic testing, she would have considered the option of terminating her pregnancy by abortion. The court ruled that the physician was guilty of negligence in not advising her so that she could make an informed decision regarding whether to have the child. The mother was awarded substantial damages for the special medical and educational needs attributable to her child's impairment.

Judge Souter's concurrence raised an issue which had not been raised by the parties in the case, thus demonstrating his special concern with this issue. He said that physicians whose "religious or moral principles condemn" abortion should be able to avoid malpractice liability by referring their patients in a timely manner to other physicians for the testing and counselling that could lead them to decide to have an abortion. Judge Souter's raising this issue suggests a particular solicitude for physicians who hold anti-abortion views. His result, however, balances the right of the pregnant woman to be informed with the right of physicians not to perform or counsel their patients about medical procedures which violate their religious or moral beliefs.

Judge Souter makes no direct statements in his concurrence as to whether or not he agrees with the landmark *Roe v. Wade* decision which recognized a woman's constitutional right to a safe and legal abortion. He describes this right as "necessarily permitted" under *Roe v. Wade*, and goes no further in discussing this landmark decision. While this language might refer to the obligation of state courts to obey *Roe v. Wade* under the Supremacy Clause of the U.S. Constitution, it raises questions about whether he would, as a Supreme Court Justice, accept the decision in *Roe v. Wade* as constitutionally proper.

CRIMINAL PROCEDURE

By STEVEN FASMAN

Steven Fasman is a board member of Supreme Court Watch and an attorney at Paul, Weiss, Rifkind, Wharton and Garrison.

Judge Souter's judicial decisions on criminal procedure raise serious concerns about his commitment to the protection of civil rights and civil liberties.

These must be addressed during the nomination process. Supreme Court Watch has not yet had the opportunity to comprehensively review Judge Souter's existing record in this area. Nevertheless, our preliminary review of dozens of opinions authored by Judge Souter suggests that he has often taken an extremely narrow view of constitutional protections guaranteed to those involved in the criminal justice system. In particular, he has written disturbing opinions analyzing *Miranda* and its progeny, the right to due process of law, the right to counsel, the right to a speedy trial, and the right to searches based only upon warrants.

MIRANDA WARNINGS. In *State v. Coppola*, 536 A. 2d 1236 (N.H. 1987), Judge Souter's majority opinion extended several U.S. Supreme Court decisions which limit *Miranda*'s effect on the refusal of a defendant to talk to police prior to arrest and before receipt of *Miranda* warnings.

Before his arrest and before getting *Miranda* warnings, the defendant told police, "...if you think I'm going to confess to you, you're crazy." Judge Souter ruled that this statement was not a declaration of the defendant's right to remain silent but was admissible as evidence of a guilty conscience. This opinion unfairly penalizes a defendant who has heard of *Miranda* warnings before his arrest and, based on the *Miranda* litany, refuses to talk to police.

In *State v. Rathbun*, 561 A. 2d 505 (N.H. 1989), Judge Souter's majority opinion affirmed a conviction based in part on incriminating statements made by the defendant. The defendant argued that previous New Hampshire decisions expanding on the Fifth Amendment and state constitutional rights protected by *Miranda* (and corresponding state decisions) should have led to suppression of the statements as improperly taken. Judge Souter limited the force of those New Hampshire decisions, struggling to diminish them so as to allow the defendant's statements to stand as spontaneously provided.

DUE PROCESS. The majority of the New Hampshire Supreme Court found a violation of the state constitutional guarantee of due process in *State v. Denney*, 536 A. 2d 1242 (N.H. 1987), and reversed the conviction. The case turned on the defendant's refusal to take a blood test for alcohol. Judge Souter dissented, claiming that the due process right asserted by the defendant and upheld by the majority did not exist.

The majority held that the defendant's refusal to submit (continued on next page)



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72 Fifth Avenue
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to a blood test could not be used against him unless he was warned that such refusal would be admissible evidence. Judge Souter dissented, arguing that no such warning was required by due process and that, even if it were, the *Miranda* warning that anything said by the defendant could be used against him was sufficient.

Judge Souter dissented in another due process case which involved testing for blood alcohol. The legislature proposed to eliminate a requirement that the state preserve a quantity of a DWI suspect's blood sufficient to conduct two tests and also a requirement that, as a prerequisite to the admissibility of the state's alcohol test, the state preserve a sample of a DWI suspect's breath for the suspect's independent analysis.

The majority in *Opinion of the Justices*, 557 A. 2d 1355 (N.H. 1989) said that the abolition of the preservation requirement would violate the suspect's due process rights, arguing that the accused would not otherwise have an adequate alternative means of independently determining his blood alcohol content at the time of the test. Failure to preserve a second breath sample would likewise deprive a suspect of the opportunity to test the integrity and accuracy of the state's evidence against him.

Judge Souter, in dissent, argued that no such due process right exists. Due process only requires that the state preserve evidence that might be expected to play a significant role in the suspect's defense. Judge Souter suggested that the chance of a second blood test proving the suspect's innocence was very low. He argued that defendants had alternative means to demonstrate their innocence, such as demonstrating the unreliability of the testing devices.

RIGHT TO COUNSEL. The Sixth Amendment and the equivalent clause in the New Hampshire Constitution guarantee the right to counsel upon indictment for a serious

offense. Cases interpreting these clauses protect this right by barring use of incriminating statements made by defendants under indictment without the presence of counsel.

Judge Souter, writing for the majority in *State v. Bruneau*, 552 A. 2d 585 (N.H. 1988), took an unlikely

view of the facts before him in order to distinguish these prior cases and uphold the use of incriminating statements made by the defendant to police and police informers without the benefit of an attorney.

SEARCH WARRANTS. In *State v. Valenzuela*, 536 A. 2d 1252 (N.H. 1987), the court, in an opinion by Judge Souter, upheld a conviction that relied on the fruits of a search conducted pursuant to a search warrant. The court rejected claims that the evidence should have been suppressed because the warrant was improperly obtained, even though the court admitted that the police officer's affidavit accompanying the warrant application contained several factual misstatements. There were other problems with the application as well. The court also upheld the use of "pen registers," which disclose numbers dialed from the defendant's telephone, prior to the issuance of a warrant.

WAIVER OF RIGHTS. Judge Souter reversed and remanded criminal convictions in two cases due to the failure of the trial courts to insure that the waiver of rights by the defendant had been proper. In *Richard v. MacAskill*, 529 A. 2d 898 (N.H. 1987), Judge Souter ruled that a *nolo contendere* plea had been entered unknowingly without effective assistance of counsel. In *State v. Hewitt*, 517 A. 2d 820 (N.H. 1986), the defendant, who remained silent when his lawyer agreed to the trial court's continuing with the trial after one

of the jurors had been excused, did not waive his right to a 12-person jury.

Judge Souter deserves credit for his recognition and protection of these important rights.

JUVENILE CRIME. In *State of New Hampshire v. DeFlorio*, 512 A. 2d 1133 (N.H. 1986), Judge Souter, writing for a unanimous court, held that minors who commit misdemeanors in violation of motor vehicle laws will automatically be regarded by the criminal justice system as adults even though minors who commit felonies may be treated as adults only after judicial determination.

Using a "rational basis" standard to evaluate the equal protection claim asserted by the defendant, Judge Souter argued that the legislature could rationally conclude that the only effective deterrent to wild teenage driving is adult penalties. Incarceration of a 16- or 17-year-old with adult prisoners, Judge Souter wrote, is not cruel and unusual punishment.

SPEEDY TRIAL. Previous New Hampshire decisions had established that a defendant's constitutional right to a speedy trial is presumptively violated if more than nine months elapse between arrest and trial. A full year elapsed in *State v. Colbath*, 540 A. 2d 1212 (1988), but Judge Souter, writing for the majority, strove to mitigate the significance of the extraordinary delay by placing part of the blame on the defendant. The court denied the speedy trial claim, arguing that the defendant never initiated a speedy trial request, that he was out on bail and that he suffered no prejudice from the extended wait.

RAPE SHIELD LAW. The conviction in the *Colbath* case, discussed previously, was ultimately overturned for other reasons. The defendant in this case was charged with sexual assault. Judge Souter, who generally rules against defendants in criminal procedure questions, overturned this conviction on the ground that the trial judge erroneously excluded evidence about the victim's sexually suggestive behavior just prior to the attack.

The defendant had testified that the victim left a bar with him voluntarily and had consented to sexual intercourse. Judge Souter's opinion said that the state's rape shield law, intended to prevent victims from being put on trial, had to be interpreted in light of a defendant's right to a fair trial. Judge Souter wrote that "evidence of the [victim's] openly sexually provocative behavior toward a group of men [could be taken] as evidence of her probable attitude toward an individual within the group."

In addition, he suggested that the victim could have alleged rape "as a way to...excuse her undignified predicament." The court found that "the outcome of the prosecution could very well have turned on a very close judgment about the [victim's] attitude of resistance or consent." On retrial, the defendant was convicted again.

CONCLUSION. The importance of constitutional protections accorded to those involved in the criminal justice system cannot be overstated. These guarantees protect all citizens from abuse by the sometimes overwhelming power of the state. Any nominee to the Supreme Court should be someone who will seek to vindicate and uphold these rights.

Judge Souter's record in this area is sufficiently troubling to justify a thorough examination by the Senate of his commitment to these basic rights.

DUE PROCESS AND EQUAL PROTECTION

By ROBERT A. SEDLER

Robert A. Sedler is a board member of Supreme Court Watch and a Professor of Law at Wayne State University, Detroit, Michigan.

Constitutional challenges to state legislation on the basis of due process and equal protection derive from the Fourteenth Amendment. This Amendment prohibits a state from depriving a person of life, liberty or property without due process of law or equal protection of the laws. State constitutions also have due process and equal protection clauses.

Some due process challenges inquire whether, given the claimed state interest in the legislation and the individual right affected by the legislation, the legislation is valid. Equal protection claims challenge state laws on the basis that laws unfairly discriminate between comparable categories of people.

In both due process and equal protection analyses, "levels of scrutiny" or standards of review are used by the courts to scrutinize state action. They differ depending on the importance of the individual interest involved. The highest level of scrutiny applies when the law, or a classification contained in the law, discriminates on a suspect basis such as race or affects a fundamental right such as marriage and the family, a person's right to reproductive freedom, the right to vote, and the right to travel between states. In such circumstances, a heavy burden is put on the state to justify the legislation. The state must show that the law or classification is the "least drastic means" of advancing a "compelling governmental interest."

The lowest level of scrutiny in both due process and equal protection analyses is the "rational basis" standard, which allows legislation to stand so long as it is not completely arbitrary or unfair. A "middle level" of scrutiny seems to have evolved on the United States Supreme Court in cases of sex discrimination and discrimination against illegitimate children. The higher the level of scrutiny used by the court, the less likely it is that the legislation can withstand the constitutional challenge.

State courts can interpret state constitutions as providing greater protection for individual rights than are provided under similar provisions of the United States Constitution. States also sometimes have special provisions protecting individual rights.

New Hampshire, like a number of other states, has a constitutional prohibition against the legislature's limiting the right of accident victims and other tort claimants to recover damages against responsible parties. In New Hampshire, "middle level" scrutiny applies to legislation restricting this right to recover. "Middle level" scrutiny also applies to laws interfering with land use. The end result is that certain actions are unconstitutional under the New Hampshire Constitution that are not unconstitutional under the United States Constitution.

Most of the due process and equal protection decisions in which Judge Souter participated as a member of the New Hampshire Supreme Court involved either challenges under the state constitution alone or challenges under both the state and federal constitutions. Looking at these decisions, the following observations can be made about Judge



"JUDGE SOUTER'S JUDICIAL DECISIONS ON CRIMINAL PROCEDURE RAISE SERIOUS CONCERNS"

ABOUT HIS COMMITMENT TO THE PROTECTION OF CIVIL RIGHTS AND CIVIL LIBERTIES."



Souter's record as a member of the New Hampshire Supreme Court:

1) While Judge Souter has joined in some opinions which find due process and equal protection violations under the state constitution, he is less disposed to find a due process or equal protection violation than most of his colleagues;

2) He has questioned the use of "middle level" scrutiny in cases involving the constitutionality of restrictions on tort liability, and is more disposed than most of his colleagues to defer to legislative judgment;

3) He has joined in opinions in the relatively few cases where the New Hampshire court invalidated laws under the less restrictive "rational basis" standard;

4) He has not ruled on any significant case involving issues of race, alienage or gender discrimination.

The court rendered an advisory opinion, holding that it was constitutional for the state to prohibit gays and lesbians from adopting children or acting as foster parents. The court did hold, however, that it was unconstitutional to prohibit gays and lesbians from operating day care centers.

Some of the due process and equal protection cases in which Judge Souter participated on the New Hampshire Supreme Court include the following:

PUBLIC BENEFITS. Judge Souter wrote the opinion in *Appeal of Albert & Edward Bosselait*, 547 A. 2d 682 (N.H. 1988), where the court unanimously upheld the denial of unemployment compensation benefits to two elderly workers who had been laid off from their part-time jobs.

For 22 years they had shared a single full-time janitor's job, each working four hours a day. They argued that their poor health and age precluded their working full time, and challenged the provision of the state law denying unemployment compensation to persons who are not "available for and seeking permanent full-time work." Judge Souter first rejected claims that the restriction violated the Federal Age Discrimination Act (he found it was not adequately raised) or the Federal Rehabilitation Act (their inability to work longer because of their age did not constitute a "handicap"). He then addressed the equal protection claims and found that the requirement of being available for full-time employment as a condition for receipt of unemployment compensation benefits did not deny equal protection to those persons who only wanted to or only were able to work part-time.

Applying the "rational basis" test, he found that the restriction was rationally related to the state's interest in conserving available funds for those persons who needed them most—those who have no sources of income except for their paychecks. He said that the state could conclude that those who work only part-time probably have another source of income. Judge Souter's opinion in this case illustrates the application of the "rational basis" test with extreme deference to legislative judgment.

RESTRICTIONS ON TORT RECOVERY. Under the New Hampshire Constitution, restrictions on tort recovery are subject to "middle level" scrutiny. Judge Souter has questioned the application of this standard of review to restrictions on tort recovery and is more deferential than the majority of his colleagues to legislative judgment in this area.

In *Opinion of the Justices*, 495 A. 2d 1182 (N.H. 1985), Judge Souter joined his colleagues in an advisory opinion to hold that the state could not constitutionally limit recovery against the state to those who suffered death, bodily injury and property damage, while denying recovery for other injuries. The court also held unconstitutional absolute immunity for the state for all intentional wrongdoing by state employees, for tax assessment or collection, for detention of goods by law enforcement officers, and for the operation of public highways, streets, sidewalks and publicly-owned airports.

Nevertheless, in a dissenting opinion in *City of Dover v. Imperial Casualty & Indemnity Co.*, No. 89006, 1990 N.H. Lexis 39, Judge Souter argued in favor of municipal immunity for injuries incurred while on municipal highways, streets and sidewalks. The majority, in a suit by a woman who was injured while walking on a city sidewalk, held that a state law making cities immune from such suits violated the equal protection and "right to remedy" provisions of the state constitution. Applying "middle level" scrutiny, the majority found that virtually complete municipal liability went too far in denying a category of citizens any remedy simply because the defendant was a municipality.

Judge Souter's dissent argued that the court should have been more deferential to legislative judgment and that the law was justified because it provided for municipal liability in some circumstances and shielded municipalities from unmeritorious suits. He criticized the manner in which the majority applied "middle level" scrutiny in this case and called for a re-examination of the earlier New Hampshire Supreme Court precedent which had authorized "middle level" scrutiny in such cases.

Similarly, Judge Souter dissented in *Estabrook v. American Hoist & Derrick*, 498 A. 2d 741 (N.H. 1985), where the majority found that a 1978 amendment to the state workers' compensation law barring a tort action by an injured employee against another employee (and so limiting the injured employee to the lesser recovery provided under the worker's compensation law) violated the state constitution.

The case resulted from the wrongful death claim brought by the wife of a firefighter who died en route to a fire when the driver failed to negotiate a turn. The majority held that the 1978 amendment violated the due process and equal protection rights of injured workers by depriving them of their common law right to a remedy against the negligent party without giving them a substituted remedy in return.

While the state provided workers' compensation in exchange for the common law tort action against the employer, it provided the injured employees with no substitute for the loss of their common law action against a co-employee.

Judge Souter argued in his dissent that it was sufficient for the injured employee to recover workers' compensation against the employer, and that it did not matter that there was no substituted right against the co-employee. The majority disagreed, noting that the original workers' compensation act involved compensation for the injury caused by the employer, which was different from the right to a remedy for injury caused by a co-worker.

Judge Souter's dissents in these cases reflect his insistence on deference to legislative judgment in due process and equal protection cases, even when the legislation restricts the right to recover in tort, which is specifically protected by the New Hampshire Constitution.

POLITICAL RIGHTS. In *Opinion of the Justices*, 554 A. 2d 446 (N.H. 1989), Judge Souter joined a unanimous advisory opinion, holding that a requirement that a notary public have been a registered voter for three years prior to being appointed violated the equal protection clause of the state and federal constitutions, but that such a requirement for justices of the peace did not. The court was applying the "rational basis" test.

PROPERTY RIGHTS. In *Town of Chesterfield v. Brooks*, 489 A. 2d 600 (N.H. 1985), the court, applying "middle level" scrutiny to interferences with property rights, held that a town zoning ordinance requiring mobile homes to be located 500 feet back from all paved roads or to be located on unpaved roads violated equal protection. Judge Souter concurred only in the result.

CONCLUSION. Judge Souter's decisions in due process and equal protection cases coming before the New Hampshire Supreme Court indicate that he takes a very cautious approach to the use of these provisions to protect individual rights against governmental action. On the whole, he is somewhat less disposed to find a due process or equal protection violation than most of his colleagues. He has questioned the use of the "middle level" scrutiny that is employed by the New Hampshire Supreme Court to deal with the constitutionality of restrictions on tort liability and is more disposed than most of his colleagues to defer to legislative judgment and to uphold restrictions in these cases. Moreover, he is reluctant to interpret these provisions as providing greater protection than is provided under

the due process and equal protection clauses of the federal constitution.

At the same time, he has joined in a number of opinions striking down state laws on due process and equal protection grounds, including those in the relatively few cases where the court has invalidated laws under the less restrictive "rational basis" standard. He appears to be operating within the institutional framework of the New Hampshire Supreme Court, although he is clearly at the more conservative end of the spectrum.

RIGHTS OF GAYS AND LESBIANS

By GLORIA JAN and JUSTIN BRASCH

Justin Brasch, a student at Cardozo Law School, and Gloria Jan, a student at Yale Law School, are both legal interns at Supreme Court Watch.

Judge Souter joined an advisory opinion to the New Hampshire House of Representatives which rejected a proposal to prohibit gays and lesbians from running day care centers, but held that provisions to exclude gays and lesbians from adopting children or becoming foster parents were consistent with the state and federal constitutions. *Opinion of the Justices*, 530 A. 2d 21 (N.H. 1987).

By taking this position, Judge Souter and his colleagues failed to follow the lead of the majority of other state courts which, like the dissent to this opinion by fellow New Hampshire Supreme Court Justice Batchelder, have rejected the use of sexual orientation as a factor in evaluating potential adoptive or foster parents. The Court refused to consider gays and lesbians as a protected group such as women or racial minorities, thus failing to challenge this nation's long-standing discrimination against gays and lesbians.

Judge Souter and his colleagues reasoned that the state had a legitimate interest in providing role models for children, and that the exclusion of gays and lesbians from being foster and adoptive parents would further this purpose. The court's decision relied on the disputed theory that there is a "reasonable possibility" that having a gay or lesbian parent might affect a child's "developing sexual identity." The rationale underlying this theory is that "persons in the position of parents are the primary role models after whom children consciously or unconsciously pattern themselves."

The court conceded that there have been "a number of studies that find no correlation between a homosexual orientation of parents and the sexual orientation of their children." But the court concluded that since the "source of sexual orientation is still inadequately understood," the state could, in the best interests of children, exclude gays and lesbians from adopting children or becoming foster parents.

Justice Batchelder, in his dissent, found that the legislature and the majority of the Court provided no "rational basis" for concluding that gays and lesbians lack the skills necessary to be proper role models and parents. He further noted that the legislature had received no evidence showing that gay and lesbian parents "endanger their children's development...any more than heterosexual parents."

Justice Batchelder objected to the majority's evaluation of gays and lesbians solely on the basis of their sexual orientation rather than as individuals applying to adopt children or become foster parents. "The bill presumes that every homosexual is unfit to be an adoptive parent or to provide foster and day care," thus precluding gays and lesbians from demonstrating their skills as parents. Then-Justice Souter and his colleagues were willing to label gays and lesbians as unfit parents, which has broad implications for the rights of gays and lesbians not only to become foster or adoptive parents, but also to retain custody of their children.

As Justice Batchelder declared, "[t]he State is never more humanitarian than when it acts to protect the health of its children. The State is never less humanitarian than when it denies public benefits to a group of citizens because of ancient prejudices against that group."

FREEDOM OF SPEECH, PRESS AND ASSOCIATION

By AUDREY S. FEINBERG

Audrey S. Feinberg is a board member of Supreme Court Watch.

Judge Souter's record on First Amendment issues is mixed. Because no overall philosophy is discernible from his record, the Senate should carefully probe his views in this area.

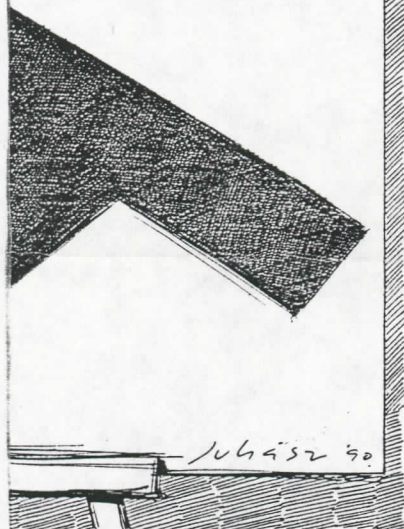
FREEDOM OF THE PRESS. Judge Souter has come down decidedly in favor of the press in two significant cases, one on confidential sources and one on libel. He has also ruled against the press in a libel case.

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"JUDGE SOUTER HAS NOT RULED ON ANY SIGNIFICANT CASE INVOLVING ISSUES OF RACE OR GENDER DISCRIMINATION."



CIVILIAN APPLICATION of STEALTH TECHNOLOGY



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On the Superior Court, Judge Souter quashed subpoenas against student reporters at the University of New Hampshire who refused to divulge confidential source material sought in connection with a murder trial. Even though New Hampshire had no statutory shield law to protect reporters, Judge Souter ruled that disclosure by reporters would be ordered "only when the defendant demonstrates that the information sought is relevant and material to his defense and that he has unsuccessfully attempted to obtain the same information by all reasonable alternatives...." (Associated Press, Dec. 2, 1980). Given the absence of state legislation, Judge Souter's ruling represents a strong statement of protection for the press.

Similarly, Judge Souter came down strongly in favor of the press in a libel case against *Hustler* magazine in *Keeton v. Hustler Magazine, Inc.*, 549 A. 2d 1187 (N.H. 1988). Dissenting from the majority of the New Hampshire Supreme Court, Judge Souter urged that the verdict of libel be thrown out. He wrote that the person suing for libel should be time-barred because she did not reside in New Hampshire, and had sued there only because the state had the longest statute of limitations (six years). Judge Souter based his opinion on technical issues; he did not cite First Amendment concerns. See also 682 F. 2d 33 (1st Cir. 1982), *rev'd.*, 465 U.S. 770 (1984), reversing the earlier dismissal of the case on personal jurisdiction grounds.

FREEDOM OF SPEECH. Judge Souter has ruled both ways in cases involving the free speech rights of individuals.

Ruling in favor of the individual exercise of free speech, Judge Souter joined an advisory opinion of the New Hampshire Supreme Court that found a law that prohibited harassment of hunters was unconstitutional under the New Hampshire Constitution. The law prohibited someone from verbally provoking hunters to dissuade them from hunting, and thus represented an illegal content-based regulation of speech. *Opinion of the Justices*, 509 A. 2d 749 (N.H. 1986).

Also, Judge Souter wrote a concurring opinion to a decision that ruled in favor of an individual attorney who did not want to be part of the tort reform lobbying efforts of the state bar association which he was required to join. Judge Souter's separate concurrence, however, stressed the narrowness of his decision, indicating that if the bar association had been lobbying on issues closer to its legal objectives he might have ruled differently. *Petition of Chapman*, 509 A. 2d 753 (N.H. 1986). See also *In re N.H. Disabilities Rights Center*, 541 A. 2d 208 (N.H. 1988), in which Judge Souter held that, despite state statutes indicating otherwise, the center could serve non-poor disabled as well as poor disabled on First Amendment grounds of right of association.

On the other side, Judge Souter ruled against an individual who stood on a sidewalk demonstrating support for voter registration and political candidate Lyndon LaRouche by distributing pamphlets, verbally advocating his views and displaying signs. Judge Souter upheld the conviction for violating a law against posting signs, seeing it as a constitutional content-neutral restriction. He also overturned the conviction for violating another ordinance prohibiting sidewalk encumbrances as inapplicable to political speech. *State v. Hodgkiss*, 565 A. 2d 1059 (N.H. 1989).

PROSECUTION OF SEABROOK NUCLEAR POWER PLANT PROTESTORS

By AUDREY S. FEINBERG

While Judge Souter was Attorney General of the State of New Hampshire, his office was often in the news for its prosecution of members of the Clamshell Alliance protesting at the construction site for the Seabrook Nuclear Power Plant. Nuclear power, and the Seabrook plant in particular, was a highly controversial issue in New Hampshire and the nation. Hard battles were fought on many fronts including all three branches of the New Hampshire government. Throughout, the Seabrook plant had the support of New Hampshire governors Meldrim Thomson and John Sununu.

While the prosecution of demonstrators at Seabrook for criminal trespass was unquestionably a legitimate responsibility of the attorney general's office, certain aspects of the way in which the office handled the prosecutions raises troubling questions. These questions and the extent of Judge Souter's personal involvement in the events should be explored further during the nomination process.

A few questions arise from a demonstration of approximately 200 people in August of 1976. The New Hampshire attorney general's office prosecuted several protestors for criminal contempt and sought and got jail time (six month sentences, with three months suspended), a harsh punishment. Further, in at least two cases, one against a protester and one against a legal observer from the New Hampshire Civil Liberties Union who was present as a neutral witness, the prosecutors sought no bail pending appeal of the convictions. The New Hampshire Supreme Court swiftly ordered the defendants' release, pointing out that bail pending appeal was to be granted for all but the most violent and troublesome convicts, pursuant to a New Hampshire statute and American Bar Association guidelines. The Court noted that bail was particularly appropriate in these cases because otherwise the defendants would serve their full sentences before their appeals would be heard. Indeed, in the case of

the legal observer, his conviction was eventually overturned. *State v. Gross*, 363 A. 2d 408 (N.H. 1976) — bail; *State v. Gross*, 379 A. 2d 804 (N.H. 1977) — conviction overturned; *State v. Adams*, 363 A. 2d 410 (N.H. 1976) — bail.

More questions arise from the more publicized demonstration of over 1400 protestors on May 1 and 2, 1977. While praising the lack of violence during their arrests, protestors complained of constitutional irregularities during arrests, bookings and arraignments. They also complained of unhealthful and unsanitary conditions in the four large armories where they were held, with one armory having only one shower for 700 people. Other protestors complained of being held for hours in military trucks with no food or water, and being denied telephone calls (Associated Press, May 2, 1977; May 4, 1977; May 6, 1977).

In addition to the complaints regarding the arrest procedures and armory holding pens, the protestors complained that, on Attorney General Souter's recommendation, they were being required to post bail pending trial rather than being released on their own recognizance. The protestors further charged that then-Governor Thomson interfered with the legal process and that bail was being set arbitrarily (Associated Press, May 2, 1977; July 6, 1977).

Further, the attorney for the Clamshell Alliance argued that the sentences imposed, 15 days jail time and a \$100 fine, and bail of \$500 pending appeal, were unduly harsh for the misdemeanor of trespass which usually carries only a fine. The first protestor sentenced had initially received a suspended sentence, but the judge changed his mind after Attorney General Souter personally appeared in court to ask for jail time. He called



"CERTAIN ASPECTS OF THE WAY ATTORNEY GENERAL SOUTER'S OFFICE HANDLED THE

PROSECUTION OF DEMONSTRATORS AT SEABROOK RAISE TROUBLING QUESTIONS. THESE QUESTIONS SHOULD BE EXPLORED FURTHER DURING THE NOMINATION PROCESS."

finding that Thomson and Souter had no advance knowledge of the mass arrests and that the armory conditions were due to an emergency created in part by the protestors. But the case leaves unanswered many questions concerning the involvement of the attorney general's office in the bail process, the armory conditions and the sentencing of protestors (Associated Press, July 6, 1977).

Judge Souter continued to be faced with issues affecting the Seabrook nuclear power plant after he was appointed to the bench. As the nuclear plant construction was delayed and became more costly, the owners of the plant repeatedly sought additional financing to avoid bankruptcy. Twice, in 1984 and again in 1986, the New Hampshire Supreme Court, including Judge Souter, approved new multi-million dollar bond issues for the plant's owners, amid great controversy (United Press International, Nov. 19, 1984; The New York Times, Feb. 1, 1986). However, in 1988, the Court, in an opinion written by Judge Souter, upheld the refusal of the Public Utilities Commission to raise electric rates to consumers in the amount requested by the plant's owners, even though the refusal resulted in the bankruptcy of the owners. *Appeal of Public Service Co.*, 547 A. 2d 269 (N.H. 1988).

Judge Souter was involved in additional Seabrook decisions that have not yet been reviewed.

SEPARATION OF CHURCH AND STATE

Attorney General Souter had one major encounter with the constitutional issue of separation of church and state in 1978. He and his office supported then-Governor Thomson's proclamation to fly flags on all public buildings at half mast on Good Friday. After a U.S. District Court judge suggested that the proclamation might be permissible if the governor declared a secular context, Governor Thomson issued a declaration emphasizing "the historical impact" of the life and teachings of Jesus Christ. At one point in the fast-paced legal proceedings, Attorney General Souter filed handwritten papers to the United States Supreme Court on the issue. The United States Supreme Court eventually upheld an injunction prohibiting the proposal (Washington Post, May 25, 1978).

Editorial assistance on this report by DAN RUBEN, legal intern at Supreme Court Watch and a law student at Pace University Law School, and CONSTANCE DeMARTINO.

DENIS BERGER is the Project Director of Supreme Court Watch and the Executive Director of The Nation Institute.

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2. We are dedicated to the principle of raising the judicial standards currently applied to nominees to the nation's highest court.

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David Souter -
~~State~~ an. J. J.

I. "Restrictive view of the state constitution"

APJ
To further the development of state constitutional law, in State v. Ball, 471 A.2d 347 (N.H. 1983), the court held that when claims of violations of the federal and state constitutions are presented, the court should address the state claims first before treating the federal issues. From 1983 to 1985, Judge Souter joined the court in broadly interpreting the state Constitution. However, he expressed reluctance to rely on the New Hampshire Constitution as an independent source of rights in his concurrence in State v. Kellenbeck, 474 A.2d 1388 (N.H. 1984): "I would concentrate on the development of State constitutional law in those cases when a State rule would be different from its federal counterpart and would affect the outcome."

Then, in 1985, Judge Souter began placing restrictions on Ball. In State v. Cimino, 493 A.2d 1197 (N.H. 1985), he warned litigants that they must clearly state independent grounds for a state claim if they are to be allowed to take advantage of Ball. By 1986, Judge Souter urged even greater limitations on Ball when he dissented from the court's consideration of a state constitutional claim on grounds that it was not "clearly" preserved for appeal. State v. Bradberry, 522 A.2d 1380 (N.H. 1986). H-

They also cite: State v. De Florio
(unanimous court upholds statute allowing minor charged with traffic misdemeanor to be tried as adult; state and federal equal protection clauses not violated)

- State v. Koppel (roadblock dissent);
cf. Michigan v. Sitz, US SC. (1990)
- State v. Valenzuela
- Ballou dissent
- State v. Heath (unanimous court upholds statutory limits on discovery depositions of young crime victims under age 16; procedural change not an ex post facto law)
- Appeal of Bosselait (unanimous)
- In re Sanborn -

II. "Original Intent"

Estate of Dionne

AFT
Judge Souter dissented, urging obedience to the "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.'" He stated that the "court's interpretive task is...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 1784." Judge Souter proceeded to trace the historical derivation of the constitutional provision from the Magna Carta of 1215 and recounted the statutory practice of compensating judges, dating back to American colonial days. He concluded by stating:

"Since the adoption of that article [14] was not followed by any known challenge to the statutory provision for fees to compensate probate judges, the most reasonable inference is that the constitutionalists of that time did not understand the fee provision to be a forbidden obligation to purchase justice."

Judge Souter's heavy reliance on what the framers intended in the late 1700s reveals a fundamental and troubling aspect in his judicial philosophy. His dissent ignored what the majority recognized -- that standards of justice have evolved over the last two hundred years and that paying a fee to the judge (not the court clerk) to hear one's case raises questions about the judge's impartiality.

RAW
If applied to the federal Constitution, this method of interpretation would contradict a number of important Supreme Court precedents. For example, state-mandated school segregation existed at the time of the adoption of the federal constitution and the Fourteenth Amendment, and there is strong historical evidence that the framers of the amendment intended not to abolish such segregation. See R. Berger, Government by Judiciary (1977) at 117-34. Nevertheless, the Supreme Court unanimously ruled that such segregation was prohibited by the equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment. Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954). Mr. Souter's method of constitutional interpretation in Dionne could well mean that these landmark rulings were flatly wrong. Similarly, this strict "original intent" analysis is at odds with many other important Court precedents protecting individual rights. Such decisions include not only Roe v. Wade, 410 U.S. 113 (1973), but also rulings establishing such fundamental precepts as the principle of one-person one-vote

and the unconstitutionality of poll taxes. See Reynolds v. Sims, 377 U.S. 562 (1964); Harper v. Virginia Board of Elections, 383 U.S. 663 (1964).

In a recent interview with The Massachusetts Lawyer, Judge Souter failed to adequately explain this dissent in Dionne:

"On constitutional matters, I am of the interpretivist school. We're not looking for the original application, we're looking for meaning here. That's a very different thing."

AFJ
While the Dionne dissent alone is not conclusive proof that Judge Souter subscribes to the theory of original intent, he has said nothing to dispel this impression. Because original intent analysis can be used to roll back the progress of the last forty years in constitutional rights, Judge Souter's views must be fully explored.

PAW
In fact, Mr. Souter's theory appears to closely resemble the "intentionalist" theory of Robert Bork, which the Senate Judiciary Committee found "outside the mainstream of such great judicial conservatives as Justices Harlan, Frankfurter, and Black" and "outside the tradition of Supreme Court jurisprudence."

from Mass Lawyer
(1990)
A member of the N.H. Supreme Court since 1983, Souter is known for his strict interpretation of the constitution. He said that he views the constitution as a living document. He veers away from the use of the label "strict constructionist" to characterize his thinking and questions whether an adequate definition of that term exists. "On constitutional matters, I am of the interpretivist school. We're not looking for the original application, we're looking for meaning here. That's a very different thing."

(from Dionne dissent)

Although I do not believe that the merits of the statutory policy are subject to our review, I agree nevertheless with the court's disapproval of the fee system in question; the majority opinion is, if anything, moderate in its condemnation. If, therefore, that system were subject to the regulation of the judicial branch in accordance with its own notions of good public policy, I would join with the court in bringing the system to an end. See *Christy & Tessier v. Witte*, 126 N.H. 702, 459 A.2d 1291 (1985). But because the fee system is a creature of statute, the only issue before us is the system's constitutionality, and for the reasons that follow I respectfully dissent from the court's holding that the statute violates article 14.

This conclusion follows virtually of necessity once we apply 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 (*Opinion of the Justices*, 41 N.H. 551 [declaring that Constitution requires a jury of twelve])." *Opinion of Justices*, 44 N.H. 633, 635 (1863). We confirmed the vitality of this interpretive principle as recently as five years ago in *Opinion of the Justices*, 121 N.H. 480, 483, 431 A.2d 135, 136 (1981), 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. See 20 EARLY STATE PAPERS OF NEW HAMPSHIRE 11, 31 (A. Batchellor ed. 1891).

Evidence of that understanding comes from two sources. The first is the body of scholarly and judicial commentary on the meaning of the clause of the Magna Carta of 1215 by which the King promised that he would no longer sell right or justice, "Nulli vendemus . . . rectum aut justiciam." *Perce v. Hallett*, 13 R.I. 363, 365 (1881). It is from this clause that the relevant language of article 14, and its counterparts in a majority of other States, is derived, see *State v. Basinow*, 117 N.H. 176, 177, 371 A.2d 458, 459 (1977), and the accepted interpretation of the Magna Carta language is therefore one good indication of the meaning intended by the eighteenth century framers, as we have previously held. *Id.*

A number of courts in addition to our own have explained the Magna Carta language, and a few examples will illustrate the interpretative consensus. The Supreme Court of Minnesota, for example, observed that "[t]he constitutional right to obtain justice freely and without purchase, which is as ancient as *magna charta*, has not been understood to be a right to have judicial proceedings carried on without expense to the parties." *State v. Gorman*, 40 Minn. 232, 233, 41 N.W. 948, 949 (1889) (citations omitted). Rather, the constitutional language as "borrowed from Magna Charta . . . was designed to abolish, not fixed fees, prescribed for the purposes of revenue, but the fines which were anciently paid to expedite or delay law proceedings and procure favor." *Perce v. Hallett*, *supra* at 364, quoted with approval in *State v. Basinow*, *supra* at 178, 371 A.2d at 459. Winfield has described the early medieval document as a letter

The second source of evidence bearing on the framers' understanding is the history of New Hampshire statutes providing not only for probate fees, but specifically for fees in lieu of probate judges' salaries or as supplements to such salaries. This history is worth pausing over, as a record of what New Hampshire judges and legislators regarded as consistent with English liberties during the early period of our history, and as consistent with the State Constitution after 1784.

While no statutory history is ever conclusive on an issue of constitutional meaning, the long and unbroken statutory sequence before us in this case is highly persuasive evidence of what the people of 1784, and their successors to the present day, understood by the language of article 14. Since the adoption of that article was not followed by any known challenge to the statutory provision for fees to compensate probate judges, the most reasonable inference is that the constitutionalists of that time did not understand the fee provision to be a forbidden obligation to purchase justice.

This consistency of statutory history with the accepted interpretation of the original Magna Carta provision demonstrates beyond any serious doubt that the people who framed and adopted article 14 meant principally to guard against bribery of the sort that had corrupted the early medieval judiciary. They did not mean to outlaw all statutory fees related to judicial services. Given the historical canon for interpreting substantive constitutional guarantees, long since adopted by this court and frequently affirmed, it follows that the majority are mistaken in applying article 14 today to invalidate RSA 547:23 (Supp. 1985).

I. Raise the Claim in the Trial Tribunal

- A. At the earliest opportunity
- B. On the record
- C. With express reference to specific constitutional provision in question
- D. Stating the basic theory to be relied upon
- E. Making a record or, if that is refused, an offer of proof, of any facts necessary to support the claim

II. Perfect the Claim in the Supreme Court

- A. Articulate the claim and theory of relief
- B. Demonstrate the constitutional basis for the theory of relief by reference to:
 - 1. The text of the provision
 - 2. Prior judicial construction of the provision or of related language in the Constitution; stare decisis
 - 3. Antecedent constitutional sources; evidence of continuity or revolution
 - 4. Other constitutions of similar pedigree with similar language and settled interpretation
 - i. Weight to be given to interpretations of similar language; is the local theory of constitutional meaning the same as N.H.'s?
 - ii. How significant are differences in text? Problem of later amendments as indicators of earlier understanding
 - iii. The shifting fortunes of federalism
 - 5. Original understanding of the voters who adopted the provision
 - a. See voters' guides; Gerber v. King, 107 N.H. 495 (1967)

- b. Secondary sources
 - i. Views of framers, etc.
 - ii. Evidence of contemporary understanding; e.g. statutes
 - c. Pitfalls
 - i. Intent vs. text
 - ii. Specific vs. general; application expected vs. principle intended
 - iii. The clause vs. the whole document; reconciling expectations of coherence with the fruits of frequent amendment
6. Arguments for resolving uncertainty in accordance with principles of ethics or social policy; because judicial receptiveness to claims so couched may range over a broad spectrum, the competent advocate will attend to
- a. The reflection of such principles in, and their consistency with, the meaning of clear and settled constitutional provisions
 - b. The compatibility of such claims with the separation of powers
 - c. The practical administrability of the rule desired

III. "Role of Attorney General"

about whether he viewed his role as advocate for the public interest or as the lawyer for the governor who appointed him; whether and to what degree he adopted the legal positions he defended; and what his current view is of the arguments he advanced. raise questions

AFJ
In an interview prior to his January 1976 confirmation, he stated that not only is the attorney general the "chief law enforcement officer" and "civil law officer for state government", but he is also "counsel to the public". (Manchester Union-Leader, Dec. 28, 1975) Only a few weeks later, he declared:

"At no time would I give testimony with which I disagree. And it would be irresponsible for the attorney general to support any state agency if he felt what they were doing was clearly wrong." (Concord Monitor, Jan. 7, 1976)

Concord Monitor
(quote continues)

"At no time would I give testimony with which I disagree,"

Souter said. "And it would be irresponsible for the attorney general to support any state agency if he felt what they were doing was clearly wrong."

As legal counsel for state agencies, Souter, he will represent an agency in an already-completed action, or in ongoing actions on which the law is open to interpretation.

"That's the lawyer's responsibility — to give his client the best defense he can."

AFJ
However, Attorney General Souter also stated that "he will represent an agency in an already-completed action, or in ongoing actions on which the law is open to interpretation." In a 1978 letter, shortly before he left office, Mr. Souter further described his standard:

"My standard...has been simply this: this office will represent any governor in a proceeding brought against him in his official capacity whenever his action cannot reasonably be judged patently illegal or unconstitutional. If, as I

believe, the Attorney General should act as a lawyer guided by generally applicable principles, I don't believe any other standard is possible. The alternatives seem to me to be an Attorney General who is a political rubber stamp or one who is a political spokesman for political opposition to the Governor. I find each such alternative unacceptable."

Letter to Robert A. Backus, Esq., March 30, 1978.

AFJ
Despite these disagreements, David Souter supported the governor's positions on such issues as lowering the flag on state buildings on Good Friday to commemorate the death of Jesus Christ and refusing to comply with federal fair employment reporting regulations (New Hampshire was the only state in the Union to refuse). A former attorney of Mr. Souter's staff recalled that at his own farewell dinner, Mr. Souter publicly thanked the governor for never asking him to take a position that he thought was inappropriate.

Responsibility and Supervision

As a state official, David Souter held responsibility for any briefs or letters that went out under his name. In one of his early interviews as attorney general, David Souter stated his intention to keep his office small to maintain "a tightly-knit, tightly-run organization." One former staff member, Richard Wiebusch, a senior attorney who handled a case opposing Medicaid funding for abortions, recently told a reporter that Mr. Souter "had no time to look at most of the documents his staff wrote." (Concord Monitor, Aug. 8, 1990) However, several attorneys serving under Mr. Souter contradicted that statement, saying that the attorney general reviewed most documents filed under his name, such as opinion letters and briefs, though the degree of review varied according to individual. Regardless of the degree of his supervision, David Souter was constitutionally entrusted with carrying out and defending the legal positions of the state.

Boston
2/10/90
5/2/90
"Attorneys general are not policy makers," Rudman said. "They do not decide which statutes they defend and enforce. There were numerous instances when we might disagree with policies of the executive or laws passed by the Legislature, but our oath was to uphold those policies and

laws. And we did."

There is a limit, Rudman said. An attorney general can refuse an unconstitutional order. "That never happened to me when I was attorney general, and I can't think of an occasion when it happened to David."

IV. "Reproductive Rights and Privacy"

A. Briefs Filed in Coe v. Hooker

PAW
As Attorney General Mr. Souter participated in the appellate phase of a case involving the state's obligation to make Medicaid funds available for abortions for poor women. In 1975, the New Hampshire Department of Health and Welfare issued a regulation stating that it would not pay for abortions except "when they were medically necessary to preserve the life or health of the mother or fetus." The New Hampshire rule was challenged, and the U.S. District Court enjoined enforcement of the regulation. Coe v. Hooker, 406 F.Supp. 1072 (1976). Mr. Souter was not Attorney General when the policy was promulgated, but he had become Attorney General by the time the District Court issued its injunction and his office was responsible for the appeal. The Supreme Court later upheld a state rule similar to New Hampshire's, and the Coe complaint was ultimately dismissed. It is the language in the briefs filed during the appellate phase, however, that warrants careful inspection.

The Attorney General first asked the U.S. Court of Appeals to suspend the injunction entered by the district court and also filed an appeal of the district court's decision. The brief asking that the injunction be suspended twice referred to abortion as the "killing of unborn children." Arguing against a continuation of the injunction, the brief said: "A requirement that the state of New Hampshire pay for all abortions performed on Medicaid recipients during the course of this appeal may be expected to benefit few, if any, persons and will be morally offensive to the thousands of New Hampshire citizens who do not wish their taxes to finance the killing of unborn children." Memorandum in Support of Defendant's Motion for Suspension of Injunction Pending Appeal in Coe v. Hooker, *supra*, at 5. On the following page, the brief states: "Many thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant." *Id.* at 6. The Court of Appeals denied the request to suspend the district court's injunction.

The state's main brief on appeal also included strong anti-abortion rhetoric. Once again, the Attorney General's brief calls abortion the "killing of unborn children." Appeal of Decision of District Court of New Hampshire, Brief of Appellants, in Coe v. Hooker, *supra*, at 41. In another passage, the brief refers to abortion as the "destruction of fetuses." *Id.* at 23.

While the briefs acknowledge the constitutional right created by Roe, and pertain only to state funding of abortions, they are nonetheless disturbing in two respects. First, the gratuitous use of such inflammatory language raises the question whether Mr. Souter subscribes to the views of anti-choice advocates who regularly employ such rhetoric.

Second, as in Mr. Souter's concurrence in Smith v. Cote described above, the briefs give great weight to the feelings and beliefs of those who oppose abortion.

The assistant attorney general who argued the Coe case has stated that Mr. Souter had little knowledge of, or participation in, the briefs. See Los Angeles Times (July 31, 1990). This is inconsistent with the views of other former colleagues concerning Mr. Souter's role in major cases, as well as Mr. Souter's own view that the attorney general's office was a "tightly-knit, tightly-run organization."

NYT
7/31/90

Richard V. Weibusch, whose signature appears on the brief as an assistant attorney general, said today, "I never ran the language before Judge Souter." Mr. Weibusch, now a lawyer in private practice in Manchester, N.H., said the brief did not represent anyone's personal view on abortion but was the result of the obligation of the office of attorney general to defend regulations adopted by a state social services agency.

The Attorney General is appointed by the governor, who at the time was Meldrim Thomson Jr., a firm opponent of abortion.

"The language in the briefs is all mine," Mr. Weibusch said. "I don't remember having any discussions with David about the case."

Language to Attract Attention

Mr. Weibusch said that at the time the case was being argued, there was a general acceptance of the legitimacy of Roe v. Wade, the landmark 1973 case that established the constitutional right to abortion. Asked why he employed the phrase, "killing of the unborn," he said he was reaching for the "most colorful, most high-profile language to win my case."

"While the language, in retrospect, might tie in with the language of some groups today," he said, "all I was trying to do was get the attention of the court."

from: Dr. G. J. [unclear]
Motion For Suspension of Injunction Pending Appeal.

By its own lights, then, the District Court has enjoined Defendants from preventing abortions in the second and third trimesters except when medically necessary to preserve the life or health of either the mother or the fetus. That injunction is, on its face, contrary to the Supreme Court's holding in Roe and Doe and must be suspended during the process of this appeal.

III. A REQUIREMENT THAT THE STATE OF NEW HAMPSHIRE PAY FOR ALL ABORTIONS PERFORMED ON MEDICAID RECIPIENTS DURING THE COURSE OF THIS APPEAL MAY BE EXPECTED TO BENEFIT FEW, IF ANY, PERSONS AND WILL BE MORALLY OFFENSIVE TO THE THOUSANDS OF NEW HAMPSHIRE CITIZENS WHO DO NOT WISH THEIR TAXES TO FINANCE THE KILLING OF UNBORN CHILDREN.

Many thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant. These are deep, often religious, beliefs, giving rise to strong emotions.

There is, in fact, an argument of substance that, while the citizens of a state may not act to prohibit a woman from aborting, they are free, under both the Constitution and Title XIX of the Social Security Act, to decline to contribute their tax dollars to support such an activity.

The terms of that injunction are also contrary to the holdings of the United States Supreme Court in Roe v. Wade, supra, and Doe v. Bolton, supra, and, while they may operate to benefit a few, are morally offensive to thousands of New Hampshire citizens.

~~Plaintiffs cannot in good~~

~~faith dispute that thousands of New Hampshire citizens possess a~~
~~very strongly held and deep seated moral belief that abortion is~~
~~the killing of unborn children. In the present case, where the~~
~~New Hampshire Division of Welfare has adopted a regulation designed~~
~~to limit payment for abortions to those which are medically necessary~~
~~to preserve life or health, that regulation is not rendered unreason-~~
~~able or unconstitutional solely because, in its promulgation, the~~
~~Division of Welfare may have considered those beliefs.~~

~~The Plaintiffs cannot and do not allege that anyone interfered with~~
~~the right of privacy as delineated by Roe v. Wade, supra, which~~
~~includes the right to make the decision to abort. On the contrary,~~
every woman in the State of New Hampshire is equally free from
government interference in the exercise of this right.

- 1st Circ. brief ~~says~~ ^{uses} the phrase "killing of unborn children" to describe the view of abortion held by "thousands of N.H. Citizens."
- Case started prior to Souter becoming AG, & NH was arguing the position now established by U.S. Supreme Court case law.

B. Smith v. Cote

APJ
In his concurrence, Judge Souter reached out to resolve an issue not before the court concerning the dilemma faced by doctors who are opposed to abortion and yet must discharge their professional obligation. He offered an alternative for such doctors, by allowing them to make timely referrals to other physicians "who are not so constrained." The majority believed it unnecessary to address the issue raised in Judge Souter's concurrence because it had not been briefed or argued in the court below.

Thus, this short concurrence is recent and telling evidence of the nominee's special empathy for the opponents of legal abortion.

from: Smith v. Cote the Supreme Court of the United States has held that a woman has a constitutionally secured right to terminate a pregnancy. *Roe v. Wade*, 410 U.S. 113 (1973). It follows from *Roe* that the plaintiff Linda Smith may seek, and the defendants may provide, information and advice that may affect the exercise of that right. The basic social and constitutional issue underlying this case thus has been resolved; we need not cover ground already traveled by a court whose interpretation of the National Constitution binds us. Today we decide only whether, given the existence of the right of choice recognized in *Roe*, our common law should allow the development of a duty to exercise care in providing information that bears on that choice.

(Souter concurrence ^{is on} next page)

SOUTER, J., concurring: I concur in the majority opinion and add this further word, not because that opinion fails to respond to the questions transferred to us, but because those questions fail to raise a significant issue in the area of malpractice litigation that we address today. The trial court did not ask whether, or how, a physician with conscientious scruples against abortion, and the testing and counselling that may inform an abortion decision, can discharge his professional obligation without engaging in procedures that his religious or moral principles condemn. To say nothing about this issue could lead to misunderstanding.

In response to the questions transferred, the court holds that a sphere of medical practice necessarily permitted under *Roe v. Wade*, 410 U.S. 111 (1973), is not exempt from standards of reasonable medical competence. Consequently we hold that the plaintiff alleges a violation of the physician's duty when she claims, in the circumstances of the case, that prevailing standards of medical practice called for testing and advice, which the defendants failed to provide.

It does not follow, however, and I do not understand the court to hold, that a physician can discharge the obligation of due care in such circumstances only by personally ordering such tests and rendering such advice. 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. See Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L. J. 1488, 1510-12 (1978) (The Physician as Conscientious Objector); Editorial Note, *Genetic Malpractice: Avoiding Liability*, 54 U. CIN. L. REV. 857, 869 (1986) (Failure to Refer to Genetic Counselor).

- Concurrence does not "reach out" to "resolve" issue, but notes that the question is "open for consideration in any case in which it may be raised."

C.

Opposition to Repeal of Abortion Statute

AFJ

As attorney general in 1977, David Souter successfully opposed the repeal of an 1848 law which applied criminal penalties for the performance of an abortion. To support his argument, David Souter evoked the symbol of New Hampshire becoming the abortion capital of the country. He is quoted as saying, "Quite 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." He further hypothesized, "Let's say somebody performed an abortion, which would now be legal in New Hampshire...in the eighth month. Let's assume you had a viable fetus. If that fetus died as a result of the abortion, that would not be murder or manslaughter. That would be no offense at all the way I read the statute."

Apparently, Mr. Souter was concerned that repeal would leave the state without any prohibition against abortions, when in fact the abortion statute was (and is) completely unenforceable under Roe. Moreover, Roe has always allowed state-imposed restrictions after viability, contrary to Mr. Souter's assertions. These gratuitous, inflammatory comments reveal a hostility to the fundamental right to choose.

May 27, 1977 letter to David Bradley, Chairman, Sen. Judiciary Com.

Dear Mr. Chairman:

This bill in its present form contains one feature which I do not believe the Legislature intends to enact. In removing from the books all penalties for abortion, at whatever stage of pregnancy the abortion might be performed, the bill would leave the State of New Hampshire without those prohibitions against abortion which are constitutional under the holdings of the Supreme Court of the United States.

Because of several problems which this office was required to work on today under pressure of deadlines, I am frankly unable to offer a statute to you at this time which would provide the degree of prohibition against abortion which the Supreme Court of the United States allows to the states. If need be, I can only ask that you seek suspension of the rules of the Senate to allow for the drafting of such a statute. If you would call on me the first of next week, I will make every effort to arrange for help in drafting such a statute, either in consultation with your Committee or by giving review to whatever the Office of Legislative Services may make.

Yours respectfully,

David N. Souter
Attorney General

May 19, 1977 Union Leader

Bill Is Seen Making NH an 'Abortion Mill'

By DONN TIBBETTS
State House Bureau Chief

CONCORD — Atty. Gen. David Souter hopes to convince the Senate to alter a House-passed bill which if enacted will wipe out all state law dealing with abortion and could make the Granite State an "abortion mill."

"Quite apart from the fact that I don't think unlimited abortions ought to be allowed, if the State of New Hampshire left the situation as it is now, I presume we would become the abortion-mill of the United States," said Souter.

"But I think it's abundantly clear the legislature does not want to let this situation stay as it is," he said.

"Now that this bill has been received by the Senate Judiciary Committee, I'm going to address that committee and advise we had better sit down and talk about this and decide what is to be done," he explained.

The problem centers on

amended HB 858 which the House took from the table May 11 and passed without debate, by voice vote.

The bill outwardly was simply an omnibus measure that would clean up errors, omissions and inconsistencies in state law and to make existing law conform to the criminal code on a variety of subjects ranging from snowmobiles to maple syrup and even the reporting of bear kills.

But within that 23-page bill was repeal of all existing state law on abortion. Few rank and file solons knew that, including avowed supporters of the right to life.

Souter explained yesterday that one of the state laws that would be wiped out made it a misdemeanor to do any abortion, procure an abortion or administer one.

"If the child was a so-called quick child, the law made it a felony to perform an abortion," he said. "The third statute, under which Joyce Millette was prosecuted several years ago, made it murder if the mother was killed in the course of an illegal abortion," Souter reported.

What HB 858 will do is to knock out the old misdemeanor and old felony statutes so there will be nothing there. It would leave on the books the statute making it murder if you killed the mother in the process of an abortion, but the trouble is that statute says it's murder if the mother is killed in the course of performing either of the acts described in the two foregoing sections, explained Souter.

"Well you will no longer have any two foregoing sections, so the third section, although it wouldn't be repealed, would probably be worthless," asserted the state's top law enforcement officer.

"The criminal code, which defines the offenses of killing another, defines 'another' as excluding a fetus. Let's say somebody performed an abortion which would now be legal in New Hampshire—so far as the state is concerned

"Let's assume you had a viable fetus. If that fetus died as a result of the abortion, that would not be murder or manslaughter. That would be no offense at all the way I read the statute," said Souter.

"If the fetus was born and lived of course it would no longer be a fetus but a child and the murder and manslaughter laws would apply. But if it was killed in the course of administering the abortion, it could not be prosecuted as manslaughter or murder," he said.

"That would leave the possibility of the Board of Registration in Medicine going after anybody engaged in abortions beyond what the U.S. Supreme Court says can be done, he noted.

Souter feels the House bill has gone too far. "Yes; that's right," he said.

The measure has been

from: On on Leader 8/4/90

New Hampshire's strict anti-abortion laws, which still remain on the books, were largely superseded by the 1973 Roe vs. Wade U.S. Supreme Court decision. A 1990 effort to eliminate those laws passed the Legislature but was thwarted by Gov. Judd Gregg's veto.

After Souter's critical 1977 remarks, the Senate Judiciary Committee amended House Bill 888 to eliminate its abolition of abortion laws. The bill, once again non-controversial, was passed by the Senate and signed into law that June by Souter's boss, Gov. Meldrim Thomson, a staunch anti-abortion conservative.

Asked about the interview yesterday, Tibbetts said Souter never said that his concerns about abortion reflected his personal views.

"Having read my piece with Souter, it does not strike me as surprising," the veteran State House bureau chief observed.

"Souter obviously was acting on behalf of his client, Gov. Mel Thomson. That's what attorneys general are expected to do. For example, Warren Rudman served as AG under a more liberal Walter Peterson as his principal client. Later, Rudman served as AG under Mel Thomson and a conservative client.

"What I'm suggesting is that because any attorney general opposes a particular measure as the result of a governor's request, does not necessarily mean that attorney general personally and philosophically adheres to that position."

D. "Opposition to Parental Consent/Judicial Bypass Bill"

ATJ
Contrary to David Souter's position, judges have a legal obligation -- just as doctors have a professional obligation -- to apply the law to issues regardless of their personal beliefs. Judges frequently make moral decisions, most visibly in death penalty cases. Judge Souter's empathy with anti-choice judges suggests not only a restrictive view on the role of the courts in protecting individual rights and applying constitutional standards, but also his strong distaste for abortion. In addition, though the letter was instrumental in preventing passage of the bill, Judge Souter took no position on whether young women should be required to obtain parental consent -- leaving open the question of whether he would vote with some of the U.S. Supreme Court Justices to permit states to require parental consent or notification without the opportunity for teenagers to obtain judicial relief.

Wash. Post
7/26/90

By David S. Broder
and Ruth Marcus
Washington Post Staff Writers

As a judge on the New Hampshire Superior Court in 1981, Supreme Court nominee David H. Souter wrote a letter on behalf of the court urging the state legislature not to enact a bill that would have forced the judges "to make fundamental moral decisions" on abortions for pregnant minors.

A leading abortion-rights advocate in the state, who solicited the letter, said it "has been a critical part of preventing passage of parental consent legislation" in New Hampshire for the last nine years.

After being contacted by state Rep. Elizabeth Hager (R), the abortion-rights supporter, Souter wrote the May 13, 1981, letter on behalf of the judges of the New Hampshire Superior Court.

Hager, a member of the board of the National Abortion Rights Action League, said she decided to contact Souter when a parental consent bill passed by the state Senate was due for a hearing in the House. She said he was the only judge she knew well-enough socially that "I felt comfortable picking up the phone and having this conversation."

"I told him there was a judicial bypass in the bill and I hoped he would read it and talk to his fellow judges, because I didn't think they would want to be dealing with minors who could not talk to their parents about obtaining abortions."

"He agreed and he talked to his fellow judges, and he drafted the letter, and they approved it, and he

sent it to the committee. ... It was very influential," she said.

Four years later, when the issue came up again, she called Souter, by then on the state Supreme Court, who referred her to Richard Dunfey, head of the Superior Court judges. "I sent him a copy of the [Souter] letter and he made a couple of minor changes and sent it to the legislature over his signature," she said.

Parental consent legislation was killed that year and again in 1986, Hager said, crediting the letter as being an important factor.

Dunfey said yesterday he could generally confirm that account. He said he and other judges had collaborated with Souter on the 1981 letter.

JUDGE SOUTER'S LETTER

On May 13, 1981, David H. Souter, then a New Hampshire Superior Court judge, sent this letter to Roma H. Spaulding, chairman of the New Hampshire House Committee on Health and Welfare:

Dear Madam Chairman:

I am writing as a member of the committee to speak for the Superior Court on proposed legislation that would affect the court. The full court met on May 7 and directed me to write to you to express the court's position on SB 194, which you have scheduled for hearing on May 13.

The judges do not believe it is appropriate for the court to take a position on the basic question addressed by the bill, whether parental consent should be required before an abortion may be performed upon an unmarried minor. The court's concern is directed, rather, to that provision of the bill that would require a justice of the Superior Court to authorize the performance of an abortion upon such a minor when there is no parental consent, if the justice determines "that the performance of an abortion would be in . . . [the] best interests" of a minor who is "not mature."

The members of the court find two fundamental problems inherent in this provision. 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 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. In the place of a rule or a norm there would be left only the individual judge's principles and predilections. As carefully considered as these might be, they would still be those of only one individual, not those of society. Much criticism of the role of the judiciary in this country has characterized judicial activity in the application of constitutional standards as no more than the imposition of individual judges' views in the guise of applying constitutional terms of great generality. 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.

The court's second concern is with the necessarily moral character of such choice and the resulting disparity of responses to requests that judicial discretion be exercised. As you would expect, there are some judges who believe abortion under the circumstances contemplated by the bill is morally wrong, who could not in conscience issue an order requiring an abortion to be performed. There are others who believe that what may be thought to be in the "best interests" of the pregnant minor is itself just as necessarily a moral as a social question, upon which a judge may not morally speak for another human being, whatever may be that judge's own personal opinion about the morality of abortion. Judges in each such category would be obligated to indicate that they could not exercise their power in favor of authorizing abortions to be performed on immature pregnant minors. The inevitable result would be required shopping for judges who would entertain such cases. In other words, a principled and consistent application of the quoted provision would be impossible.

For these reasons I have been directed to request on behalf of the court that any bill you may pass on this subject not authorize the exercise of judicial choice by justices of the Superior Court to determine whether an abortion should be performed upon a pregnant, immature minor whose parents do not consent to that course of action.

Yours respectfully,
David H. Souter, Justice
New Hampshire Superior Court

E. Concord Hosp. Hal

AFJ

, he has expressed sympathy for anti-choice doctors and judges who eschew any involvement in helping women exercise their right. Perhaps most significantly, in discussing abortion, David Souter has used the language of the anti-choice movement, including "abortion mill," "killing the unborn," and "the destruction of fetuses." The only known occasion in which he did not take a restrictive position is when the board of trustees of the Concord Hospital voted soon after Roe v. Wade to allow abortions to be performed at the hospital. Those present do not recall Judge Souter, a member of the board, commenting on the policy.

Souter silent on hospitals' abortions

CONCORD, N.H. (AP) — Supreme Court nominee David Souter was affiliated with two New Hampshire hospitals that perform abortions, but officials at both facilities said yesterday that Judge Souter never discussed the divisive issue.

As with his judicial record, little about Judge Souter's feelings about abortion can be gleaned from his performance as a board member of Concord Hospital or as an overseer to the Dartmouth Hitchcock Medical Center, which has an affiliated hospital that performs abortions.

Both hospitals have abortion guidelines; New Hampshire has a law making some abortions tantamount to a felony.

But those laws, which have not been enforced since the 1973 Roe v. Wade decision that legalized abortion, never became an issue while Judge Souter was serving either on the state Superior or Supreme courts.

Judge Souter participated in just one known case dealing with abortion, siding with the majority in a 1986 ruling that said physicians have a responsibility to test unborn children for birth defects and in the event defects are detected to counsel the pregnant woman about options — including abortion.

Officials at the two hospitals said they had no recollection of Judge Souter discussing abortion at meetings or in personal conversations.

"Over the course of time that I've been here, that issue never came before the board," said Richard Warner, president of Concord Hospital. "He and I never talked about it."

Mr. Warner came to the hospital in May 1975, when Judge Souter was a member of its board. Judge Souter served as president of the board from 1978 to 1985.

Mr. Warner and others couldn't provide a specific number but said relatively few abortions are performed at the hospital. The procedure usually is done at area clinics or doctors' offices, the hospital officials said.

At Concord Hospital and several area clinics, it's customary not to perform abortions after 17 weeks — seven weeks short of the end of the second trimester, said hospital spokeswoman Beth Fensterwald.

One exception is Dartmouth Hitchcock, where officials said there had been rare occasions when abortions have been performed up to the end of the second trimester. Those cases almost exclusively involve potential harm to the pregnant women, officials said.

Written abortion guidelines at Dartmouth Hitchcock acknowledge a split among physicians and other staff members over whether abortions should be performed.

"We feel very strongly that our patients have all alternatives discussed with them," the guidelines say.

Dr. George A. Little, chairman of Dartmouth Hitchcock's department of child and maternal health, said it was possible that the facility would refuse to perform an abortion for a woman past 17 weeks who didn't have a medical reason.

Judge Souter was an overseer for the Dartmouth Medical School, which is affiliated with the hospital.

Dr. Robert McCollum, who retired as dean of the medical school three weeks ago but remains on staff, said the overseers had no role in hospital affairs.

He said that during the twice-a-year overseers' meetings Judge Souter "never mentioned the word abortion, nor was the question raised during any meetings."

F. Brief on Privacy Rights in U.S. v. New Hampshire

PAW
One of the nominee's few significant discussions of privacy rights came in the context of a brief he filed with the First Circuit Court of Appeals in U.S. v. New Hampshire. (Other aspects of this brief are discussed in the Civil Rights section of this Report.) In this case, the state was challenging the constitutionality of its obligation to report demographic statistics to the Equal Employment Opportunity Commission (EEOC). Among the reasons Attorney General Souter advanced in contesting the EEOC requirement was that state employees' privacy rights would be violated by reporting their race. Mr. Souter's brief strongly asserted that the

Constitution includes a "comprehensive" right to privacy. Appeal from Decision of the United States District Court for the District of New Hampshire, Brief for Appellant in U.S. v. New Hampshire, supra, at 46. In particular, Mr. Souter's brief argued that: "Though not expressly mentioned in the Constitution, [privacy] takes its existence from the penumbras of the Bill of Rights," id. at 45-46, citing Griswold v. Connecticut, and "[w]hen a fundamental right is implicated, such as the right of privacy, government's infringement of that right can be justified only by a 'compelling state interest.'" Id. at 49-50, citing Roe v. Wade. The nominee's own views concerning these important precedents are clearly subjects for further inquiry by the Senate Judiciary Committee.

from
Questions Presented
in cert. petition
US v. NH v. US
→ 3. ~~Insofar as section 709 (c) purports to authorize such a regulation, does section 709 (c) cause violation of the right of privacy guaranteed by the penumbras of the Bill of Rights; liberty guaranteed by the Fifth and Fourteenth Amendments; power reserved to the states under the doctrine of intergovernmental immunity and the Tenth Amendment; prohibitions implicit in the Thirteenth Amendment against racial badging, and prohibitions implicit in Article I sections 1 and 8 against delegation of legislative powers?~~

C. *Insofar As Section 709(c) Purports To Authorize The Regulation, It Causes Violation Of Certain Constitutional Principles.*

By following the mandate derived from section 709 (c), New Hampshire violates the right of privacy of its employees. Congress has no power to force such impermissible state action. Cf. *Townsend v. Swank*, 404 U.S. 282 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

The "right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). So "comprehensive" a right should include the right to refuse to inform the government of one's racial/ethnic background. Referring to the Fifth, Thirteenth, and Fourteenth Amendments specifically and also to the Bill of Rights generally, one could fairly tell the government — state or federal — that the color of his or her skin is simply none of the government's business. And if the government would lack the power to compel that information directly, from the individual concerned, it should likewise lack the power to compel that information indirectly, from the employer of such individual.

It is no answer to this argument to say that the reports here required are merely in gross, that they do not identify any particular employee by race, and that they therefore invade no one's privacy. Saying this ignores what precedes the reports; it ignores the offending acts — the visual surveys of *individuals* or the making of certain post-employment records on *individuals*. With similar voids in logic, the government could profess to justify in-gross reports on the frequency with which persons have psychiatric treatment or the frequency with which they have sexual relations. Psychiatric and sexual in-gross reports, in and of themselves, might not offend anyone's privacy; but that simply is not the point. What is the point is the personal prying that would have to precede such reports — prying that could palpably offend the privacy of each and every individual who was later to become a statistic within these reports. Whether directly, or indirectly through agents, government cannot lightly intrude into anything which is a matter of individual privacy; and this

applies no less to racial and ethnic background than to psychiatric needs and sexual habits.

* * *

Liberty, under both the Fifth and Fourteenth Amendments, is given a broad construction. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). It denotes not only freedom from bodily restraint but also the right "to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Id.* at 572. One of these privileges, we submit, stems from the constitutional doctrine of limitation of powers: it is a freedom from governmental obtrusions that are excessive in demand and attenuated in justification. More specifically, for an employer⁴, it is a freedom from such offensive federal commands as that to "eyeball," record, and report the skin color of human beings; and, for an employee, it is a freedom from having his or her own skin color "eyeballed," recorded, and reported for the state and federal governments.

from cert.
petition
NH v. US.

Rights of Gays and Lesbians

In Opinion of the Justices, 530 A.2d 21 (1987), the Supreme Court rendered an advisory opinion on the constitutionality of state

legislation prohibiting gays from adopting children, becoming foster parents, and running day care centers. The court relied heavily on Bowers v. Hardwick, 106 S.Ct. 2841 (1986), which held that homosexuals do not have a federal constitutional right of privacy. Judge Souter and three other Justices accepted without any critical evaluation and despite contrary evidence presented, the legislative assumptions that "the provision of a healthy environment [for children] should exclude homosexuals...from participating in governmentally sanctioned programs of adoption, foster care, and day care" because "being a child in such programs is difficult enough without the added social and psychological complexities that a homosexual lifestyle could produce."

Applying the weakest scrutiny possible -- the rational basis test -- the court advised that the ban on adoption and foster parenting was constitutional. However, the court concluded that prohibiting gays from running day care centers was constitutionally infirm, on the basis that day care providers, unlike adoptive and foster parents, are not primary role models.

In a stinging dissent, Justice Batchelder rejected the use of sexual orientation as a factor in evaluating potential adoptive or foster parents. He writes, "[t]he State is never more humanitarian than when it acts to protect the health of its children. The State is never less humanitarian than when it denies public benefits to groups of citizens because of ancient prejudices against that group."

from: Opinion of the Justices

[1-4] For purposes of federal equal protection analysis, homosexuals do not constitute a suspect class, nor are they within the ambit of the so-called "middle tier" level of heightened scrutiny, as sexual preference is not a matter necessarily tied to gender, but rather to inclination, whatever the source thereof. Nor is there a fundamental right to engage in homosexual sodomy. See Bowers v. Hardwick, 106 S. Ct. 2841 (1986). There is, further, no such right to adopt, to be a foster parent, or to be a child care agency operator, as these relationships are legal creations governed by statute. Therefore, since no suspect or quasi-suspect class or fundamental right is involved, the proper test to apply in determining the bill's constitutionality for federal equal protection purposes is whether the legis-

Opinion of the Justices (con.)

lation is "rationally related to a legitimate governmental purpose." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985).

The purpose of the bill, as stated in House Resolution 32, is to promote "the provision of a healthy environment[.] . . . role model[s] . . . [and] positive nurturing" to children affected by State-approved or -licensed activities and to eliminate the "social and psychological complexities" which living in a homosexual environment could produce in such children. In general, we accept the assertion that the provision of appropriate role models is a legitimate government purpose. The question, then, is whether a blanket exclusion of homosexuals from adoption, foster parentage, and child care agency licensure is rationally related to the achievement of this purpose. It is not our business to inquire into the wisdom or desirability of the legislature's choice. *Sedgewick v. City of Dover*, 122 N.H. 193, 198, 444 A.2d 490, 492 (1982). It may, however, be preferable to deal with the present issue as the State may now do, as one of a number of relevant factors on a case-by-case basis. The question before us is nonetheless the narrow one, whether the proposed choice may constitutionally be made.

[5] It is our opinion that the exclusion of homosexuals, as narrowly defined by your resolution, from foster parentage and adoption can be found to be rationally related to the bill's purpose, expressed in House Resolution 32, to provide appropriate role models for children, but we are unable to conclude that such an exclusion vis-à-vis operators of all types of child care agencies is so related. The

This is especially evident in light of the bill's use of the term "applicant" as the entity whose sexuality is at issue. It would often be the case that the applicant would not be a human being at all, but rather a corporation, for example. In addition, even if the applicant were a human being, he or she might have little or no contact with the children for whom services were to be provided, in which case the applicant's sexual preference would be irrelevant.

Moreover, any analysis of rational basis must take into account the State's especially great responsibility in the foster care and adoption contexts to provide for the welfare of the children affected by placement decisions. In foster care and adoption cases, the State by law has either the exclusive, or a highly significant, responsibility to choose what is best for the child. In the day care context, however, parental responsibility for choice supplements the State's obligations.

[6, 7] The question of whether the bill violates the equal protection guarantee of the New Hampshire Constitution involves a similar inquiry. As under the Federal Constitution, no suspect class is

involved, nor is heightened scrutiny requiring application of the fair and substantial relation test, see *Carson v. Maurer*, 120 N.H. 925, 932, 424 A.2d 825, 831 (1980), appropriate. The proper test under the State Constitution is, again, the rational relationship test. See *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 667, 406 A.2d 704, 707 (1979). We have determined above that the proposed legislation is rationally related to a legitimate governmental purpose insofar as it applies to adoption and foster care. " "

[10] Therefore, the proposed bill does not unconstitutionally deprive homosexuals as defined of due process of the laws under either the State or Federal Constitution.

[11] The third question posed by the legislature is whether the proposed bill would violate any substantive right to privacy under either the State or Federal Constitution. We answer that it would not, resting our determination upon the United States Supreme Court's decision in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), wherein the Court stated that the substantive due process line of cases exemplified by *Griswold v. Connecticut*, 381 U.S. 479 (1965), did not confer a fundamental right to engage in consensual homosexual sodomy because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . . Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct is constitutionally insulated from state proscription is unsupportable." *Bowers*, 106 S. Ct. at 2844. In addition, we note that no intrusion by the State in this context is possible unless and until an individual invites it by voluntarily seeking to adopt or to be licensed as a foster parent. Only then would the State pose questions about the individual's private life, as the agent responsible for preserving and furthering the welfare of its children. See RSA 170-B:14 (Supp. 1986); RSA 170-E:4, I (Supp. 1986). We should add that this opinion is not meant to suggest that the State might have a similar authority to delve into the privacy of existing marital or custodial relationships. The same result would hold true under the State Constitution.

V. "Religious Freedom and Separation of Church + State"

A. Defense of state-sponsored Good Friday observance

PAW

In 1978, Attorney General Souter's office defended a declaration by then-Governor Meldrim Thomson exhorting all state residents to "reverently observe Good Friday," including a plan to fly state flags at half mast on Good Friday in order to "memorialize the death of Christ on the Cross on the first Good Friday." See Complaint in Brown v. Thomson, No. 78-93 (D.N.H. filed March 20, 1978) at 2-3. Both in the lower court and the Supreme Court, the Attorney General argued that the plan was constitutional in part because it was an attempt to recognize Jesus as an "historical" or "secular figure" -- an argument that could seriously threaten church-state principles. See Reply to Memoranda Filed by Petitioners in Brown, supra, No. A-807 (U.S. filed March 24, 1978) at 4; Motion to Dismiss for Failure to State a Claim in Brown, supra, No. 78-93 (D.N.H. filed March 22, 1978) at 2.

The district court rejected the Attorney General's arguments and issued an injunction against the plan, finding that it "not only seeks to advance religion, but a particular religion" and "contains all the seeds of divisiveness that the establishment provision [of the Constitution] was designed to prevent." Brown, supra, No. 78-93 (D.N.H. March 22, 1978); Washington Post (March 25, 1978). Although the court of appeals temporarily reversed the lower court's order on procedural grounds, the Supreme Court reinstated the injunction against the plan. See Brown, supra, No. A-807 (U.S. March 24, 1978); Brown, supra, Misc. No. 78-8028 (1st Cir. March 23, 1978); Washington Post (March 25, 1978).

After Judge Souter's nomination to the Supreme Court, reports have surfaced suggesting that he may have disagreed with Thomson's actions. Thomson reportedly stated that Mr. Souter "advised against" litigating the issue in court, and several attorneys have stated that Mr. Souter did not agree with Thomson's position. See Manchester Union Leader (July 25, 1990); School Law News (August 2, 1990) at 3; Los Angeles Times (July 27, 1990). The attorney who actually argued the case, however, has reported that Attorney General Souter "directed the effort" and that his "advice and counsel was important." See Washington Times (July 26, 1990). To the extent that the nominee supported the constitutionality of Thomson's conduct, his commitment to fundamental First Amendment principles is called into question.

AFJ

Attorney General Souter supported the flag lowering, stating that it was "a religiously neutral symbol of respect for an individual" within the state's discretion. Lowering the flags, he claimed, had a secular purpose in that it recognized Good Friday as an occasion to commemorate the death of Jesus Christ. Failing to recognize the religious significance attached to Jesus Christ and inherent in the observance of Good Friday, Mr. Souter contended that the order did not advance or inhibit religion:

"The lowering of the flag to commemorate the death of Christ no more establishes a religious position on the part of the State or promotes a religion than the lowering of a flag for the death of Hubert Humphrey promotes the cause of the Democratic Party in New Hampshire."

A federal judge issued a temporary restraining order, noting that the governor's order contained "all the seeds of divisiveness that the establishment provision was designed to prevent. It not only seeks to advance religion, but a particular religion." The First Circuit Court of Appeals reversed, but Justice William Brennan, as Justice for the First Circuit, issued a temporary stay on the appeals court decision, thus reinstating the district judge's order.

Governor Thompson Declaration
April 8, 1977

WHEREAS, in lands where the Christian religion prevails and among churches throughout our land, Good Friday represents a day of solemn prayer and rededication, especially in these times when all of us are more conscious of the everlasting debt we owe to our Creator; and

WHEREAS, today, more than ever, we appreciate the moral grandeur and strength of Christianity as the bulwark against the forces of destructive ideologies, and it is upon its uncompromising principles of human integrity, dignity and decency that we shall further our better tomorrows;

NOW, THEREFORE, I, MELDRIM THOMSON, JR., Governor of the State of New Hampshire, do hereby appeal to my fellow citizens to reverently observe Good Friday, April 8, 1977, particularly between 12:00 Noon and 3:00 P.M., with due meditation in church or chapel and I especially solicit the cooperation of employers in business and industry by permitting their employees to participate in this meditation during some part of these three solemn hours. Flags flown at half-mast on our buildings will memorialize the death of Christ on the Cross on the first Good Friday.

AFJ

from N.H. Magraw to D. Smuss
(Dist Ct) March 22, 1978

C. The Declaration at issue in this case and the symbolic act of lowering flags pursuant thereto has a secular purpose. While no one would deny that Good Friday is a religious occasion and that Christ is a religious figure, the Constitution does not prohibit all state involvement with religion. Zorach v. Clauson, 343 U.S. 306, 97 L.Ed. 954 (1951). The Declaration merely states that Good Friday, as a religious occasion for Christians, is an appropriate occasion for meditation or prayer and dedication to Christian principles. This kind of purely voluntary recognition of Christian principles has been recognized as having a secular purpose. See Gaines v. Anderson, supra. Moreover, the issuance of declarations and proclamations urging the observance of religious holidays and principles espoused by religious organizations has been an essentially neutral function in this state. See, for example, the Defendant's proclamations concerning Thanksgiving, Christmas, Hanukkah and Fast Day. (Copies of said proclamations or declarations are attached hereto as Exhibits B, C, D and E.) With respect to the lowering of the flag to commemorate the death of an individual, in this case Jesus Christ, the symbolic action of lowering the flag on Good Friday is a symbolic recognition of the fact that Good Friday is an appropriate

occasion to commemorate the death of an individual who, it is submitted, although primarily a religious figure, may be respected and revered for secular purposes as well.

Lowering

From Judge Skinner's March 22, 1978
memo, attaching P.O.

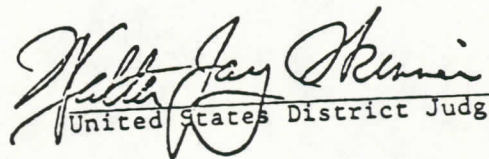
-3-

People who do not accept Christian theology, or believe in the divinity of its founder, can hardly deny the historical impact of the life and teachings of Jesus on Western civilization. It may well be possible to devise an observance of this fact centered around the death of Jesus which is sufficiently devoid of endorsement of Christianity or of any other religion, so as not to offend the strictures of the First Amendment.

I agree with plaintiffs' counsel, however, that withdrawal of the Declaration at this point, would not validate the lowering of flags on Good Friday. The his of the last two years' observances and the issuance of the Declaration yesterday cannot be so easily erased.

Unless the Declaration is withdrawn and replaced with another clearly placing the lowering of flags on public buildings to half-mast on Good Friday in a secular context, such lowering of flags must also be restrained.

Accordingly, I have issued the Temporary Restraining Order filed herewith.


United States District Judge

3. On March 22, 1978, a temporary restraining order was issued ordering defendant Thomson to rescind the declaration of March 21, 1978 and restraining defendant Thomson from lowering the flags on public buildings "unless before that date defendant shall have issued and publicly disseminated a declaration clearly putting such action in a secular context, without officially endorsing the tenants of Christianity or any other religion". See Exhibit 2.
4. On March 23, 1978, the Court of Appeals for the First Circuit vacated the District Court Order. In the posture of this case, the Court of Appeals for the First Circuit correctly treated the Temporary Restraining Order as the equivalent of a preliminary injunction within the meaning of 28 U.S.C. 1291.
5. On March 24, 1978, this Honorable Court stayed the Order of the Circuit Court of Appeals for the First Circuit. The first sentence of that order stated: "the application for stay of the judgment of the United States Court of Appeals for the First Circuit (Misc. No. 78-8029) presented to Mr. Justice Brennan and by him referred to the Court, is granted pending the timely filing and disposition of a petition for a writ of certiorari in this Court". At the time the order was issued, counsel for the petitioners was uncertain as to whether timely filing of the petition for a writ of certiorari meant that the petition had to be filed within ninety (90) days of March 24, 1978 or ninety (90) days from final Order of the United States Court of Appeals for the First Circuit.
6. On March 24, 1978, a new declaration was issued by defendant Thomson. It read as follows:

"WHEREAS, throughout our land Good Friday is for many a day of solemn prayer and rededication, especially in these times in which the moral strength of our society is under test; and

"WHEREAS, Good Friday is an appropriate occasion to commemorate the historical impact of Western civilization on the life and teachings of Jesus Christ and the principles of human integrity,

dignity and decency which he espoused;

"NOW, THEREFORE, I, MELDRIM THOMSON, JR., Governor of the State of New Hampshire, do hereby appeal to my fellow citizens to show consideration for those who wish to observe with reverence GOOD FRIDAY, MARCH 24, 1978, and I especially solicit the cooperation of employers in business in industry by permitting their employees who wish to do so to participate in meditation or other appropriate activity during some part of this day. Flags flown at half-mast in our buildings will memorialize the contributions of Christ to our society; I also urge our fellow citizens to fly their own flags at half-mast and their lapel flags in a position of stress on Good Friday."

facts from
N.H. Motion
to Amend
U.S. S.Ct. Order
of March 24,
1978

B. Wooley v. Maynard

AFJ
The attorney general's office, under David Souter, defended the constitutionality of the statute. He argued that important government interests were furthered by the establishment of an efficient motor vehicle registration system and promotion of tourism and state pride. The attorney general's office also argued that obscuring the motto bore "no relationship to the freedom of expression of the [Maynards]" and did not amount to symbolic speech worthy of First Amendment protection. Mr. Souter did not believe that the message conveyed by obscuring the state motto was sufficiently "particularized" to constitute symbolic speech. He characterized Maynard's conduct as "pure whimsy" without further explanation.

In an opinion by Chief Justice Warren Burger for a seven-member majority, the U.S. Supreme Court disagreed. While not passing on the "symbolic speech" issue, the Court found that the state could not compel an individual to display an ideological message on his private property for viewing by the public. The First Amendment, the Court held, protects the rights of individuals to refuse to foster an idea they find morally objectionable. Contrary to Mr. Souter's views, the Court also held that the state's interest was not sufficiently compelling to justify required display of the state motto on their license plates.

The Burger Court, unlike Mr. Souter, clearly found that the state interest in identifying passenger vehicles could have been achieved through less drastic means that did not impinge so broadly on First Amendment rights. Furthermore, the state's interest in promoting tourism and state pride through display of the motto did not outweigh an individual's right not to be forced to carry such messages.

PAV
More troubling than the fact that the Attorney General opposed the Maynards' position was his apparent denigration of their sincerely held religious and ideological beliefs. The brief submitted by the Attorney General to the Supreme Court claimed that their conduct was "interpretable only as whimsy or bizarre behavior" which fell "far short of warranting First Amendment protection." See Brief for Appellants in Wooley v. Maynard, No. 75-1453 (U.S. filed Aug. 4, 1976) at 6.

from N.H.'s
Supreme Court
Brief

By a Lebanon District Court complaint dated December 28, 1974, Mr. Maynard was charged with a second violation of N.H. RSA 262:27-c (supp.). (App. 19 and 20). He was found guilty on January 31, 1975, was sentenced to pay a fine of \$50.00 and was sentenced to the Grafton County, New Hampshire, House of Correction for six months, which imprisonment was suspended. Mr. Maynard again did not appeal the conviction. He advised the Lebanon District Court that he would refuse to pay the fines, now totaling \$75.00, as a matter of conscience and not due to any inability to pay. The Lebanon District Court then ordered Mr. Maynard be committed to the House of Correction for fifteen days. He served his sentence and was released on February 15, 1975.

rights. To require a person who registers a motor vehicle in New Hampshire and who utilizes this State's highways to attach to his motor vehicle license plates bearing the State Motto constitutes no required affirmation of belief on the part of that person. *State vs. Hoskin*, 112 N.H. 332 (1972). The acts of the Appellees in physically removing and obscuring the State Motto on their license plates do not constitute symbolic speech. A careful analysis of the circumstances of this case satisfies the standards for justified governmental regulation set forth in *United States vs. O'Brien*, 391 U.S. 367 (1968). Neither by their conduct nor by a combination of their conduct and surrounding circumstances did the Appellees convey any particularized message likely to be understood. Their acts, without explanation, are interpretable only as whimsy or bizarre behavior. Any communication peculiar to their acts falls far short of warranting First Amendment protection.

The First Amendment contentions of the Appellees are, first, that the State Motto on their license plates constitutes a required affirmation or belief and, second, that their acts of obscuring the State Motto constitute protected symbolic speech. In *State vs. Hoskin*, *supra*, the New Hampshire Supreme Court dismissed the first argument, saying:

"The defendants' membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no requirement that they endorse that motto or profess to adopt it as matter of belief. . . . [we] think that viewers do not regard the uniform words or devices upon registration plates as the craftsmanship of the registrants. They are known to be officially designed and required by the State of origin. The hard fact that a registrant must display the plates which the State furnished to him if he would operate his motor vehicle is common knowledge." (*Ibid*, at 336-337).

brief (con)

holding is also assailable by analogy to the legal requirement (31 U.S.C. §324-a) that our National Motto, "In God We Trust", appear on all our coins and currency. This requirement ensures even greater dissemination of "the message" since currency is personally passed by hand. Nevertheless, it is a federal felony to alter, deface, mutilate, or impair any coins or any evidence of national bank obligations. 18 U.S.C. §§331 and 333.¹ To deface a coin or federal bank note by obscuring the National Motto clearly tends to defeat the establishment of a uniform national monetary system — a governmental interest which is unrelated to the suppression of free expression. Likewise, to deface a license plate by obscuring the State Motto clearly tends to defeat the establishment of a duly authorized uniform State motor vehicle registration system. For this reason, the second significant case of symbolic speech decided by this Court, *Spence vs. Washington*, 418 U.S. 405 (1974), is inapposite for while the defacement of a flag was found not to impair significantly any interest of the State of Washington in preserving the integrity of a privately-owned flag, in the instant case the significant interest of the State of New Hampshire in a uniform system of motor vehicle identification was directly impaired by the acts of the Appellees in defacing State-issued license plates.

WOOLEY v. MAYNARD, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), per BURGER, C. J., held that requiring appellee to display the motto on his license plates violated his first amendment right to "refrain from speaking":

"[T]he freedom of thought protected by the First Amendment [includes] both the right to speak freely and the right to refrain from speaking at all. See *Barnette*. The right to speak and the right to refrain from speaking are complementary components of the 'broader concept of 'individual freedom of mind.' This is illustrated [by] *Miami Herald Publishing Co. v. Tornillo* (1974) [Sec. 7, III infra], where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized.

" * * * Compelling the affirmative act of a flag salute [the situation in *Barnette*] involved a more serious infringement upon personal liberties than the

passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment [to] reserve from all official control.' *Barnette*.

"New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty, as Maynard already has. [The] fact that most individuals agree with the thrust of [the] motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."

The Court next considered whether "the State's countervailing interest" was "sufficiently compelling" to justify appellees to display the motto on their license plates. The two interests claimed by the state were (1) facilitating the identification of state license plates from those of similar colors of other states and (2) promoting "appreciation of history, state pride, [and] individualism." As to (1), the record revealed that these state license plates were readily distinguishable from others without reference to the state motto and, in any event, the state's purpose could be achieved by "less drastic means," i. e., by alternative methods less restrictive of first amendment freedoms. (See generally Sec. 3 infra.) As to (2), where the State's interest is to communicate an "official view" as to history and state pride or to disseminate any other "ideology," "such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."

REHNQUIST, J., joined by Blackmun, J., dissented, not only agreeing with what he called "the Court's implicit recognition that there is no protected 'symbolic speech' in this case," but maintaining that "that conclusion goes far to undermine the Court's ultimate holding that there is an element of protected expression here. The State has not forced appellees to 'say' anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to 'speech,' such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture." The State has simply required that *all* non-commercial automobiles bear license tags with the state motto. [Appellees] have not been forced to affirm or reject that motto; they are simply required by the State [to] carry a state auto license tag for identification and registration purposes. [The] issue, unfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.

C, Support for state school prayer law

PAW
Perhaps even more troubling was the nominee's conduct concerning a New Hampshire school prayer statute. A state law explicitly permitted local school districts to "authorize the recitation of the traditional Lord's Prayer" in elementary schools, directing that participating students be "reminded" that "this Lord's Prayer is the prayer our pilgrim fathers recited when they came to this country." N.H. RSA 194:15-a. In a suit filed against a school district that sought to implement the law, a federal court ruled that the law was "patently and obviously unconstitutional." Jacques v. Shaw, No. 76-26 (D.N.H. Feb. 6, 1976) at 1.

The state was not a party to the lawsuit challenging the law, and Attorney General Souter properly made clear that the state would not defend independent school districts challenged for seeking to implement it. But even before any suit was filed, Attorney General Souter stated that his office would "do everything we can to uphold the law." Concord Monitor (Jan. 28, 1976). He also reportedly offered to file an amicus curiae brief in support of the law in the Shaw case, even though the state was not a party and could have avoided participating in the case altogether. See Manchester Union Leader (Feb. 7, 1976) at 1. This incident raises serious concerns about the nominee's views on this "patently and obviously unconstitutional" law and why he volunteered to support it when no state agency was sued and he was not required to do so.

Concord Monitor
1/28/76

Local School Boards May Fight Prayer Suits Alone: Souter

By THE ASSOCIATED PRESS

Local school boards may have to fight anti-school prayer suits without the help of the New Hampshire attorney general's office, says Atty. Gen. David H. Souter.

Souter said Tuesday his department would become involved only if a suit is filed challenging the constitutionality of the seven-month-old state law which allows the Lord's Prayer to be recited in classrooms.

"In that case our concern is to do everything we can to uphold the law," Souter said.

The N.H. Civil Liberties Union has said it plans to file suit to stop recitation of the prayer in Rochester schools.

Souter said if that suit challenges the action of the school board for allowing prayer in the classrooms, it is not within his jurisdiction.

"If one school district acted unconstitutionally that does not necessarily mean the statute is unconstitutional," he said, add-

Last month, Gov. Thomson said his office, through its legal counsel, "will be prepared to defend any... challenges, and I expect that the attorney general's office will be prepared to assist."

But Souter said Tuesday, "I don't know what's on his (Thomson's) mind. I've told him it's not within our jurisdiction."

"We'll not assist by being counsel for independent districts, which under law we have no business doing."

Souter has advised school boards to consult with local attorneys before allowing classroom prayer.

Meanwhile, a spokesman for Democratic presidential candidate Fred Harris said Harris does not support the prayer law because it apparently violates the U.S. Supreme Court ruling disallowing school prayer.

"Our interpretation (of the state law) is that it's not a plan that allows the student to medi-

VI Civil Rights

A. Speeches

FAW

Even more troubling and revealing, the nominee personally expressed views consistent with the state's civil rights positions in several of his own speeches, as discussed in the Judicial Philosophy section of this report. In a May, 1976 speech, delivered during the EEOC appeal, Attorney General Souter attacked federal affirmative action programs as "affirmative discrimination," stating that they focus improperly on statistics and illustrate that "[t]here are some things our government cannot do." Manchester Union Leader (May 31, 1976).

In Speech at NEAI Commencement

Souter Raps Ethnic Preferment

By BARRY PALMER

Staff Reporter

NASHUA — Federal guidelines giving preference to persons because of their ethnic backgrounds were attacked yesterday by N.H. Atty. Gen. David Souter as "affirmative discrimination."

— He was the keynote speaker at the 10th annual commencement exercises of New England Aeronautical Institute and Daniel Webster College at St. Stanislaus Hall, at which degrees were conferred on 80 bachelor and associate degree candidates by Pres. William F. Griesemer Jr.

Souter, a Rhodes scholar, said "affirmative discrimination" is a policy whereby a person achieves eligibility for some service strictly by virtue of his ethnic background. He pointed to federal guidelines which require an employer to give preference to a particular ethnic or racial group until a certain percentage requirement is fulfilled.

Souter denounced that type of policy, and said it does not help those who need it, saying the government "should not be involved in this." He said protection of civil liberties over the years has been accomplished by applying the principles of restraint.

"There are some things government cannot do," he said, "and our whole Constitutional history is a history of restraining power." He added that "affirmative discrimination" addresses a set of statistics, rather than the individual.

Manchester Union Leader, 5/31/76

145-7
The nominee went further in criticizing alleged federal government intrusion in a 1978 speech. He claimed that the federal government had no constitutional authority in matters such as the education of handicapped children, the 55 mile-per-hour speed limit, and providing unemployment benefits for state and local workers. He reportedly urged that the United States avoid a "strong central government" and lamented the fact that this notion had "dropped from our consciousness." Concord Monitor (Dec. 29, 1983).

Mr. Souter has stated that he has no text or other record of his speeches other than news reports, and did not mention his 1978 speech at all in his questionnaire response. See Souter questionnaire at 12-14.

20m
Souter
H.
questionnaire →
During my tenure as Attorney General, I gave a limited number of speeches before various groups in New Hampshire on legal and public policy topics. I have no copies of the texts of such speeches. It is not my practice to speak from a prepared text. I do not ordinarily keep any note cards or outlines that I might use for speeches and have not been able to locate any such note cards or outlines. The following summarizes my recollection concerning the speeches and lectures of which I am aware. In addition, while serving on the Superior Court and on the Supreme Court, I gave three lectures in connection with a continuing legal education program sponsored by the New Hampshire State Bar Association described in my response to Question I-18 below.

1. I gave several speeches in opposition to a legislative proposal to legalize casino gambling in New Hampshire. The speeches addressed only the legal and, in particular, law enforcement consequences of the proposal. The speeches were given between November 1976 and April 1977. I recall that two of the groups I addressed were the Franklin Rotary Club and the Lancaster Chamber of Commerce.

2. On February 22, 1979 I appeared before a citizens' group, the Concord Health Area Survey, and on January 7, 1980, I appeared before the Office of Health Planning and Development. I made both appearances in my capacity as President of Concord Hospital. I have no written record of any statement I may have made in connection with either appearance, but in each instance I spoke in favor of the hospital's construction and renovation plans.

3. I appeared on at least one occasion before the Concord City Zoning Board of Adjustment to comment on a zoning proposal affecting Concord Hospital.

4. During the 1970's and 1980's, I appeared approximately a half dozen times before the Weare, New Hampshire town meeting to report on the value of unpaid medical services rendered to residents of Weare by

Concord Hospital. It was the practice of Weare and other towns surrounding Concord to make an appropriation to Concord Hospital to help defray those expenses.

5. In May 1976, I gave the commencement address at graduation exercises of the Daniel Webster College and New England Aeronautical Institute. I am sending to the Committee under separate cover news clips concerning that address. *(included Manchester Issues)*

6. On June 17, 1976, I gave the commencement address at the Weare High School graduation exercises. I spoke on the subject of our constitutional system of government. I am sending under separate cover news clips concerning that address.

Empty questionnaire was required to be completed in
2 weeks - supplemented by letter of
Sept 7 (same date as PAR report) filling in
gaps on question 1 + noting St. Paul's;
Manchester Police; Peterborough Rotary; Newport
Chamber of Commerce (1978 talk "identifying
the failure of the states to address
certain pressing problems as one cause of
a shift in authority to the national
government"; D A R; Merrimack Co. Medical So.

B. EEOC (US v New Hampshire)

AFT
Mr. Souter used the same reasoning when, as attorney general, his office defended New Hampshire's refusal to report the racial composition of the state's workforce, as required by federal fair employment laws. In the state's brief before the U.S. Supreme Court, Mr. Souter challenged the constitutionality of the reporting requirement, calling it "superfluous" and "abusive." He claimed that the requirement "proceeds from the cynical assumption that the fairest employer cannot be trusted any more than the most biased. And, it ends in treating every employer as if he were a suspected bigot and lawbreaker." He stated the regulation was non-essential to the aims of Title VII and a intrusive and unnecessary exercise of governmental power.

Mr. Souter contended that requiring state employers to make racial and ethnic classifications was itself an illegal state action in violation of the equal protection clause. Such requirements were to be tolerated no more than racial quotas, which were impermissible in his view. Mr. Souter further argued that the reporting requirements would cause employers to think in terms of color, rather than merit, and thereby result in employers acting in terms of color. He assumed this result, even though the reporting was to be done on an aggregate, not an individual, basis. The Supreme Court rejected his arguments.

AAW
as Attorney General, Mr. Souter was involved in another challenge by New Hampshire to an important federal civil rights rule. A long-standing Equal Employment Opportunity Commission regulation requires employers with more than 100 employees, including state and local governments, to submit forms containing racial breakdowns of their workforces. See 29 C.F.R. Part 1602. As current EEOC chair Evan Kemp has explained, these statistics are "necessary" for civil rights investigation and enforcement and to help measure progress toward achieving fair employment goals. Washington Post (Aug. 1, 1990) at A4.

Along among the 50 states, however, New Hampshire refused to comply with the EEOC regulation. The federal government filed suit and, before the nominee became Attorney General, a federal district court ruled against the state

in 1975. United States v. New Hampshire, No. 75-197 (D.N.H. Dec. 22, 1975). In 1976, Attorney General Souter pursued vigorous appeals of the court ruling.

In a brief filed by Attorney General Souter and one of his assistants, the nominee argued that the EEOC rule was not authorized by federal law and was actually unconstitutional. The brief claimed that the required statistics had "nothing to do with unlawful employment practices", would lead to impermissible job quotas, could not be constitutionally collected by the federal government, and would somehow actually promote discrimination. See Brief for Appellant in United States v. New Hampshire, No. 76-1018 (1st Cir. filed Feb. 20, 1976) at 9, 14-15, 38.

The Court of Appeals flatly rejected the Attorney General's claims, finding that the required statistics were "often highly useful" in investigating and proving discrimination, that claims of "purely hypothetical misuse of data" could not justify prohibiting its collection, and that the regulation was clearly constitutional. United States v. New Hampshire, 539 F.2d 277, 280 (1st Cir. 1976). In fact, the court noted that a number of the Attorney General's objections were not even "deserving of discussion." Id. at 282 n.8.

Nevertheless, the nominee attempted to pursue the case even further. In a petition for review to the Supreme Court, the Attorney General argued again that the rule was improper. He claimed that it was discriminatory because it required employers to be "color-conscious" in collecting statistics, despite the rule's clear purpose and effect to combat discrimination. See Petition for Writ of Certiorari in New Hampshire v. United States, No. 76-453 (U.S. filed Sept. 28, 1976) at 7. He asserted that the rule was "abusive" and "contrary to constitutional principles limiting federal power." Id. Then-Solicitor General Robert Bork opposed Attorney General Souter's petition for review, pointing out that "under well-established principles" it had no merit. Memorandum for the United States in Opposition in New Hampshire v. United States, supra (U.S. filed November, 1976) at 1. The Court denied Mr. Souter's petition.

Although the nominee did not personally argue the EEOC case, the available evidence indicates his approval of the briefs and arguments filed. Only the names of Attorney General Souter and one assistant attorney general appear

on both the appellate and Supreme Court briefs. That assistant has reported that the nominee was "supportive of and involved in the effort." Legal Times (Aug. 27, 1990) at 10. Indeed, former Gov. Thomson has recently stated that "I know [Mr. Souter] did not discourage me" from pursuing the EEOC case to the Supreme Court. Washington Post (August 1, 1990) at A4.

This is particularly disturbing in light of the evidence that the state's positions were, to use the nominee's term, "clearly wrong." As former EEOC chair Clifford Alexander has explained, the state's claim in the EEOC case was a "fatuous argument raised by people who are fundamentally against giving equal employment opportunity." Id.

from 1st Circuit Opinion (McEntee, w/ Coffin, Campbell,

the information which the regulations require a state to furnish on the EEO-4 form is essentially raw statistical data which, properly interpreted, can provide an intelligent basis for determining whether the state may be guilty of an unlawful employment practice within the purview of Title VII. See 42 U.S.C. § § 2000e-2 and 3.³ Information like that which the EEO-4 form seeks to accumulate is often highly useful when an agency or court attempts to make the often difficult inference that illegal discrimination is or is not present in a particular factual context.

The constitutional basis of § 709 (c) — at least insofar as state and local governments are concerned — is the fifth section of the fourteenth amendment:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Supreme Court has consistently held this section to mean that "Congress is authorized to *enforce* the prohibitions [of the fourteenth amendment] by appropriate legislation." *Ex Parte Virginia*, 100 U.S. 339, 345 (1880) (emphasis in original [sic]). See also *Katzenbach v. Morgan*, 384 U.S. 641, 648-51 (1966). It is clear that when, by the Equal Employment Opportunity Act of 1972, Congress extended the coverage of Title VII to state and local government employees, that was an exercise of the power granted Congress by the fifth section of the fourteenth amendment.

150 Acc op (con)

The House Report on the 1972 act explicitly states:

"The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.

"Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill. Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated 'under color of state law' as embodied in the Civil Rights Act of 1964."

...ed). In our view, when Congress extended these assurances to state and local government employees in 1972, it was simply enforcing the guarantee of "the equal protection of the laws" accorded by the first section of the fourteenth amendment. See *Fitzpatrick v. Bitzer*, *supra* at 5123. And, as the challenged record keeping and reporting provision, § 709 (c), is a reasonable and proper means of assuring equality in employment, see Part I *supra*, it too would be authorized by the fifth section of the fourteenth amendment.

from: NH Cert Petition (1976^{act}_{term})

~~New Hampshire~~ did not seek an exemption, under 29 C.F.R. §1602.35, from filing such reports. But ~~believing "race/ethnic group identifications" to be unlawful and unconstitutional, it refused to make, record, and report such identifications for calendar years 1973, 1974, and 1975.~~ (A. 3.) For 1973, however, New Hampshire did file a report on the EEOC forms; but rather than use the ethnic designations there provided, it used the word "American" to designate the ethnic category of all its employees. (A. 8, 74.) The EEOC found this report unacceptable and returned it; New Hampshire did not file any further report for that year. (A. 8, 74.) For 1974 and 1975, New Hampshire filed no report at all. All other states — except Hawaii, which has been subject to different requirements — filed acceptable reports for 1973 and 1974 (A. 8, 74.); the record contains no information on 1975 filings.

~~On 24 September 1973, New Hampshire Governor Thomson wrote as follows to an official of the EEOC:~~

~~If you want a breakdown of our American employees, then I suggest you let us find out by the simple method of asking or letting~~

²It has, however, complied with the order of the district court, affirmed at the court of appeals, regarding identifications for those years.

4

~~them volunteer the information. Otherwise, we would be very happy to have you come and conduct the visual survey.~~ (A. 10.)

And on at least three other occasions similar views were expressed to federal officials by either the Governor or the State's Personnel Director. (A. 15, 19, 21.) Th

The requirement for "race/ethnic group identifications" binds each and every employer — as well as each and every labor organization — that is subject to Title VII and 29 C.F.R. Part 1602.³ That kind of nondiscrimination, however, is not a virtue but a vice. It proceeds from the cynical assumption that the fairest employer cannot be trusted any more than the most biased. And it ends in treating every employer as if he were a suspected bigot and lawbreaker.

New Hampshire is one of a handful of states whose policies historically have been free of racial discrimination. See *Keyes v. School District No. 1*, 413 U.S. 189, 228 n. 12 (1973) (Powell, J., concurring in part and dissenting in part). The record in the present case, moreover, does not even hint that such discrimination has ever been practiced by New Hampshire. Racial discrimination, therefore, is not the cause of this controversy, although, unhappily, it is the context. The cause is federal bureaucratic abuse.

The regulation is, in short, a means turned against Title VII's end. For the natural consequence of thinking, or being forced to think, in terms of color is to act in terms of color. And once such action begins — however subtle its form or benign its objective — it becomes a practice which, in tending to benefit one individual because of his color, tends to deprive another because of his color. Such a "racially differential impact" — even apart from any discriminatory purpose — runs afoul of section 703 (a). *Washington v. Davis*, 44 L.W. 4789, 4792 (U.S.S.C. 1976). Moreover, the classification leading to that result is itself contrary to section 703 (a)(2). Title VII sweeps wide: it "tolerates no racial discrimination, subtle or otherwise." *McDonnell Douglas Co. v. Green*, 411 U.S. 792, 801 (1973) (emphasis added); see also *McDonald v. Santa Fe Transportation Co.*, 44 L.W. 5067 (U.S.S.C. 1976).

The regulation is also inconsistent with section 703 (j). See p. 28 hereof. That section is an expression of Congressional disfavor with quotas.

New Hampshire is acutely aware of the legion of cases that have sanctioned the use of racial statistics. New Hampshire understands also that racial statistics could be used in dealing with pattern-and-practice problems under section 707. But the regulation in question is not needed for the acquisition of such statistics. In any problem with a particular employer, the EEOC could easily get such statistics — merely by invoking its investigatory powers under the statute. See sections 707 (e), 706, 709 (a), 710, and 705 (g) (2).

B. *Insofar As Section 709(c) Purports To Authorize The Regulation, It Is Without Constitutional Basis.*

Citing *Fitzpatrick v. Bitzer*, 44 L.W. 5120 (U.S.S.C. 1976), the First Circuit held that section 5 of the Fourteenth Amendment is the constitutional basis for the requirement that state employers make "race/ethnic group identifications." It reasoned that the requirement is an appropriate means to the end of equal protection of the laws, guaranteed by section 1 of the Fourteenth Amendment. In fact, however, the requirement is quite to the contrary. See *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

This, again, is not merely a matter where a particular allegation or determination is made that a particular employer has committed acts of discrimination; and where, because of such allegation or determination, that employer is told he must make certain kinds of "race/ethnic group identifications" for a certain period. In such a case, the identifications might be used in investigating the alleged injury or, if injury is found, in providing the needed relief. The present case is different. It concerns, not exceptions to the rule, but the rule itself. We are told in effect that, as a matter of universal policy of indefinite duration, all employers are to become, and remain, color-conscious, in

order to become, and remain, color-blind. This is government by non sequitur. Such illogic at the top evidences two things: (1) *parens patriae* does not always know best; and (2) doublethink has come at least eight years earlier than George Orwell expected.

"Our Constitution is color-blind" *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Except when tests of the strictest scrutiny are met, "it does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of [civil] rights." *Id.* at 554 (Harlan, J., dissenting).

Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, *Slaughter House Cases*, 16 Wall 36 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880); *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967), racial classifications are "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and subject to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944). They "bear a far heavier burden of justification" than other classifications, *McLaughlin v. Florida*, 379 U.S. 184 (1964). [*Hunter v. Erickson*, 393 U.S. 385, 391-92 (1969).]

Section 709 (c) makes a mockery of these principles: its requirement that every state employer regularly make "race/ethnic group identifications" causes "state action" that contravenes the equal protection clause. See, e.g., *Evans v. Newton*, 382 U.S. 296 (1965), and *Shelley v. Kramer*, 334 U.S. 1 (1948). Congress has absolutely no power to authorize such action. *Townsend v. Swank*, 404 U.S. 282 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Just as the requirement for "race/ethnic group identifications" has no constitutional warrant under the Fourteenth Amendment, so too it has no constitutional warrant under the interstate commerce clause or "elastic" clause of Article I section 8. See *Fitzpatrick v. Bitzer*, *supra* at 5122 n. 9, NB concurring opinions of Brennan, J., and Stevens, J.; see also, *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

from N.H. brief for Appellant in U.S. SC.

II.

SECTION 709(c) IS UNCONSTITUTIONAL BECAUSE:

- A. It Is An Invalid Exercise Of Congress's Power To Regulate Interstate Commerce Under Article I §8; And It Is Neither Necessary Nor Proper For Congress's Regulation Of Interstate Commerce Under Article I §8. ^{9/}

NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937) is the watershed decision for a broad construction of the interstate commerce clause. That case upheld a federal labor relations act which provided for collective bargaining in all industries "affecting commerce"; it gave rise to the so-called affectation doctrine. Since then, the interstate commerce clause and the gloss of Jones & Laughlin have been invoked to justify ever-increasing federal regulation. Cases illustrating that effect are myriad. See, e.g., United States v. Darby Lumber, 312 U.S. 100 (1941) (regulating the production of goods later shipped into interstate commerce); Wickard v. Filburn, 317 U.S. 111 (1942) (regulating farm production intended solely for consumption at the producing farm); Maryland v. Wirtz, 392 U.S. 183 (1968) (regulating state-owned facilities); and Perez v. United States, 402 U.S. 146

^{9/} The United States argued below that (1) states were made "employers" under section 701(b) by virtue of the equal protection clause, not the interstate commerce clause, and that (2) therefore the State's views on the interstate commerce clause were irrelevant. That argument misses the point: the point is not the constitutional underpinning of section 701(b) as it applies to states; the point is the constitutional underpinning of section 709(c) as it applies to all "employers."

(1971) (regulating criminal transactions that occur solely within one state). More material to the case at bar, though, is that the interstate commerce clause and the affectation doctrine have been used to fight racial discrimination. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and Katzbach v. McClung, 379 U.S. 294 (1964).

New Hampshire entertains no illusion that Jones & Laughlin and its progeny can be overturned. Nor would it even wish that result. What New Hampshire seeks here is nothing so extreme; it seeks merely a decision giving effect to the other half of Jones & Laughlin, the half which recognizes that the interstate commerce clause, however broad, still has limits.

The Court in Jones & Laughlin expressed fear of a completely centralized government, one whose actions contravened the idea of a government with limited powers. New Hampshire submits that section 709(c), insofar as it authorizes the regulation in question, is evidence of unchecked centralized government. If the interstate commerce clause can justify "race/ethnic group identification" reports annually, then why could it not justify such reports monthly, or weekly, or daily? And if the interstate commerce clause can justify "race/ethnic group identification" reports in an employment setting, then why could it not justify such reports in other settings? For example, each citizen has a constitutional right to travel (Griffin v. Breckenridge,

403 U.S. 88 (1971)); the interstate highway system is part of interstate commerce (Id.); and no one would argue that the federal government should let states intimidate members of minorities from enjoying their right to travel on interstate highways. Yet, doubtless such intimidation could occur, e.g., through police harassment. To ascertain, then, whether such intimidation might be occurring, could not the interstate commerce clause justify a federal requirement that each state make "race/ethnic group identifications" of those using interstate highways within the state? Visual surveys could occur at exits and from overpasses. Refined surveys could make use of binoculars and slow-motion cameras. Each passenger in a vehicle could be identified according to the "minority group to which he or she appears to belong, identifies with, or is regarded in the community as belonging." The same categories set out in the regulation in question could be applied to these surveys. Of course, though, the same kinds of questions that are set out on pages 13-21 hereof could also be applied to these surveys; e.g., how would one identify a driver whose one parent was "American Indian" and whose other parent was "Other" (e.g., Aleut)? or a passenger whose one parent was "White" (e.g., Pakistani) and whose other parent was "Other" (e.g., Thai)?

At some point, obviously, the federal government can extend the interstate commerce clause beyond reason and into the absurd. And New Hampshire submits that that point has been reached in this case. The distinction between reasonable regulation and absurd regulation is no less significant to the invocation of the interstate

commerce clause than is the distinction between national commerce and local commerce. The second distinction was explicitly addressed in Jones & Laughlin, and it has implications for the first:

. . . [The interstate commerce clause] may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and completely create a centralized government. . . . The question is necessarily one of degree. Id. at 37.

* * *

. . . In A. L. A. Schechter Poultry Corp. Case, 295 U.S. 495, . . . we found that the effect there was so remote as to be beyond the Federal power. To find "immediacy and directness" there was to find it "almost everywhere," a result inconsistent with the maintenance of our Federal system. Id. at 40-41.

* * *

We have often said that interstate commerce itself is a practical conception. Id. at 41-42.

New Hampshire submits that enforcement of the regulation in question would "effectually obliterate the distinction" between the reasonable and the absurd; it would simply suppose reasonableness, rather than treat it as a question which is "necessarily one of degree." Further, New Hampshire submits that to find reasonableness in this regulation would be to find it "almost everywhere"; and to give effect to the regulation would be to let a "practical conception" be stretched and warped into a stultifying, impractical requirement. . . .

It requires State action. That contravenes the Equal Protection Of The Laws Guaranteed To Persons By The Fourteenth Amendment; And It Is Not Appropriate For The Enforcement Of The Equal Protection Of The Laws Guaranteed To Persons By The Fourteenth Amendment.

"Our Constitution is color-blind" Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). "[I]f does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of . . . [civil] rights." Id. at 554 (Harlan, J., dissenting). Section 703(c), however, makes a mockery of that idea: by requiring state employers to make "race/ethnic group identifications," it causes "state action" that contravenes the equal protection clause of the Fourteenth Amendment. o o o

D. It Infringes The Liberty Of Persons Without Due Process Of Law, Contrary To The Fifth Amendment; And It Requires State Action That Infringes The Liberty Of Persons Without Due Process Of Law, Contrary To The Fourteenth Amendment.

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J. dissenting).

"Liberty," under both the Fifth and Fourteenth Amendments, is given a broad construction:

"Liberty" . . . [is a] broad and majestic term. . . . [It is] among "the [g]reat [constitutional] concepts purposely left to gather meaning from experience." Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

It denotes not only freedom from bodily restraint but also the right "to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." Id. at 572. One of these privileges, we submit, stems from the constitutional doctrine of limitation of powers: it is a freedom from governmental obtrusions that are excessive in demand and attenuated in justification. . . .

E. It Contravenes Powers Reserved To The States And The People Under The Tenth Amendment.

The Tenth Amendment provides: "The powers not delegated to the States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Obviously, the United States has been delegated the power to regulate interstate commerce as well as the power to enforce equal protection of the laws. But equally obviously, it has not been delegated the power to oversee and control every detail of human activity. By virtue of the Bill of Rights and their penumbras, individuals have the means to resist unjustified federal encroachments, and therefore to retain a large measure of control over their lives. States qua states, however, do not share these same advantages.

Although there is reason to conclude that, when states are acting as private persons, the federal government must treat them with due process (see Argument II D), the law on this is by no means certain. And to the extent that the Fifth Amendment does not protect states from capricious and excessive federal actions, states are forced to take refuge in the Tenth Amendment. When, for example, non-government employers and both government and non-government employees can resist federal irrationality by invoking the Bill of Rights, the states too should be able to resist -- if by no other means than invoking the Tenth Amendment. To conclude otherwise would be nonsensical: it would be to conclude that with respect to states -- but no one else -- the federal government can be irrational.

We submit that the Tenth Amendment reserves to the states the power to run their activities rationally. And the natural consequence of that power is an ability to resist such arbitrary federal programs as the one embodied in section 709(c).

F. It Requires "Badging" By Race,
Contrary To The Thirteenth
Amendment

WASHINGTON - While he was New Hampshire's attorney general, David H. Souter, the Supreme Court nominee, was obliged to defend in court the policies of an archconservative governor, including a challenge to federal equal opportunity rules, Sen. Warren B. Rudman, his predecessor in the state post, said yesterday.

Rudman, a Republican who has been one of Souter's key mentors, said the equal opportunity case began while he was attorney general and Meldrim Thomson Jr. was governor. Thomson's orders were often very conservative, but they never became so extreme that either he or Souter concluded that they were unconstitutional, Rudman said.

While he said he could not remember Souter's opinion on the issue, Rudman said he personally agreed with the argument that the federal government had no right to order state governments to list their employees by race.

"But we lost," Rudman said.

Souter's actions as Rudman's deputy and as attorney general have produced considerable controversy since President Bush nominated him to replace the retiring Justice William J. Brennan Jr. Some civil rights organizations said yesterday that Souter's arguments were beyond the legal mainstream.

Rudman, who said he originally filed the case, added, "I happen to agree with Mel Thomson at the time." There is a distinction, he said, between properly requiring private employers to document their hiring policies and issuing the same requirements to states. "That's a viola-

tion of the principles of federalism and state sovereignty," he said.

Asked if Souter had told him whether he agreed with that position, Rudman replied, "I just don't recollect."

Eleanor Holmes Norton, head of the Equal Employment Opportunity Commission under President Carter, said Souter's legal language "sounded like a far right fanatic and did not

belong in a legal brief." She said it raised a serious question because "it shows no understanding of modern-day anti-discrimination laws without adequate data."

Ralph Nease, chairman of the Leadership Conference on Civil Rights, said the Souter petition "raises concerns and shows why we need to delve deeply into this nomination."

In one, Souter embraced the Supreme Court's privacy doctrine in a case challenging the authority of the federal government to force states to report the race, sex, and national origin of their employees by job category. In defending New Hampshire's refusal to comply with the order, Souter and his legal team relied heavily on the controversial *Griswold* and *Roe* precedents to thwart federal authority.

Whether directly, or indirectly through agents, government cannot lightly intrude into anything which is a matter of individual privacy; and this applies no less to racial and ethnic background than to psychiatric needs and sexual habits.

Souter did not write the brief in that case, and like all his work as state attorney general, his positions were determined by the policy of the governor at the time, arch-conservative Meldrim Thomson Jr. And New Hampshire offered a number of other statutory and constitutional arguments aside from privacy.

But Haffer, who wrote the brief and argued the case, says Souter was supportive of and involved in the effort to fend off federal power.

"David and I talked generally about the case, since it was an argument that had to be made very carefully," Haffer recalls.

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C.

AFJ

State Literacy Test

The 1965 Voting Rights Act amendments are pivotal in this country's commitment to the protection of minority rights. In 1970, David Souter sought New Hampshire's exemption from adhering to them. In United States v. New Hampshire, Civ. No. 3191 (D. N.H. 1970), the Nixon Justice Department filed an action, declaring that the amendments to the 1965 Voting Rights Act invalidated provisions in the New Hampshire constitution which prescribed a literacy test as a qualification to

vote. As assistant attorney general, Mr. Souter defended the literacy test. He unsuccessfully argued that a suspension of the tests under the 1965 amendments exceeded Congress's authority, because the tests had been previously administered in compliance with federal law.

David Souter is obviously untroubled by the position he was asked to defend. Twenty years later, in his questionnaire to the Senate Judiciary Committee, he described this case as one of the ten most significant that he argued. However, given the opportunity to explain his position, he does not reflect on the substance of the case or on how the Voting Rights amendments have affected minority citizens. Instead, Mr. Souter could only recall the intellectual exchange of his oral argument.

PAW

He also argued against a preliminary injunction to permit persons who could not pass the test to vote in state elections in November, 1970. He claimed that such persons were merely "fortuitous and incidental beneficiaries of a legal, rather than a constitutional, right to vote," and that permitting them to vote would harm the state by "watering the value" of the votes of other citizens. Id. at 7.8.

A three-judge federal court firmly rejected the nominee's arguments. The court had "no difficulty in finding that the federal statute is probably constitutional." United States v. New Hampshire, supra, slip op. at 2-3, a conclusion confirmed by the Supreme Court itself several months later by an 8-1 vote in Oregon v. Mitchell, 400 U.S. 112 (1970). In contrast to the short shrift the nominee accorded to the right to vote of persons who could not pass the New Hampshire literacy test, the court found that "irreparable harm will inevitably result to those individuals" if they were "denied the right to vote," and accordingly granted the injunction requested by the United States. Id. at 3.

from Souther S. W. Westromare

5. United States v. New Hampshire, U.S.D.C., D.N.H. Civil No. 3191. This action was brought in 1970 by the United States Attorney to declare that amendments to the federal Voting Rights Act of 1965 rendered unenforceable New Hampshire's literacy test for voters. The governor decided that the state constitutional provision requiring the literacy test should be defended, and the Attorney General assigned me to respond to the complaint and argue the matter before a three-judge District Court of the United States for the District of New Hampshire. Our position was that blanket suspension of state literacy tests exceeded Congressional authority under the Fourteenth and Fifteenth Amendments when the federal act was applied against those states whose tests had previously been administered without unlawfully discriminatory intent or effect. Although the state lost, I will always remember my participation in the argument of that case as one of the most gratifying events of my life, for it gave me the only chance I ever had to appear before the late Judge Gignoux of the District of Maine, and the argument included a genuinely dialectical exchange between that great jurist and me. The other members of the court who heard the matter on September 29, 1970, were Judge Coffin of the First Circuit and Judge Bownes of the District of New Hampshire.

Counsel associated with me were:

The Hon. Warren B. Rudman (then Attorney General of New Hampshire), Hart Senate Office Building, Washington, D.C.; (202) 224-1601

The Hon. William F. Cann (then Deputy Attorney General of New Hampshire; now retired from the Superior Court of New Hampshire), 36 Roger Avenue, Concord, N.H. 03301; (603) 228-2328

Counsel for the United States was:

The Hon. David A. Brock (then U.S. Attorney; now Chief Justice of the Supreme Court of New Hampshire), Noble Drive, Concord, N.H. 03301; (603) 271-2149

N.H. agreed personally to register illiterates
pending result of US v. N.H.

from: N.H. memo in Dist. Ct. opposing t.r.o.
to enjoin N.H. from applying literacy req.

^{It is} also the State's position that the cited section of the Act
is unconstitutional as applied to this State. Nonetheless,
the relationship between this motion and the pending original
actions in the United States Supreme Court is such that no
final determination of the constitutionality of the cited
section need be made by this Court.

It is significant that in each instance the provision
whose constitutionality was upheld was restricted in its
application to essentially particular circumstances. The
application of the literacy test suspension provisions,
considered in South Carolina v. Katzenbach, was restricted
to certain political subdivisions in which voter registration
or voter participation in November of 1964 was less than 50%
of the voting age population. The Court could, therefore, find
that Congress had restricted its exercise of power in such a
way as to affect few, if any, areas substantially different
from the areas in which undoubted unconstitutional State
discriminations had in the past taken place. While admitting
that the formula mentioned could perhaps extend somewhat further,
the Court at page 788, —, 330, stated that "[i]t was therefore
permissible to impose the new remedies on the few remaining
States and political subdivisions covered by the formula, at
least in the absence of proof that they have been free of
substantial voting discrimination in recent years."

N.H. (con)

purposes. First, authority is wanting for the proposition that a blanket suspension of all literacy tests may be compelled by Congressional legislation, absent the showing of a correlation between areas in which suspension is effected and areas in which the tests have been used for ultimately unconstitutional purposes. Second, the quoted language of the Court suggests that unless there is such a particularized application of suspension provisions, constitutionality is unlikely. Hence, the State of New Hampshire submits that the United States has failed to meet its obligation to demonstrate a substantial likelihood that the Act will be adjudged, in this respect, constitutional.

III. THE RISK OF IRREPARABLE HARM TO NEW HAMPSHIRE
IF THE MOTION IS GRANTED OUTWEIGHS THE RISK
OF HARM TO ILLITERATES IF THE MOTION IS DENIED

To segregate the ballots of illiterates from those of other voters, pending a decision of the Supreme Court, would be unwise since the voting performance of illiterates could thereby become easily discoverable, since an identified block of voters could thereby in a very precise manner be identified as affecting the outcome of a possibly close election, and since such a segregation would serve only the object of chaos in the event that the Supreme Court of the United States had not announced a decision by January 1, 1971. The State submits that to the extent that any one group might so precisely be identified, the necessity for acceptance of the result of the electoral process is jeopardized. The parties, therefore, appear to be in substantial agreement that illiterates should either be treated as regular voters or they should be treated as voters not at all.

Should illiterates be allowed to vote on November 3, detriment to the State and its citizens will occur in watering the value of every literate citizen's vote should the United States Supreme Court later determine that illiterates should not have voted. To this harm must be added the impossibility of providing any means whereby illiterate voters could intelligently vote upon the constitutional proposals, which are presented on the ballot in narrative form; the result of allowing illiterates to make a choice in such matters is

tantamount to authorizing them to vote at random, utterly without comprehension. Lastly, it is essential to recognize that the power of the State which it is claimed that the congressional action has usurped is a power of Constitutional nature. While the franchise is guaranteed to the citizens by the Constitution of the United States, it is without question that the power of the states to determine the qualifications of voters is a reserved power of a Constitutional, rather than of a merely legal, nature. See, e.g., Lassiter v. Northhampton County, supra.

The voting right which may be claimed by New Hampshire illiterates, whoever and however many they may be, is a right, by contrast, of a merely legal nature. It has not been shown, and the State submits it could not be shown, that any present New Hampshire illiterate has been deprived the franchise as a result of any unconstitutional discrimination by the State of New Hampshire or any other state. The evidence presented by the United States tends to prove just the converse conclusion, since it demonstrates a higher rate of voter participation in New Hampshire than in 16 out of 22 states which maintain no literacy requirements. See "APPENDIX TO MEMORANDUM IN SUPPORT OF MOTIONS OF THE UNITED STATES" at p. 34.

New Hampshire illiterates, therefore, may be enfranchised for the first time, if at all, not because they could constitutionally claim that franchise but because the Supreme Court may determine that a blanket suspension of literacy tests is a constitutional exercise of congressional power. The individuals can claim, therefore, no more than that they are the fortuitous and incidental beneficiaries of a legal, rather than a constitutional, right to vote.

from: Opinion of 3 Judge Ct. - Coffey, Ginnoux, Bowles

We have no difficulty in finding that the federal statute

is probably constitutional. South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Daston County v. United States, 395 U.S. 285 (1969); Frederick J. Christopher, Jr., et al v. Mitchell, Attorney General of the United States and the New York City Board of Elections, --- F.Supp. --- (D.D.C., Oct. 2, 1970) (Three Judge Court).

Nor do we have any difficulty in finding that irreparable harm will inevitably result to those individuals who are illiterate if they are denied the right to vote. The Supreme Court has emphasized on many occasions, most recently in Evans v. Cornman, 398 U.S. 419 (1970), that the right to vote is the most fundamental of fundamental rights.

[T]here can be no doubt at this date that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper v. Virginia Board of Elections, 383 U.S. 663, 665 (1966); see Williams v. Rhodes, 393 U.S. 23, 29 (1968). Moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges. See Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Wesberry v. Sanders, 376 U.S. 1, 17 (1964). 398 U.S. at 422.

We are keenly aware of the fact that the constitutionality of the Voting Rights Act Amendments was argued before the United States Supreme Court on October 19, 1970,³ and that until that Court has spoken on this issue, it will not be finally decided.

September 17, 1970

Honorable Lee Johnson
Attorney General
Department of Justice
State Office Building
Salem, Oregon 97310

Dear General Johnson:

Thank you very much for your letter addressed to the Attorney General dated September 11, 1970, which enclosed a copy of Oregon's Brief in Oregon v. Mitchell. It strikes me as meeting very effectively the rubbish contained in Section 301 (a) of the 1970 Amendments. We are most grateful to you for sending it to us. Should the occasion arise, though I do not expect it, I will I would plagiarize from your Brief on a wholesale basis.

Sincerely yours,

David E. Foster
Assistant Attorney General

from: Oregon v. P. [unclear]
Justice Black op.

The State of Arizona maintains that Title II cannot be enforced to the extent that it is inconsistent with Arizona's literacy test requirement, Ariz. Rev. Stat. Ann. §§ 16-01.A.4, 16-101.A.5 (1956). I would hold that the literacy test ban of the 1970 Amendments is constitutional under the Enforcement Clause of the Fifteenth Amendment and that it supersedes Arizona's conflicting statutes under the Supremacy Clause of the Federal Constitution.

In enacting the literacy test ban of Title II Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race. Congress could have found that as late as the summer of 1968, the percentage registration of nonwhite voters in seven Southern States was substantially below the percentage registration of white voters.¹³ Moreover, Congress had before it striking evidence to show that the provisions of the 1965 Act had had in the span of four years a remarkable impact on minority group voter registration.¹⁴ Congress also had evidence to show that voter registration in areas with large Spanish-American populations was consistently below the state and national averages. In Arizona, for example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the statewide average.¹⁵ Arizona also has a serious problem of deficient voter registration among Indians. Congress-

sional concern over the use of a literacy test to disfranchise Puerto Ricans in New York State is already a matter of record in this Court. *Katzenbach v. Morgan*, *supra*. And as to the Nation as a whole, Congress had before it statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests.¹⁶

Congress also had before it this country's history of discriminatory educational opportunities in both the North and the South. The children who were denied an equivalent education by the "separate but equal" rule of *Plessy v. Ferguson*, 163 U. S. 537 (1896), overruled in *Brown v. Board of Education*, 347 U. S. 483 (1954), are now old enough to vote. There is substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement. Moreover, the history of this legislation suggests that concern with educational inequality was perhaps uppermost in the minds of the congressmen who sponsored the Act. The hearings are filled with references to educational inequality. Faced with this and other evidence that literacy tests reduce voter participation in a discriminatory manner not only in the South but throughout the Nation, Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to enforce the Civil War amendments.

Finally, there is yet another reason for upholding the literacy test provisions of this Act. In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is—a serious national dilemma that touches every corner of our land.

By like reasoning Congress in the present legislation need not make findings as to the incidence of literacy. It can rely on the fact that most States do not have literacy tests; that the tests have been used at times as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians; that radio and television have made it possible for a person to be well informed even though he may not be able to read and write. We know from the legislative history that these and other desiderata influenced Congress in the choice it made in the present legislation; and we certainly cannot say that the means used were inappropriate.

Ore. v. Mitchell

— Douglas, J.

C. Literacy

The remaining provision of the Voting Rights Act Amendments involved in these cases is the five-year suspension of Arizona's requirement that registrants be able to read the Constitution in English and to write their names. Although the issue is not free from difficulty, I am of the opinion that this provision can be sustained as a valid means of enforcing the *Fifteenth* Amendment.

Harlan, J.

Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious." This danger of violation of § 1 of the *Fifteenth* Amendment was sufficient to authorize the exercise of congressional power under § 2.

Whether to engage in a more particularized inquiry into the extent and effects of discrimination, either as a condition precedent or as a condition subsequent to suspension of literacy tests, was a choice for Congress to make." The fact that the suspension is only for five years will require Congress to re-evaluate at the close of that period. While a less sweeping approach

in this delicate area might well have been appropriate, the choice which Congress made was within the range of the reasonable." I therefore agree that § 201 of the Act is a valid exercise of congressional power to the extent it is involved in this case. I express no view about its validity as applied to suspend tests such as educational qualifications, which do not lend themselves so readily to discriminatory application or effect.

we had previously concluded that literacy tests, fairly administered, violate neither the Fourteenth nor the Fifteenth Amendment, *Lassiter v. Northampton Election Board*, 360 U. S. 45 (1959), we nevertheless upheld their selective proscription by Congress. *South Carolina v. Katzenbach*, 383 U. S. 301 (1966). Canvassing the "voluminous" legislative history of the 1965 Act, we found ample basis for a legislative conclusion that such a proscription was necessary to combat the "insidious and pervasive evil" of racial discrimination with regard to voting. *Id.*, at 308-315. Accordingly, we held the proscription to be well within the power of Congress granted by § 2 of the Fifteenth Amendment. *Id.*, at 327-334. Three years later, in *Gaston County v. United States*, 395 U. S. 285 (1969), we sustained application of the ban on literacy tests to a county where there was no evidence that the test itself was discriminatory or that—at least since 1962*—it had been administered in a discriminatory manner. Notwithstanding this fact, we noted that the record did contain substantial evidence that in years past, "Gaston County [had] systematically deprived its black citizens of the educational opportunities it granted to its white citizens." *Id.*, at 297. Since this "in turn deprived them of an equal chance to pass the literacy test," *id.*, at 291, even impartial administration of an impartial test would inevitably result in just the discrimination that Congress

and the Fifteenth Amendment had sought to proscribe. *Id.*, at 296-297; see *South Carolina v. Katzenbach*, 383 U. S., at 308, 333-334.

* *Gaston County* was a suit by the county under § 4 (a) of the 1965 Act, 42 U. S. C. § 1973b (a) (1964 ed., Supp. V), to reinstate the county's literacy test. The county would have been entitled to do so upon demonstration that, for the preceding five years, no "test or device" had been there used for the purpose or with the effect of abridging the right to vote on account of race or color.

We need not question Arizona's assertions as to the nondiscriminatory character, past and present, of its educational system. Congressional power to remedy the evils resulting from state-sponsored racial discrimination does not end when the subject of that discrimination removes himself from the jurisdiction in which the injury occurred. "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S.

Brennan, White, & Marshall, J.J.

ater

United States of America,
Plaintiff

(Post-Oregon v. Mitchell)

ATTORNEY GENERAL

v.

Civil Action No. 3191

State of New Hampshire,
Defendant

STIPULATION FOR DISMISSAL OF FIRST,
SECOND AND THIRD CAUSE OF ACTION

1. The complaint in this action set forth three causes of action. Pursuant to a prior stipulation of the parties and an order of the Court, the three causes were severed and consideration of the second cause (relating to durational residential requirements for voting and absentee voting) and the third cause (regarding reduction of voting age) was deferred.

On October 27, 1970, the Court entered its judgment as to the first cause, upholding the validity of Section 201 of the Voting Rights Act as amended and enjoined enforcement of New Hampshire laws and Constitutional provisions relating to literacy requirements.

On December 21, 1970, the Supreme Court of the United States issued its decision in Oregon v. Mitchell, No. 43 Original. The Supreme Court upheld the validity of Section 201 of the Voting Rights Act as amended, and the State of New Hampshire has agreed to suspend, until August 6, 1975, enforcement of its Constitutional and Statutory literacy requirements in accordance with the decision of the United States Supreme Court in Oregon v. Mitchell (supra).

2. On December 21, 1970, the Supreme Court, in the case of Oregon v. Mitchell, (supra) upheld the validity of Section 202 of Title II of the Voting Rights Act, as amended. The State of New Hampshire has agreed to be bound by this holding and to comply with all provisions of Title II, Section 202.

3. On December 21, 1970, the Supreme Court of the United States in the case of Oregon v. Mitchell, (supra) upheld the validity of Section 302 of Title III of the Voting Rights Act as amended, which lowers the voting age to 18, as it relates to federal elections but held that Section to be invalid in regard to state and local elections.

The State of New Hampshire has agreed to permit otherwise qualified citizens between 18 and 21 years of age to vote in any election for the office of President, Vice President, presidential elector, member of the Senate or member of the House of Representatives.

4. Accordingly, it is hereby stipulated that the first, second and third causes of action be dismissed without prejudice, each party to bear its own costs.

Dated:

David A. Brock, United States Attorney
for the District of New Hampshire,
Attorney for the Plaintiff

Warren B. Rudman, Attorney General,
State of New Hampshire,
Attorney for the Defendant

Gag Order on State Employees

An obtuse statement by David Souter in connection with one of Governor Thompson's controversial policies should give free speech advocates concern.

At Governor Meldrim Thomson's urging, the Executive Council adopted a resolution supporting nuclear power as the official state policy of New Hampshire. The resolution was in response to mounting criticism from legislators and state officials for the nuclear power plant that was to be built at Seabrook. Essentially, the resolution sought to prevent state employees from speaking against nuclear power in any official capacity. (New Hampshire Times, March 17, 1976)

"If someone wants to oppose the nuclear power plant, he has an easy way out. He can resign and then speak out against it," declared Governor Thomson. When critics charged the governor with imposing a gag rule, he quickly retreated, "State employees have always been free to speak out on any issue as private citizens....If any state employee were called before a regulatory board or court to give testimony on a subject with which he had special competence, he or she would be expected to respond regardless of the direction of the testimony." (Manchester Union-Leader, March 6, 1976)

Attorney General Souter's comment on the governor's resolution was noncommittal: "No state employee, whose job it is to make sure that environmental protection safeguards are obeyed, should feel intimidated by the new policy." Mr. Souter failed to assure employees that their jobs would be protected if they openly disagreed with Thomson's policy. Looked at another way, his statement could be interpreted as trivializing the employees' free speech rights.

Public Right to Know

David Souter's narrow interpretation of the state's Right-to-Know law, when New Hampshire was coping with mounting criticism of the state prison, suggests a position which, at best, is vague and noncommittal. At worst, it is evidence of a belief that the state has the right to deny information to the public.

In July 1976, Governor Thomson announced that the Executive Council and the state prison board would be holding a "closed-door" session to discuss problems at the prison. Attorney General Souter defended the private meeting under an exception in the state's Right-to-Know Law permitting executive sessions if matters to be discussed "would be likely to adversely affect the reputation of any person other than a member of the body itself." Mr. Souter promised reporters he would advise the governor to open the meeting if discussion drifted to criticizing Prison Warden Helgemoe's administration. (Concord Monitor, July 1, 1976)

The Concord Monitor criticized this attempt to evade the Right-to-Know law. According to the newspaper, Governor Thomson "already has so sullied Warden Helgemoe's reputation that little could be said in a public session to damage it further...The closing of the joint meeting was a sham, a cover-up and an evasion of the law. The public was denied its right to know the truth about the prison." (Concord Monitor, July 2, 1976)

Recognizing that the "reputation" exception could be used to exclude the public from almost any discussion, Attorney General Souter admitted that "it could be stretched so far as to swallow the law entirely." But then Mr. Souter declared that the Right-to-Know Law as a whole "stinks" because it is a piece of "vague and lousy legislative drafting."

First Amendment - Speech

E. Other First Amendment Issues

The nominee's record on other major First Amendment matters, such as the freedom of speech and expression and the freedom of the press, is limited and mixed. There are several indications that the nominee might construe these constitutional protections quite narrowly, and the Committee should explore in detail Mr. Souter's views on these basic First Amendment questions.

Free Speech

In 1989, Judge Souter authored an opinion for the New Hampshire Supreme Court upholding the conviction of an individual convicted under a local ordinance prohibiting the posting signs on public property. The case, State v. Hodgkiss, 565 A.2d 59 (1989), arose out of the campaign activity of a Lyndon LaRouche supporter who was distributing literature urging people to register to vote and to support LaRouche in the New Hampshire primary. The defendant set up a table to hold literature and above the table he hung a sign, which he attached with rope to a tree and a lamppost. The defendant was prosecuted and convicted under two local ordinances, one that prohibited encumbrances on sidewalks, and the other that prohibited posting signs on trees, lampposts and public buildings.

The New Hampshire Supreme Court reversed the conviction on the sidewalk encumbrance, finding that the local ordinance applied only to commercial, not political, activity. However, the Court upheld the conviction for posting signs on public property. Judge Souter wrote that the local ordinance was a constitutional means of advancing the town's interest in keeping public spaces free of ugly signs. Relying in part on the Supreme Court's recent decision in Ward v. Rock Against Racism, ___ U.S. ___, 109 S.Ct. 2746 (1989), Judge Souter reasoned that the ordinance would only be forbidden if "a substantial portion of the burden on speech does not serve to advance its goals." 565 A.2d at 1064. Judge Souter disagreed with defendant's contention that the municipal ordinance had to be least restrictive means of realizing the city's objectives. Rather, Mr. Souter adopted the position that the least restrictive means standard does not apply to time, place and manner regulations that are content-neutral.

As a Justice on the New Hampshire Supreme Court, David Souter has written several opinions on freedom of expression, but they shed little light into his philosophy of the First Amendment. In State v. Hodgkiss, 565 A.2d 1059 (N.H. 1989), Judge Souter upheld a law banning the posting of signs on city property, but struck down another which prohibited encumbrances on sidewalks that prevented an individual from distributing literature and urging passers-by to vote for a candidate.

Response

- o As the Hodgkiss opinion makes clear, the Supreme Court precedents left no room for a "least restrictive means" analysis.

"[A] regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but ... it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied 'so long as the ... regulation supports a substantial government interest that would be achieved less effectively absent the regulation.' *United States v. Albiertini*, 472 U.S. 675, 689 [105 S.Ct. 2897, 2906, 86 L.Ed.2d 536] (1985); see also [*Clark v. Community for Creative Non-Violence*, 468 U.S. 288] at 297 [104 S.Ct. 3065, 3071,

The cumulative effect of these arguments is to suggest, without actually stating, that the ordinance must not only be tailored narrowly enough to avoid placing a "substantial portion of the burden on speech [that] does not serve to advance its goals," *Ward v. Rock Against Racism supra*, but must qualify as the least restrictive means of realizing its legitimate aesthetic objective. Suffice it to say here that *Ward*, which was decided following the argument in this case, conclusively rejected this standard for judging a content-neutral, time, place, or manner regulation, as distinguished from one that is content-based. *Ward v. Rock Against Racism, supra* 109 S.Ct. at 2758 n. 6.

82 L.Ed.2d 221 (1984)].... So long as the means chosen are not substantially broader than necessary to achieve the government's interest ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism, supra* 109 S.Ct. at 2757-58 (footnote omitted).

- o Hodgkiss was unanimous.

Other points of interest

- o PAW is right, and the Alliance wrong, re: the anti-encumbrance holding. The Court carefully avoided reaching the question of the ordinance's constitutionality, finding instead that reached only commercial encumbrances.
- o In light of Senator Specter's interest in Cohen, you may be interested to note that you cite it and distinguish it here.

A comparable unwillingness to distinguish between significantly different instrumentalities of communication infects the defendant's argument that his suspended sign was the virtual equivalent of the placard he might concededly have carried by hand, or of the display of a message on one's clothing, which was held to be protected in *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). But the attempt to analogize these activities ignores the fact that the public owner of the lamppost and the tree has reserved them for non-expressive purposes, whereas the placard would presumably belong to the person who carried it on the sidewalk forum, just like the jacket on which Cohen

had written his opinion of the draft. The right to paint a message on one's own jacket does not entail the right to disfigure public buildings, trees and lampposts with signs and posters. We thus reject the arguments for identifying such postings with other, distinct and protected acts, and we stand by the conclusions reached above, that the ordinance does not burden any expressive activity beyond what is necessary to achieve its substantial and legitimate goal, and is therefore tailored with sufficient limits to satisfy first amendment standards.

Freedom of the Press

Freedom of the Press

The nominee has also authored several opinions on issues related to the freedom of the press. In some cases, the decisions he has rendered raise questions about his interpretation of the First Amendment.

A. Nash

For instance, in Nash v. Keene Pub. Corp., 498 A.2d 348 (1985), Judge Souter reversed a trial court grant of summary judgment for a newspaper in a libel case. The libel action was brought by a police officer against a newspaper that published a letter from a man whom the officer had arrested. The trial court granted summary judgment for the newspaper, finding that the letter was an expression of opinion and therefore protected. Judge Souter reversed, permitting the libel action to go forward. He reasoned that "the letter itself can obviously be read as stating facts." Id. at 352. Accordingly, he ruled that "it is clear that the trial court erred in determining that readers could not understand [the statements] as factual" and that a jury would have to determine whether readers actually considered the statements as fact. Id.

o Text of letter

"Specific facts

To The Sentinel:

As for specific facts:

1. I was stopped at the corner of Victoria and Water Streets when Officer Nash's cruiser hit my vehicle.
2. He hit me: The dent and blue paint on the driver's side door proves it. (He can't drive.)
3. Because of one cop's stupidity Keene just lost another cruiser (myself a car).
3. This is his sixth cruiser he zeroed, and I don't drive with my lights off.
4. Nash is a Wyatt Earp who likes to assault perpetrators (allegedly).
5. He muscled me with both hands handcuffed, lying in a hospital bed (a real man).
6. He's done it before, and will do it again to you.
7. Assistant City Attorney David Park has numerous complaints on the matter of Nash.
8. Eh, what's happening to Keene? Go to sleep. Don't get involved.

RENAULD R. DESMARAIS

259 Marlboro St.

Keene

EDITOR'S NOTE: Attorney Park denies he has received complaints about Patrolman Nash, except from Dr. Demarais [sic] with regard to his recent arrest."

o Rationale of opinion on this point

[2-5] The first such issue concerned the character of the letter, as alleging fact or expressing opinion. This issue arose under the basic rule that for actionable libel, there must be publication of a false statement of fact, RESTATEMENT (SECOND) OF TORTS § 581A (1977), that tends to lower the plaintiff in the esteem of any substantial and respectable group of people. *Duchesnaye v. Munro Enterprises, Inc.*, 125 N.H. 244, 252, 480 A.2d 123, 127 (1984). Conversely, a statement of opinion is not actionable, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *Pease v. Telegraph Pub. Co., Inc.*, 121 N.H. 62, 65, 426 A.2d 463, 465 (1981), unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion. *Duchesnaye v. Munro Enterprises, Inc.*, *supra* at 249, 480 A.2d at 125; RESTATEMENT (SECOND) OF TORTS § 566 (1977). Whether a given statement can be read as being or implying an actionable statement of fact is itself a question of law to be determined by the trial court in the first instance, *Pease v. Telegraph Pub. Co., Inc.*, *supra* at 65, 426 A.2d at 465, considering the context of the publication as a whole. See *Morrisette v. Cowette*, 122 N.H. 731, 733, 449 A.2d 1221, 1222 (1982). If an average reader could reasonably understand a statement as actionably factual, then there is an issue for a jury's determination, and summary judgment must be denied. See *Pease v. Telegraph Pub. Co., Inc. supra*.

Thus the first question before us is whether the trial court was correct in finding that no average reader could have understood the letter to be stating or implying fact rather than opinion. We hold

that it was error to find that there was no genuine issue between the parties on this point and error to find that the letter must be read as a non-actionable expression of opinion.

The trial court attempted to explain away the statements in the letter as nothing but the hyperbolic expressions of Desmarais's animus against the plaintiff. The court seemed to regard the allegations as too obviously exaggerated to be taken as factual and concluded, therefore, that they must be expressions of opinion.

We cannot agree. Although the defendant's statement of "Letters Policy" described the readers' column as a place for opinions, the letter itself can obviously be read as stating facts. The defendant printed "Specific facts" in large print above the letter, and the letter began with the phrase, "As for specific facts:". There followed a series of statements that were ostensibly factual and defamatory: the plaintiff had "zeroed" six police cruisers; the plaintiff "likes to assault perpetrators (allegedly)"; the plaintiff "muscle" Desmarais when the latter was handcuffed in a hospital bed.

[6] Whether readers actually did understand the statements as factual is, of course, not a matter that is before us. But it is clear that the trial court erred in determining that readers could not understand them as factual. In effect, the trial court's ruling resolved an issue that is properly for the consideration of a jury. Given this conclusion, we need not analyze the letter further to disclose other apparently factual statements or implications that could be the subject of liability and genuine dispute.

Other points of interest

o This opinion was also unanimous.

o Last term, in Milkovich v. Lorain Journal Co. the Supreme Court said the following on this general subject (7-2,

Brennan & Marshall dissenting)

We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadum column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed, "the clear impact in some nine sentences and a caption is that [Milkovich] lied at the hearing after . . . having given his solemn oath to tell the truth." Scott, 25 Ohio St. 3d, at 251, 496 N. E. 2d, at 707. This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.

lied in this case

o Two other objections may be raised to this opinion:

-- that you left it to the jury to determine whether the plaintiff police officer was a public or private figure; on this point, you were following clearly established New Hampshire precedent; see Baer v. Rosenblatt, 108 N.H. 368, 370-71, 237 A.2d 130, 132-33 (1967), on remand from 383 U.S. 75 (1966); McKusker v. Valley News, 121 N.H. 258, 428 A.2d 493 (1981);

--and that you refused to require the plaintiff to produce "clear and convincing" evidence of actual malice at the summary judgment stage even though that is the standard that applies at trial. The state of the law was unclear on this point in 1985. The Supreme Court subsequently ruled that the "clear and convincing" requirement had to be met at summary judgment, Anderson v. Liberty Lobby (1986), but did so over a dissent by Justice Brennan, who took a view similar to yours that such a requirement at summary judgment was unfair to the plaintiff and would turn summary judgment proceedings into full blown trials.

B. Duchesnaye

Similarly, Judge Souter upheld a libel judgment against a newspaper based upon an editorial the paper published. Plaintiff had been found guilty of making annoying telephone calls. The local newspaper ran a front page story about the plaintiff's conviction and, in the same edition, editorialized about the problem of "obscene and harassing phone calls." The editorial stated that often children made such calls, but that "others who make these calls are unstable persons who need help." Duchesnaye v. Munro Enterprises, 480 A.2d 123, 124 (1984). Judge Souter found that reading the news story and the editorial together a reader could conclude that the plaintiff had made obscene calls and that he needed psychiatric help for instability, and that could be defamatory to the plaintiff.

o Article + Facts

The record indicates that in April 1975 the Berlin District Court found the plaintiff guilty of making telephone calls with intent to annoy another, in violation of RSA 644:4. Soon thereafter, Robert Ring, the local manager of the telephone company, met with Howard James and Joe Myerson, the general manager and the editor, respectively, of the defendant's newspaper, *The Berlin Reporter*. Mr. Ring asked them for publicity designed to discourage improper use of the telephone, and he told them about the plaintiff's recent conviction.

On inquiry to the Berlin Police Department, Mr. Myerson learned that the plaintiff had made no statements during his annoying calls, and he told this to Mr. James. Mr. Myerson then wrote a front-page story about the plaintiff's conviction. The story identified the plaintiff as a 56-year-old Berlin man and was accurate on matters relevant to the present action. The same issue of the newspaper contained Mr. James' editorial on the subject of "obscene and harassing phone calls." He wrote that such calls were often from children, but he went on to observe that "others who make these calls are unstable persons who need help. In fact, some are in their thirties, forties and even fifties. A few days ago a 56-year-old Berlin man was arrested and convicted in District Court of making these calls."

o Holding

In limiting summary judgment for the defendant to the claim based upon the news story, the superior court found that it was reasonably possible to read the editorial together with the news story as defamatory in two respects. It could be understood to describe the plaintiff as needing psychiatric help for instability, and it could be read to imply that the plaintiff had made obscene telephone calls. At trial the plaintiff sought to hold the defendant liable by proving that readers of the editorial had in fact understood it in these defamatory senses. See *Thomson v. Cash*, 119 N.H. 371, 375, 402 A.2d 651, 653-54 (1979).

The defendant's first assignments of error rest on the rule that expressions of opinion are not actionable as such. "'However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'" *Pease v. Telegraph Publishing Company, Inc.*, 121 N.H. 62, 65, 426 A.2d 463, 465 (1981) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)). The defendant argues in effect that the court could have found only that the editorial had been an expression of opinion, and that the record is therefore devoid of any basis for finding liability.

we agree that the editorial reference to "unstable persons who need help" could be read merely as an expression of the opinion that a person who makes annoying or obscene calls is unstable and in need of psychiatric help. We also note that the plaintiff's only witness to testify about his actual understanding of the editorial agreed on cross-examination that it expressed the "opinion" "that people who made these calls needed help." There is language in the trial court's findings indicating that the court found the quoted language to be opinion and also found the opinion actionable.

Before determining whether this was reversible error, however, we must answer two questions: did the court find the ostensible opinion had been understood to imply defamatory facts, and did the court properly find the editorial contained factual and defamatory material in addition to the opinion?

[1] It is axiomatic that "[w]ords alleged to be defamatory must be read in the context of the publication taken as a whole." *Morrisette v. Cowette*, 122 N.H. 731, 733, 449 A.2d 1221, 1222 (1982). In such context, a statement in the form of an opinion may be read to imply defamatory facts, and it is actionable if it is actually understood that way. *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), cert. denied, 434 U.S. 834 (1977); RESTATEMENT (SECOND) OF TORTS § 566 (1977); see *Morrisette v. Cowette*, supra at 734, 449 A.2d at 1222.

This case went to trial on only two possibilities of libel, that the plaintiff needed psychiatric help and that he made obscene calls. Thus, if the reference to psychiatric help was opinion, it could have had a libelous implication only if it implied, or was a step in the process of implying, that the defendant had made obscene calls.

[2] There was no evidence, however, that anyone so understood the reference to needing help. Hence, the record is insufficient to support a finding of liability based on the defamatory implication of an ostensible statement of opinion.

[3] We next consider whether the trial court based liability on any other ground than opinion. We find that it did. As the court found on the motion for summary judgment, a series of factual statements in the editorial could have been read as indicating that the plaintiff had made obscene calls. The plaintiff had been identified in the front-page news story as a 56-year-old Berlin man; the editorial stated as a fact that a "56-year-old Berlin man" had been convicted of making "these" "obscene and harassing" calls. The same witness who testified that he had understood the reference to sickness as opinion, just as clearly testified that he had understood the editorial to imply that the plaintiff had made obscene calls. This was a sufficient basis for the trial court's finding that the witness "understood the editorial to be using the plaintiff as an example of a sick person who makes obscene phone calls." (Emphasis added.) It is clear that the trial court thus rested liability properly on the finding that the editorial had been understood to identify the plaintiff as an obscene caller, though the court may also erroneously have considered the opinion as an alternative ground of liability.

- o Thus, the Report is wrong in stating that you "found that ... a reader could conclude that the plaintiff ... needed psychiatric help." To the contrary, you ~~found~~ ^{ruled} that "the court found [that part of] the quoted language to be opinion" and that this was the only finding the evidence would support on that issue.

Other points of interest

- o Like the previous case, this case's approach to "opinion" that implies "fact" is consistent with the S.Ct. decision of last term in Milkovich v. Lorain Journal Co., 58 U.S.L.W. 4846 (1990)

where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by Gertz.⁴

The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadum column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this

- o Dodson was unanimous.

Other Freedom of Press
Cases

1. Siel The nominee has also rendered several decisions favorable to First Amendment rights. For instance, Mr. Souter quashed subpoenas that a murder defendant served on two reporters at the University of New Hampshire student newspaper. In New Hampshire v. Siel, 7 Med.L.Rep. 1904 (1981), Judge Souter determined that the New Hampshire Supreme Court would most likely find a qualified privilege for reporters and that a criminal defendant would have to overcome significant hurdles to defeat the privilege.

Finally, as a trial judge on the New Hampshire Superior Court, in the 1981 case of State v. Siel, Judge Souter quashed subpoenas of two student reporters whose notes were sought by the defendant in a murder trial. Their newspaper article alluded to the victim's involvement in a local drug trafficking ring, which was a key factor at trial.

2. Keeton v. Hustler

In another case, Judge Souter dissented from a decision in which the New Hampshire Supreme Court ruled that the state's extraordinarily long statute of limitations applied to libel claims. Keeton v. Hustler Magazine, 549 A.2d 1187 (1988).

Notes on Sieck

- o The U.S. Supreme Court unanimously adopted your "well reasoned" analysis in this case.
- o This was a matter of first impression in N.H.

Notes on Keeton

- o This was a conflict of laws opinion.
- o You were joined only by Thayer.
- o This came on certification from the 1st Circuit after a remand from the U.S. Supreme Court, which had found no due process violation in New Hampshire's assertion of personal jurisdiction on the basis of the circulation of the magazine in W. H.

Freedom of Association

Freedom of Association

1. N.H. Disabilities Rights Center

In the area of freedom of association, Judge Souter found unconstitutional a state law that banned legal services corporations from serving anyone other than a poor clients. In re New Hampshire Disability Rights Center, 541 A.2d 208 (1988). Judge Souter ruled that this statute infringed on the Disabilities Rights Center's First Amendment right of association.

In In re New Hampshire Disabilities Rights Center, 541 A.2d 208 (1988), Judge Souter invalidated a state law provision prohibiting non-profit corporations from providing services to non-indigent clients. He agreed that operation of the law violated an organization's rights of association and advocacy under the federal constitution.

2. Petition of Chapman

Also, in Petition of Chapman,

Judge Souter wrote a concurring opinion in a case in which the court found that the bar association's lobbying against tort reform violated the First Amendment rights of a member of the bar who disagreed with this position. 509 A.2d 753 (1986).

In Petition of Chapman, 509 A.2d 753 (N.H. 1986), Judge Souter and the majority struck a compromise between the New Hampshire bar association and several member attorneys claiming that the association's lobbying against tort reform legislation violated their free speech rights. The court concluded that the bar association could lobby on legislative measures regarding the administration of justice, but not on proposed changes in substantive law, such as the creation or repeal of causes of action.

Notes on Chapman.

o The U.S. S.Ct. adopted an analysis very similar to yours unanimously in Keller v. State Bar of California (June 4, 1940).

Aboud held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.

Construing the Railway Labor Act in *Ellis*, supra, we held:

"[W]hen employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the [*24] employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." Id., at 448.

We think these principles are useful guidelines for determining permissible expenditures in the present context as well. Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State." Lathrop, 367 U.S., at 843 (plurality opinion).

The Supreme Court of California decided that most of the activities complained of by petitioners were within the scope of the State Bar's statutory authority, and were therefore not only permissible but could be supported by the compulsory dues of objecting members. The Supreme Court of California quoted [*25] the language of the relevant statute to the effect that the State Bar was authorized to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." 47 Cal. 3d, at 1169, 767 P. 2d, at 1030. Simply putting this language alongside our previous discussion of the extent to which the activities of the State Bar may be financed from compulsory dues might suggest that there is little difference between the two. But there is a difference, and that difference is illustrated by the allegations in petitioners' complaint as to kinds of State Bar activities which the Supreme Court of California has now decided may be funded with compulsory dues.

Petitioners assert that the State Bar has engaged in, inter alia, lobbying for or against state legislation (1) prohibiting state and local agency employers from requiring employees to take polygraph tests; (2) prohibiting possession of armor-piercing handgun ammunition; (3) creating an unlimited right of action to sue anybody causing air pollution; and (4) requesting Congress to refrain from enacting a guest worker program or from permitting the importation of workers [*26] from other countries. Petitioners' complaint also alleges that the Conference of Delegates funded and sponsored by the State Bar endorsed a gun control initiative, disapproved statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endorsed a nuclear weapons freeze initiative, and opposed federal legislation limiting federal court jurisdiction over abortions, public school prayer and busing. See n. 2, supra.

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities avig political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with [*27] disciplining members of the bar or proposing ethical codes for the profession.

In declining to apply our Abood decision to the activities of the State Bar, the Supreme Court of California noted that it would entail "an extraordinary burden. . . . The bar has neither time nor money to undertake a bill-by-bill, case-by-case Ellis analysis, nor can it accept the risk of litigation every time it decides to lobby a bill or brief a case." 47 Cal. 3d, at 1165-1166, 767 P. 2d, at 1028. In this respect we agree with the assessment of Justice Kaufman in his concurring and dissenting opinion in that court:

"[C]ontrary to the majority's assumption, the State Bar would not have to perform the three-step Ellis analysis prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter. Instead, according to [Teachers v.] Hudson, [475 U.S. 292 (1986)] 'the constitutional requirements for the [association's] collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges [*28] are pending.' (Id. at 310). Since the bar already is statutorily required to submit detailed budgets to the Legislature prior to obtaining approval for setting members' annual dues (Bus. and Prof. Code § 6140.1), the argument that the constitutionally mandated procedures would create 'an extraordinarily burden' for the bar is unpersuasive. "While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate. It is noteworthy that unions representing government employees have developed, and have operated successfully within the parameters of Abood procedures for over a decade." Id., at 1192, 767 P. 2d, at 1046 (citations omitted; footnote omitted).

In Teachers v. Hudson, 475 U.S. 292 (1986), where we outlined a minimum set of procedures by which a union in an agency shop relationship could meet its requirement under Abood, we had a developed record regarding different methods fashioned by unions to deal with the "free rider" problem in the organized labor setting. We do not have any similar [*29] record here. We believe an

integrated bar could certainly meet its Abood obligations

by adopting the sort of procedures described in Hudson.

Questions as to whether one or more alternate procedures would ~~also~~ likewise satisfy that obligation are better left for consideration upon a more fully developed record.

Equal Protection / Gender

A. Meloon v. Helgemoe Brief

Equal Protection

David Souter's views on the scope of equal protection regarding sex-based classifications are evidenced in a brief filed by the New Hampshire Attorney General's office in an appeal of a statutory rape case, Meloon v. Helgemoe, No. 77-1197 (D. N.H. April 27, 1977). Mr. Souter opposed a federal order holding that New Hampshire's statutory rape law was unconstitutional, because it punished only men who had sexual intercourse with underage females and not women who had intercourse with underage males. Mr. Souter disagreed in an extremely paternalistic manner.

He contended that any claim of sex discrimination was to be analyzed under the rational basis test, dismissing the "heightened scrutiny" standard for gender-based classifications that the U.S. Supreme Court had firmly adopted the year before in Craig v. Boren, 429 U.S. 71 (1976). The Craig test requires that a classification "must serve important government objectives and must be substantially related to the achievement of those objectives." Mr. Souter insisted that this language was merely an outgrowth of the rational basis test, contrary to mainstream legal thought concerning equal protection standards.

Several actions by the nominee, however, call into question his commitment to these principles. In particular, he attacked the "intermediate review" test and called for a return to the traditional "rational basis" standard -- a significant change in the law that could well provide virtual carte blanche for harmful and unfair government practices that discriminate based on gender.

Brief in Helgemoe v. Meloon

In 1977, Attorney General Souter announced that he would appeal a lower court ruling that the state's statutory rape law violated equal protection because it punished males but not females for having sex with a person under 15. See Nashua Telegraph (May 14, 1977). The appeal could have been, and initially was, undertaken consistent with the "intermediate review" standard. The Attorney General's brief in the court of appeals acknowledged that heightened scrutiny was appropriate and argued that the state's law met that test. See Brief for Appellants in Meloon v. Helgemoe, No. 77-1197 (1st Cir. filed June 3, 1977) at 10-26. The court of appeals, however, affirmed the lower court and concluded that the law was unconstitutional. Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977).

Text of Brief

~~Decisions~~ present this Court with the opportunity not only to address the most impression issue of the constitutionality of a gender based statutory rape law -a-vis the Equal Protection Clause, but also to reanalyze and clarify the unsettled question of what is the correct equal protection test to apply to statutory classifications based on sex.

Few areas of the law have troubled this Court as much in recent years as has the problem of testing statutory classifications based on sex against the Equal Protection Clause of the Fourteenth Amendment. There are, of course, two traditional tests to which constitutionally challenged statutes under the Equal Protection Clause have been subjected -- rational basis and strict scrutiny. Under the rational basis standard a state is entitled to make reasonable classifications among persons upon whom benefits are conferred or burdens imposed, and the equal protection safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. See, e.g., Andridge v. Williams, 397 U.S. 471, 484-485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-426 (1961); and Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955).

The strict scrutiny test is imposed if the statutory distinction is based upon a "suspect classification" such as race, alienage, or nationality, (Loving v. Virginia, 388 U.S. 1 (1967); Graham v. Richardson, 403 U.S. 365 (1971); and Oyama v. California, 332 U.S. 633 (1948)) or if the distinction infringes a "fundamental interest." Dunn v. Blumstein, 405 U.S. 330 (1972); and Skinner v. Oklahoma, 316 U.S. 535 (1942). To successfully withstand the strict scrutiny test, a state must demonstrate a "compelling state interest" in creating the challenged classifications. Skinner v. Oklahoma, supra.

Where the statutory classification under consideration has been based on sex, however, this Court has been unwilling to apply either of the traditional tests. Instead, the Court has resorted to an amorphous "substantial relation" test which requires more heightened scrutiny than would be applied under the rational basis standard, but less stringent scrutiny than is applied to suspect legislation.

This middle-tier approach began to evolve in Reed v. Reed, 404 U.S. 71

In other cases the Court, ~~being~~ in some instances the traditional rational basis test and in others the substantial relation test of Reed, found that certain classifications challenged as sexually discriminatory were in fact based on functional or circumstantial differences between the sexes; therefore no violation of the Equal Protection Clause existed. In General Electric Co. v. Gilbert, ___ U.S. ___, 97 S. Ct. 401 (1976); Malesinger v. Ballard, 419 U.S. 498 (1975); Muldig v. Aiello, 417 U.S. 484 (1974); and in v. Shevin, 416 U.S. 351 (1974).

In Frontiero v. Richardson, 411 U.S. 657 (1973), four Justices went so far as to conclude that sex should be regarded as a suspect classification. Since Frontiero, however, the Court has not only declined to hold that sex is a suspect class, but it has significantly retreated from that position. See, Califano v. Goldfarb, ___ U.S. ___, ___ S. Ct. 1021 (1977); General Electric Co. v. Gilbert, supra; Craig v. Boren, 429 U.S. 990 (1976); and Mathews v. Lucas, 427 U.S. 95 (1976).

The most relevant precedent for the instant case is Craig v. Boren, supra, the only Supreme Court gender-based discrimination case concerning a criminal statute.

In Craig, the Court examined and struck down an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18. The majority applied the substantial relation test from Reed, but three Justices expressed outward concern with this standard. Justice Powell, in a concurring opinion, indicated that the rational basis test should take on a "sharper focus" when addressing a gender-based classification, but he balked at characterizing the new test as an independent "middle-tier" approach. Craig v. Boren, 429 U.S. 190, ___ S. Ct. 451, 464 (1976). In separate dissenting opinions, both Chief Justice Burger and Justice Rehnquist expressed their position that gender based cases, like all cases where no suspect classification or fundamental interest is involved, should be tested by the traditional rational basis standard. Craig v. Boren, supra, at 466, 467, 469. Justice Rehnquist went on to express his concern that the substantial relation test is "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation" Craig v. Boren, supra, at 467, 468.

The Attorney General then sought review in the Supreme Court. Instead of arguing the case under the accepted "intermediate review" test, however, Attorney General Souter's brief criticized the test and argued for its abandonment by the Court, relying on a dissent by Justice Rehnquist:

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, limit, or even eliminate the new standard. Petition for Writ of Certiorari in Helgemoe v. Meloon, No. 77-1058 (U.S. filed Jan. 25, 1978) at 18-19.

The Supreme Court denied Mr. Souter's petition for review. Several years later, the Court upheld a statutory rape law against an equal protection challenge, using the "intermediate review" standard which Mr. Souter had attacked. See Michael M. v. Superior Court, 450 U.S. 464 (1981).

In the instant case the Court of Appeals was troubled by the amoebic quality of the substantial relation test. Chief Judge Coffin comments that it is "hardly a precise standard," and he worries that "we must decide the constitutionality of the New Hampshire statute under a test that to some indeterminate extent requires more of a connection between classification and governmental objective than that of the minimal rationality standard." Meloon v. Helgemoe, supra, at 604.

Despite the First Circuit's misgivings over the imprecision of the Reed substantial relation test, the Court found that the New Hampshire statute could not pass muster under that test. This decision is made even more suspect by the First Circuit's suggestion that the Court would not have struck down the statute under the "minimal rationality test." Meloon v. Helgemoe, supra, at 606.

In sum, this Court has created a new equal protection test which resides somewhere in the "twilight zone" between the rationale 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.

Finally, as noted above, the instant case is one of first impression. Never has this Court weighed a gender-based statutory rape law against an equal protection argument. The implications of the First Circuit's Decision for all gender-based criminal statutes and for equal protection analysis in general are devastating. The decision should not be left to the Court of Appeals. The issue is substantial and worthy of this Court's consideration.

Other points about the brief / case

o prosecutrix was 13; respondent 24.

o First Circuit decision finding a violation was in conflict with N.H. S.Ct. decision + every state court to have considered the question; hence the case was a good ant. candidate.

o First Circuit opinion invited raising the question + law really was unsettled.

[5] The statute at issue in this case is a classification based on sex. As such it requires more heightened scrutiny than would be applied to completely non-suspect legislation, but less stringent scrutiny than is typically applied to racial classifications, *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Moreover, since a criminal statute is involved, the standards governing gender classification must be applied with special sensitivity. In *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), the majority opinion evaluated a gender based state law with criminal implications under the rule that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197, 97 S.Ct. at 457. This is hardly a precise standard. Moreover, separate concurrences by Justice Powell and Justice Stevens make it unclear as to whether that standard has majority support. In brief we must decide the constitutionality of the New Hampshire statute under a test that to some indeterminate extent requires more of a connection between classification and governmental objective than that of the minimal rationality standard.³ ~~We do not believe the stat-~~

3. It is clear after the decision in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973), that although four members of the Court favor including sex as a suspect classification, the majority does not accept such a doctrine. The resulting ambiguity as to the proper standard to apply to gender classifications was frankly discussed by Justice Powell in his concurrence in *Craig v. Boren*, 429 U.S. 190, 210 n. *, 97 S.Ct. at 464. "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited 'upper-tier'—now has substantial precedential support. As has been true

of *Reed* and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases."

Helene Helgen
564 F.2d 602 (CA1 1977)

With the recent proliferation of gender based cases, a new test, standing somewhere between strict scrutiny and rational basis, has begun to emerge.

In *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), the Court, in striking down a state probate statute that gave males a preferred position as executors, stated:

A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76, 92 S.Ct. at 254. (Citation omitted.)

In *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), a plurality of the Court found that sex was a suspect classification and, therefore, subject to strict scrutiny. It noted, after quoting from *Bradwell v. State*, 16 Wall. 130, 141, 21 L.Ed. 442 (1873), that:

"The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes, and, indeed, throughout much of the 19th century the position of

women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. *Frontiero* at 685, 93 S.Ct. at 1769. (Brennan, J.)

In a separate concurrence, the Chief Justice and Justices Powell and Blackmun refused to accept the strict scrutiny standard.

It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. *Id.* at 691-692, 93 S.Ct. at 1773.

Since then, the cases have wavered back and forth between the two tests with the Court often scrutinizing the statutory scheme under the guise of the rational basis test. See, e.g., *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974) (property tax exemption for widows upheld as rationally based due to the disparate economic opportunities afforded men and women); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) (gender based differentiation in the Navy's mandatory discharge regulations rationally related to the laudatory purpose of equalizing promotional opportunities between men and women); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) (granting of Social Security survivors' benefits to widows but not to widowers irrational and based on archaic notions of sex roles); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) (gender based distinctions as to age of minority for purposes of child support not rational).

Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), is the only Supreme Court gender based discrimination case concerning a criminal statute. After examining statistical evidence, the Court struck down a criminal statute which differentiated in the age at which beer could be sold to males (21) and females (18). It found the

relationship between gender and the asserted justification for the statutory scheme far too tenuous to withstand the substantial justification test laid out in *Reed*. In the most recent gender based discrimination case involving a section of the Social Security Act, the Court stated:

[It] is forbidden by the Constitution, at least when supported by no more substantial justification than "archaic and overbroad" generalizations, *Schlesinger v. Ballard*, *supra*, 419 U.S., at 508 [95 S.Ct. 572,] or "old notions," *Stanton v. Stanton*, 421 U.S. 7, 14 [95 S.Ct. 1373] (1975), such as "assumptions as to dependency," *Weinberger v. Wiesenfeld*, *supra* [420 U.S.] at 645 [95 S.Ct. 1225,] that are more consistent with "the role-typing society has long imposed," *Stanton v. Stanton*, *supra* [421 U.S.] at 15 [95 S.Ct. 1373,] than with contemporary reality. *Califano v. Goldfarb*, 430 U.S. 199, 207, 97 S.Ct. 1021, 1026, 51 L.Ed.2d 270 (1977).

Mr. Justice Powell's concurring opinion in *Craig* perceptively sums up the direction the law is taking.

As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited "upper-tier"—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases. *Craig*, *supra*, 429 U.S. at 210, 97 S.Ct. at 464.

Melton v. Helgenoe, 436 F. Supp. 528
C.D.N.H. 1977)

B. City of Dover Opinion

Judge Souter recently repeated his criticism of the "intermediate review" standard in a different context in a dissenting opinion in City of Dover v. Imperial Casualty & Indemnity Co., 1990 N.H. Lexis 39 (1990). Under the New Hampshire state constitution, the state supreme court has ruled that laws which restrict the common law right to recover damages should be subjected to "intermediate review." Carson v. Maurer, 424 A.2d 825 (N.H. 1980). The majority in Dover applied this principle to invalidate a state law making cities completely immune from certain types of personal injury suits. In dissent, echoing the brief in Meloon, Judge Souter called for reconsideration of the entire "intermediate review" standard. "There should be no more striking argument" than Dover, Judge Souter maintained, "for the need to reexamine the Carson test and the conceptual basis underlying what passes for intermediate review." Dover, supra, 1990 N.H. Lexis at 17.

Passage from dissent

SENT: SOUTER, J., dissenting: I respectfully dissent from the court's conclusion that RSA 507-B:2, I, violates articles 2, 12 and 14 of part I of the Constitution of New Hampshire insofar as it would provide municipal immunity for

ability arising out of ownership, occupation, and maintenance of "public sidewalks, streets [and] highways. . . ." In explaining why, I will confine my thoughts to what I see as a misapplication of the accepted middle-tier equal protection standard and say nothing more about article 14, given this court's view that the article mirrors the equal protection standard for scrutinizing limitations on a generally applicable civil right of action, see *Estate of McGill v. City of Rochester*, 119 N.H. 661, [*23] 667, 406 A.2d 704, 707 (1979).

At least since the date of *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980), the guarantee of equal protection under articles 2 and 12 has been applied to limitations on rights of civil recovery by recognizing a natural class of all people personally injured by conduct within a recognized category of ostensibly tortious behavior. Leaving aside the special problems that are said to be created by the workers' compensation statute, see *Estabrook v. American Hoist & Derrick Inc.*, 127 N.H. 162, 183, 498 A.2d 741, 754 (1985) (Souter, J. dissenting), we are supposed to pass on statutory classifications restricting a right to recover for an injury so inflicted by treating the affected cause of action as "an important substantive right," *Carson v. Maurer*, *supra* at 931-32, 424 A.2d at 830, and by requiring that any classification resulting from a restriction upon such a right "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ." (Emphasis added.) *State v.*

Noville, 113 N.H. 161, 163, 304 A.2d 366, 369 (1973), quoting *F. S. Royster* [24] *Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)." *Carson v. Maurer*, *supra* at 932, 424 A.2d at 831 (further citations omitted).

Middle-tier equal protection scrutiny thus entered the jurisprudence of the State Constitution, *id.*, and accompanying questions as yet unanswered will provide fodder for a good many opinions. I am concerned here, however, with what

I see as the misapplication of this intermediate standard, assuming it to be truly intermediate in character and as limited in application as the court in *Carson* indicated by the language used to describe it.

An understanding of that intermediate character and the limits of such review can prove elusive, however, and it is well to acknowledge that *Carson's* test suffers from a proven susceptibility to confusion with other standards of equal protection review, a failing perhaps portended by the derivation of *Carson's* language from *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). *Royster* involved a challenge to disparate State corporate income tax treatments,

as to which the latitude of State legislative discretion under the Fourteenth Amendment's equal protection clause was admitted to [*25] be "notably wide." *Id.* The majority nonetheless struck down the statute in question because they could "conceive" of "no ground" for justifying the differential treatment, *id.* at 416; Justices Brandeis and Holmes, on the other hand, dissented because they could conceive of just such a ground, *id.* at 418. What is clear, however, is that

the entire Court treated the test of what was "reasonable, not arbitrary . . . having a fair and substantial relation to the object of the legislation," *id.* at

415, as what we today would call the first-tier, rational basis test. Although the federal judiciary, like this court, has subsequently tried to use Royster's formulation to provide "somewhat heightened" middle-tier scrutiny, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985), the very opinions cited in Carson as so applying it have reverted to type, as it were, by lapsing into rational basis terminology. See, e.g., on legitimacy classifications, *Lalli v. Lalli*, 439 U.S. 259, 273 (1978), cited in *Carson v. Maurer*, supra at 932, 424 A.2d at 831 ("our inquiry [is] . . . on whether the statute's relation to the state interests it is [*26] intended to promote is so tenuous that it lacks . . . rationality"); and, on gender, *Reed v. Reed*, 404 U.S. 71, 76 (1971) (question "is whether a difference in the sex of competing applicants . . . bears a rational relationship to a state objective. . . ."). This court, indeed, has gone one step further in recognizing candidly that the rational basis test and the test derived from Royster have in some instances been treated as interchangeable, see *State v. Deflorio*, 128 N.H. 309, 315, 512 A.2d 1133, 1136 (1986).

At least in our State cases, this proven judicial tendency to blur any difference between the two tests doubtless reflects the further fact that the first segment of the compound standard derived from Royster is simply a concise version of the rational basis test, Carson's threshold requirement that a challenged classification be "reasonable, not arbitrary," see *Carson v. Maurer*, supra at 932, 424 A.2d at 831, being equivalent to the usual first-tier standard that the classification must "rationally relate[] to a legitimate State interest," *Boehner v. State*, 122 N.H. 79, 84, 441 A.2d 1146, 1149 (1982) (citation omitted). And while the court [*27] in Carson may or may not have said the last word in seeming to identify rational basis with a favorable cost-benefit balance, *Carson v. Maurer*, 120 N.H. at 933, 424 A.2d at 831, the court did make it clear that this prong of the test was deferential to the legislative judgment in question, "the wisdom of or necessity for" which was beyond the scope of judicial review. *Id.*

Indeed, as the court expressed it at one point. the second-tier test was deferential in its entirety (i.e., in the absence of suspect classification or fundamental right, courts will not second-guess legislative judgment of need, *Id.*). This pledge of deference is a shaky one, however, thanks to uncertainty over the meaning of the second segment of the standard derived from Royster, requiring a "fair and substantial" relationship between the chosen classification and the legitimate legislative objective. This uncertainty must be seen as a further condition not only facilitating the identification (or misidentification) of the Carson standard with the rational basis test, as we have seen, but also placing temptation in the way of those inclined to impose a far stricter standard in the name [*28] of intermediate scrutiny, as we will see below.

While the definitive explanation of "fair and substantial relationship" must apparently await another day, it is fair to say here that if the phrase really is to function as a genuinely middle-tier test, and at the same time defer to ultimate legislative policy judgments, it must be understood as a substantively neutral requirement that the classification in question fit the permitted legislative objective with some minimally acceptable level of precision, or promote it with some like degree of efficiency. It is thus presumably meant to be a test that would strike down a classification barring too many people from invoking a right even when they could do so without compromising the State's objective, and it might also take into consideration a claimant's demonstration that a challenged classification would allow too many to invoke the right even when that would be antithetical to the State's objective. The test, in any event, must be intended to demand that there be some

appropriate level of inclusiveness in any classification selected to serve a lawful interest by disparate treatment. On any other view, indeed, the Carson test would [*29] simply be an obscurely articulated judicial commission for reviewing the merits of legislation, a role that the Carson court took pains to disclaim any authority to play in the name of intermediate scrutiny. (Whether Carson's promise of substantively neutral middle-tier review can be a truly practical objective is, of course, another question, which would take me beyond the justifiable scope of a dissent in this case. Here, I am only trying to work with Carson's reasoning taken at face value.)

Assuming, then, that we are to have a distinctly articulated intermediate test of equal protection review, and assuming that I am right about the function that the "fair and "substantial" criterion may perform in such review consistently with Carson's reasoning, the task confronting the court is to identify the requisite degree of efficiency, or fit, that intermediate scrutiny demands. While I would not suggest that this will be a simple job, both advocates before the court and the members of the court itself should confront the difficulty in the earliest possible case, for until the job is attempted, the intermediate nature of the scrutiny will remain elusive. Fortunately, however, [*30] the facts of the case before us allow for application of what the Carson opinion claims to be intended, even without a more exactly articulated standard of legislative tailoring than the court has as yet announced.

* * *

There are two reasons, however, why this less-than-mathematically precise fit should still qualify as fair and substantial. One of those reasons is suggested in the court's own opinion: if allegations of negligence in construction, or notice to some municipal agent, are enough [*36] to counter a municipal immunity claim in the first instance, there will be precious few street and sidewalk accidents without a subsequent lawsuit against a city or town, and the court's view of immunity's proper scope will entail a serious burden of defending against such claims. Certainly the legislature could reasonably choose the scope of immunity embodied in the present statutory scheme in order to obviate the unmeritorious litigation that would attend the narrower concept favored by the court.

The second reason for finding a sufficiently fair and substantial fit between the court's view of legitimate immunity and this statutory scheme is that we have no reason to believe that in practice there would be any large gap between the immunity the court would allow and the immunity the statutory scheme would produce. Because there is no indication of the number or proportion of highway and sidewalk hazards that eventuate from municipal indifference or negligence in construction, there is no indication that the statutory immunity is overinclusive to any significant degree. It is crucial to recognize this, lest we lose sight of the point that we are supposed to be applying an intermediate [*37] standard, and should not demand the precise congruence of problem and solution that would be appropriate, say, if a fundamental right recognized by the Constitution were at stake. When, on the contrary, the majority of the court rely on two possibilities of wholly uncertain significance to strike down the statute in issue, their ruling cannot be understood as an instance of intermediate equal protection review, but as one of strict scrutiny wholly inappropriate when the trigger of judicial oversight is the limitation of a right with less than fundamental constitutional significance.

And so the "fair and substantial" relation test is metamorphosed yet again. A formulation that began its juridical life as a rational basis test, and was ostensibly adopted by this court as a standard of intermediate review, is now being applied by a majority of the court to impose the strictest scrutiny known to equal protection analysis. There could be no more striking argument for the need to reexamine the Carson test and the conceptual basis underlying what passes for intermediate review.

THAYER, J., joins in the dissent.

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Equal Protection/Other

A. Bosselait

The extraordinarily heavy burden that Judge Souter demands of those seeking relief from the courts is vividly demonstrated in Appeal of Bosselait, 547 A.2d 682 (N.H. 1988), a case involving both constitutional and statutory issues. In Bosselait, two brothers, ages 76 and 79, shared a janitorial job, with each working four hours a day. When their employer laid them off, the brothers sought unemployment benefits but were rejected. The Department of Employment appeal tribunal noted that the benefits statute required applicants to be "available for and seeking permanent, full-time work." Although the Bosselaits complained that they suffered health problems precluding full-time employment and that the statute "is discriminating against old fellas...old people," the appeals tribunal rejected their claims.

Judge Souter dismissed the plaintiffs' claims of violations under the state and federal constitutional guarantees of equal protection, the federal Age Discrimination in Employment Act and the federal Rehabilitation Act. Despite the plaintiffs' statements before the appeals tribunal (where they appeared without counsel), he stated that "[n]ot one of these issues...has been both timely raised below and preserved for consideration on appeal." Although finding the record inadequate to preserve the issues, Judge Souter proceeded, in lengthy dicta, to discuss and reject each claim.

An example of Judge Souter's narrow interpretation of the equal protection clause is his opinion in Appeal of Bosselait, 547 A.2d 682 (N.H. 1987). In that case, two elderly brothers appealed the denial of workers' compensation benefits to them when they were laid off from a janitorial job they had shared for 22 years. Although workers laid off from their jobs are generally eligible for unemployment benefits, the brothers were denied any benefits under a state rule requiring recipients to be available for full-time work. Judge Souter acknowledged the "candid testimony" in the case that the brothers "don't dare to work more than four hours a day at their ages and would not play with their health," indicating that "men close to 80 do not have the capacity for eight hours of physical labor every day without risk to their health." Id. at 687. Nevertheless, in an opinion for the court, Judge Souter upheld the denial. Professor Robert Sedler of Wayne State University has noted that Bosselait is an example of equal protection analysis illustrating "extreme deference to legislative judgment." Supreme Court Watch (Aug. 1990) at 3.

SOUTER, J. Two formerly part-time employees bring this appeal under RSA 282-A:67, I, from an order of an appeal tribunal of the department of employment security (DES), which denied them unemployment compensation because they were not "ready, willing and able" to accept and perform full-time work. We affirm.

The plaintiffs, Albert and Edward Bosselait, are brothers, who were 76 and 79 years old, respectively, at the time they filed their claims for benefits. For 22 years they shared a single full-time janitor's position at the Spaulding Youth Center in Northfield, each of them working four hours a day.

In 1986, Spaulding contracted with a third party for custodial services and eliminated about 35 positions, including the job held jointly by the plaintiffs. Following their discharge on June 30, 1986, the plaintiffs applied to DES for unemployment compensation benefits, and when a certifying officer rejected their claims, *see* RSA 282-A:44, they applied to an appeal tribunal within the department, *see* RSA 282-A:53. The tribunal held an evidentiary hearing, at which the plaintiffs were assisted by a lay representative, and each of them testified about limitations on his capacity to work. Mr. Albert Bosselait represented that he had a "weak back [that] goes out of joint when least expected," and his brother indicated that he was limited by partial eyesight and angina. They indicated forthrightly that they would not accept new jobs calling for more than four hours of work each day. Mr. Edward Bosselait testified that "we don't dare to work more than four hours a day at our age," and said that he was "not gonna play with [his] health."

When the tribunal called attention to the statutory eligibility requirement that an applicant must be "available for and seeking permanent, full-time work," *see* RSA 282-A:31, I(d), Mr. Edward Bosselait responded that "I think [the statute is] discriminating against old fellas . . . old people." The tribunal found each plaintiff ineligible because he was "not ready, willing and able" to accept full-time work as the statute required. *See* RSA 282-A:31, I(c).

After the appeal tribunal's decision, the plaintiffs obtained legal counsel, who requested the commissioner of DES to reopen the case before the tribunal, based on State and federal equal protection claims and general allegations that subparagraph (d) violated State and federal statutes prohibiting discrimination against mothers, the handicapped, and people over 65. When the commissioner refused to reopen, the plaintiffs appealed the appeal tribunal decision to the appellate division of DES, *see* RSA 282-A:62, purporting to raise a State equal protection claim, and asserting a governmental obligation to provide unemployment compensation to mothers, the handicapped, and the elderly, who may be limited to part-time work. (The procedural history from appeal tribunal to appellate division is complicated in the extreme. *See Appeal of Albert Bosselait & a.*, N.H. Sup. Ct. No. 86-430. Fortunately, its details have no bearing on the present appeal.)

The appellate division noted that it was admitted that the plaintiffs were physically able to work only four hours a day, but rejected claims that subparagraph (d) violated the State equal protection standard and conflicted with § 504 of the federal Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (Supp. 1988). The appeal to this court under RSA 282-A:67 ensued. As we have explained elsewhere, see *Appeal of Kelly*, 129 N.H. 462, 466, 529 A.2d 935, 937 (1987), our jurisdiction is limited to reviewing the record of the appeal tribunal for errors of law, see RSA 282-A:67, IV, except insofar as that record may have been clarified or the issues limited in the course of subsequent proceedings before the appellate division.

The plaintiffs have challenged the denial of benefits by seeking to raise three issues before us. They claim that subparagraph (d) violates the federal Age Discrimination Act of 1975, 42 U.S.C.A. § 6101 *et seq.* (1983); that it violates the federal Rehabilitation Act of 1973, 29 U.S.C.A. § 791 *et seq.*; and that it violates State and federal constitutional guarantees of equal protection of the laws. Not one of these issues, however, has been both timely raised below and preserved for consideration on appeal.

Under our Rule 10(1)(c), a party appealing from an administrative agency is limited to the questions "set forth in the petition [for appeal] or fairly comprised therein. . . ." The petition in this case sets out two questions, each of them raising an issue of equal protection under the State and National Constitutions. Any federal statutory issues were thus waived, although it does not appear that they were ever adequately raised before the appeal tribunal.

The record below contains no reference to the Age Discrimination Act, 42 U.S.C.A. § 6101 *et seq.*, and although Mr. Edward Bosselait stated before the appeal tribunal that he thought subparagraph (d) discriminated against the elderly, his remark could not reasonably have been understood as initiating a statutory claim under federal law. The review of proceedings before the appeal tribunal is likewise devoid of any reference to a claim under the Rehabilitation Act, 29 U.S.C.A. § 791 *et seq.* While the plaintiffs referred to their physical limitations, their remarks, again, were insufficient to put the tribunal on notice that it should address the factual as well as legal issues peculiar to such a federal statutory claim.

Thus it appears from the record that the plaintiffs not only failed to raise the statutory issues in their appeal petition to us, but failed to raise them initially in the trial forum of the appeal tribunal. Their belated attempts to inject the statutory issues into the appeal at this point therefore run afoul of our rule that "issues [must be] raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct [claimed] errors in the first instance." *Sklar Realty v. Town of Merrimack*, 125 N.H. 32, 328, 480 A.2d 149, 153 (1984) (citation omitted). To this we may add that unless a claim is raised in the trial forum, there is no opportunity for a party to develop a factual record supporting his theory of relief, or to make an offer of proof sufficient to justify a demand to introduce relevant evidence and preserve an issue for appeal. (The commissioner of DES is, of course, authorized by RSA 282-A:60 to permit a claimant to reopen a case within the time allowed in order to raise a new issue before an appeal tribunal, if the claimant has a reasonable explanation for his previous failure to raise the issue and can give an indication of legal and factual support for the position he wishes to take.)

[1] *Sklar* is equally applicable, moreover, to bar consideration of the equal protection questions that the plaintiffs purport to preserve by listing them in this appeal petition, for these constitutional issues were never adequately raised before the appeal tribunal. While, as we noted above, one plaintiff expressed the view that subparagraph (d) was discriminatory against the aged, neither he nor anyone on his behalf expressed the view that the statute was therefore invalid as working a denial of equal protection. Since many statutes are candidates for enlightened amendment without thereby being in any way unconstitutional, the plaintiff's remark was not sufficient to put anyone on notice that he thereby meant to raise a constitutional issue. (We have not overlooked the fact that the plaintiffs sought to raise a State equal protection claim in the appellate division. The appellate division, however, is not the forum of trial where issues may be raised initially in accordance with *Sklar* and like cases. The division provides an intermediate administrative appeal, in which issues previously raised may be waived or narrowed; it does not provide an opportunity to raise new issues for the first time. See *Appeal of Kelly*, 129 N.H. at 466, 529 A.2d at 937.)

We must in candor say, therefore, that if the state of the record had been adequately disclosed to us we would not have accepted this appeal. See SUP. CT. R. 10. Because, however, the appellate division saw fit to deal with an issue under the Rehabilitation Act and to conclude that there was no violation of the State equal protection guarantee, and because similar claims may be raised in the future, there is some utility in speaking to these issues here, rather than merely entering the summary affirmance that would be proper under Rule 25(1)(d).

— State equal protection / federal equal protection

we come to more familiar ground in reaching the issue under the State Constitution, part I, article 12, raised by the plaintiffs' contention that a denial of equal protection inheres in the restriction of benefits to those who are able and willing to work full-time. In addressing this State equal protection claim, the plaintiffs are principally concerned to persuade us to review the effect of subparagraph (d) under the so-called middle-tier test of *Carson v. Maurer*, 120 N.H. 925, 931-33, 424 A.2d 825, 830-31 (1980), which requires that legislation restricting the enjoyment of an "important substantive right" be reasonable, not arbitrary, and justified by a "fair and substantial" relationship to the effectuation of a legitimate governmental objective.

The plaintiffs offer three arguments to support their claim that entitlement to unemployment compensation should be treated as an important substantive right for purposes of *Carson*. None of them is persuasive.

First, the plaintiffs argue for heightened scrutiny on the ground that part-time workers are taxed like all other workers to provide funds for paying unemployment compensation, but claimants from that class of part-time workers are refused benefits to which workers are generally entitled. The argument carries the plaintiffs nowhere, however, for it rests on false assumptions of fact and law. First, workers like the plaintiffs are not taxed; their employers are taxed. See RSA 282-A:60 1

The second mistaken assumption is that those who work only part-time are denied benefits when they are unemployed. On the contrary, former part-time workers, like former full-time employees, are not disqualified unless they are unable or unwilling to take a full-time job as a condition of receiving unemployment compensation. That is to say, the members of the class affected by subparagraph (d) are not identified by the hours they used to work, but by the hours they can and will agree to work in the immediate future.

[3] The second argument for heightened scrutiny purportedly rests on an analogy with federal cases applying a middle-tier test under the fourteenth amendment for reviewing disparate treatment based on gender, because of its immutability as a characteristic. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977). The plaintiffs argue that their age is as immutable as gender, and because subparagraph (d) is said to have a disparate effect on the elderly, it should receive middle-tier scrutiny. Whatever may be the merits of the analogy, the short answer to any suggestion that a distinction based on age merits middle-tier review under the National Constitution is answered by *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976), in which the Supreme Court of the United States rejected the argument for strict scrutiny of age discrimination claims, in favor of the rational basis test. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41 (1985) (collecting cases on levels of fourteenth amendment equal protection review); see also *Washington v. Davis*, 426 U.S. 229, 242 (1976) (non-dispositive significance of merely disparate impact in equal protection review). There is thus no basis to claim that State equal protection should grant the middle-tier scrutiny that federal equal protection would provide, because federal equal protection does not provide it.

Finally, the plaintiffs try to identify their interests with the rights on which middle-tier review was premised in *Carson*, 120 N.H. at 925, 424 A.2d at 825, and *Estabrook v. American Hoist & Derrick, Inc.*, 127 N.H. 162, 498 A.2d 741 (1985). But to see why the present case bears no comparison with *Carson* and *Estabrook*, it is only necessary to recall that those cases dealt with selective restrictions on common law rights of action to recover for injuries. Here, on the contrary, we are not dealing with any common law right of recovery that was superseded by the unemployment compensation scheme, for the latter is entirely a creation of statute and dependent upon statute for its content. *Armstrong v. Adams*, 113 N.H. 370, 373, 308 A.2d 844, 846 (1973); *Pomponio v. State*, 106 N.H. 273, 274, 209 A.2d 733, 734 (1965). *Carson* and *Estabrook* therefore have no bearing on the case.

[4] If the analogy with *Carson* and *Estabrook* fails, however, comparisons with other prior cases are ready at hand. In *Arsenault v. Abbott Furniture Corp.*, 122 N.H. 521, 522, 446 A.2d 1174, 1175 (1982), we considered an equal protection challenge to the benefit scheme under the workers' compensation act, RSA chapter 281, which we resolved by application of the rational basis test. We thus applied to alleged disparities in compensation for injuries related

protection challenges to compensation schedules in *Petition of State Employees' Assoc. & Goulette*, 129 N.H. 536, 540, 529 A.2d 968, 971 (1987). *Goulette's* holding exemplified a broader rule that legislation merely regulating economic benefits and burdens, with no other significant feature, is reviewable under the rational basis criterion when challenged under the equal protection clause for allegedly producing disparate treatment, or under the due process clause on the ground that even its impartial application is invalid. See *Boehner v. State*, 122 N.H. 79, 83-84, 441 A.2d 1146, 1148 (1982) (quoting *Opinion of the Justices*, 117 N.H. 749, 758, 379 A.2d 782, 788 (1977)); see also *Cleburne v. Cleburne Learning Center, Inc.*, 473 U.S. at 440 (rational basis test applied to review "social or economic legislation" on fourteenth amendment equal protection review).

[5] A challenge to differential treatment in the distribution of benefits under an unemployment compensation scheme thus presents a classic occasion to apply the rational basis test, and the burden therefore rests on the plaintiffs to demonstrate 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. See *Boehner v. State*, *supra* at 84, 441 A.2d at 1149. But this they cannot do, for the State has identified two objectives that the legislature could find both to be served by the restriction in question and to further the admittedly proper State policy of mitigating the effects of involuntary unemployment.

The first such objective is to conserve the available funds for the benefit of those who need them most, by restricting eligibility for benefits to those who need them most. Those who need the funds most are those with no sources of income except their paychecks. Such claimants are likely to seek full-time work, because they will need the level of pay that only full-time work yields. Conversely, the legislature could infer that those who can or will work only part-time probably have another source of income or support that provides some mitigation for the effects of unemployment. The legislature could, in short, conclude that the full-time work requirement would effectively select the most needy applicants, for whose benefit the unemployment compensation funds should be conserved.

The second objective that could be found to be served by subparagraph (d) is that of limiting the unemployment itself to the briefest possible period, and thus limiting the demand for benefits accordingly. Because the applicant who restricts himself to part-time work thereby isolates himself from a significant, and probably the major, segment of the job market, the legislature was entitled to infer that an applicant ready to take full-time work has a better chance of getting some job within any given period of time. Once the applicant has a job, he can of course look about for an alternative schedule more to his liking, since he and his family will not be subjected to unusual privation while he does so, and no employer will be taxed to compensate him while he makes the further search. But pending a successful completion of that further search, the legislative goals of limiting unemployment and its social costs will be served by inducing the unemployed to accept work full-time if that is what turns up first.

[6] The scheme as so rationalized will not, admittedly, produce an exact equality of benefits and burdens among the variously identifiable segments of employable people. But the standard of equal protection makes no such demand, *Boehner v. State*, 122 N.H. at 85, 441 A.2d at 1149-50, any more than it requires a court reviewing the effects of unemployment compensation to ignore the other societal benefits, such as social security, that are available to responsible and commendable job applicants like the plaintiffs, whose age prevents their acceptance of full-time work.

--Rehab Act Claim

You found no Rehab Act violation because

(1) Benefits must be denied "solely by reason of handicap" to establish a violation. Here, the plaintiffs' weak back, angina, and poor eyesight did not prevent them from working full time. Their concern for their health did.

(2) Even if these conditions did prevent them from working full time, the plaintiffs were not "otherwise qualified" for the benefits, since to qualify, beneficiaries had to be available to work full-time. The only remaining issue was whether this requirement had a disparate impact, which under the Rehab Act is established only by the requirement's having a "particular exclusionary effect" on a class of handicapped, which effect is unreasonable either because it is not reasonably based on an appropriate governmental objective or because it could be eliminated without unreasonable expense. Plaintiffs did not attempt to prove either.

o Other noteworthy points

--The opinion was unanimous.

--Professor Sedler, cited by PAW for the proposition that this case demonstrates extreme deference to legislative judgments, wrote for the Nation Institute that "non-interpretive review is not only legitimate, but it is also a necessary postulate for constitutional adjudication" and that "Under the non-interpretivist position, the Court therefore acted legitimately when it infused the 'economic freedom' value into the due process clause during the 'Lochner era' and when it infused the 'personal freedom' value into the due process clause in Griswold v. Connecticut and the cases following." He also claims that "the Court institutionally has never accepted the interpretivist view of judicial review."

B. DeFlorio

For example, given the opportunity to establish greater protections under the state constitutional guarantee of equal protection, Judge Souter declined. In State v. DeFlorio, 512 A.2d 1133 (N.H. 1986), a sixteen-year-old was convicted as an adult of misdemeanor traffic offenses -- driving without a license and operating a vehicle "in disobedience to a police officer" -- and sentenced to four consecutive weekends in the county jail, which lacked segregated facilities for juveniles. Because of his age, the county jail staff refused to admit him. On appeal, the county and the teenager argued that the statute requiring his being tried as an adult was unconstitutional on federal and state equal protection grounds. The defendant asserted that the court should apply "heightened scrutiny" to the statutory classification based on age, which requires the government to show that the age-based distinctions "serve important governmental objectives that are substantially related to achieving those objections." Craig v. Boren, 429 U.S. 190 (1976)

Judge Souter, writing for the court, rejected his argument and applied the less protective "rational basis test", which is used to review age-based discrimination under the federal equal protection clause. The rational basis test gives great deference to discrimination and requires only that the law be reasonable. By adopting this test as "the appropriate one to apply in assessing both the State and the federal claim," Judge Souter equated the two equal protection guarantees and completely ignored his statement in Kellenbeck that state constitutional standards should differ from their federal counterparts.

a Opinion Excerpt

[3] Although the defendant appears to assume that the equal protection claim must be judged under the so-called middle tier test of *Carson v. Maurer*, 120 N.H. 925, 932, 424 A.2d 825, 830-31 (1980) (reasonable, not arbitrary, having fair and substantial relation to legislative object), we agree with the county that the rational basis test is the appropriate one to apply in assessing both the State and the federal claim. See *State v. Scoville*, 113 N.H. 161, 163-64, 304 A.2d 366, 368-69 (1973) ("reasonable, not arbitrary [having a] fair and substantial relation" test assumed to be equivalent to rational basis test; classification of seventeen-year-old violators as adult criminals is rational and consistent with constitutional principles). See also *Jones v. United States*, 103 S. Ct. 3043, 3049 (1983) (rational basis test applied to classification affecting liberty interests when challenged under equal protection aspect of fifth amendment); *Stokes v. Fair*, 581 F.2d 287, 289 (1st Cir. 1978) ("there is no constitutional right to any preferred treatment as a juvenile offender"), *cert. denied*, 439 U.S. 1078 (1979); *United States v. Quinones*, 353 F. Supp. 1325, 1328 (D.P.R. 1973) ("reasonable . . . not arbitrary . . . having fair and substantial relation" test apparently assumed to be equivalent to rational basis test; statutory distinction between crimes punishable by death or life imprisonment, in which attorney general lacks discretion to proceed against juvenile as juvenile delinquent, and other crimes does not violate equal protection), *aff'd*, 516 F.2d 1309 (1st Cir.), *cert. denied*, 423 U.S. 852 (1975); *State v. Hart*, 89 Wis. 2d 58, 277 N.W.2d 843 (1979) (rational basis justifies separate classification of children over sixteen who violate the motor vehicle code and those who violate other provisions of the criminal statutes).

o This opinion was unanimous

Rape Shield
A. Colbath

Rape Shield Cases

Similar to the rape shield laws enacted by forty-six states and the U.S. Congress, New Hampshire's statute is essentially a codification of the right to privacy for rape victims and is intended to encourage them to come forward to testify. The law provides that "[p]rior consensual sexual activity between the victim and any person other than the actor [defendant] shall not be admitted into evidence." Before Judge Souter's appointment to the state supreme court, in State v. Howard, 426 A.2d 457 (N.H. 1981), the court held that the rape shield law must yield to some degree to the defendant's constitutional right to cross-examination, and allow him an opportunity, out of the jury's presence, to show that the value of evidence of prior consensual sexual activity outweighs its prejudicial effect on the victim.

In State v. Colbath, 540 A.2d 1212 (N.H. 1988), Judge Souter reversed the trial court's exclusion of evidence of prior consensual sexual activity, stating that the rape shield law could not bar testimony of the rape victim "hanging all over everyone and making out with [the defendant] and a few others" in the hours preceding the incident. In this case, for example, "the jury could have taken evidence of the complainant's openly sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group." He further suggested that the victim may have alleged rape to "excuse her undignified predicament". The court concluded that the evidence related directly to the accused's defense of consent. However, on retrial, the defendant was convicted again.

Opinion in State v. Colbath

In addition, Judge Souter's opinion in State v. Colbath, 540 A.2d 1212 (N.H. 1988) also suggests concern about his views on women's rights. Like many other states, New Hampshire has enacted a rape shield law, which prohibits testimony in a rape case of "[p]rior consensual sexual activity between the victim and any person other than" the defendant. N.H. RSA 632-A:6. The New Hampshire Supreme Court had previously ruled that such evidence may be admitted despite the law where the defendant can bear the burden of proving that the "probative value" of the evidence outweighs its "prejudicial effect" on the rape victim. State v. Howard, 426 A.2d 457, 461 (N.H. 1981). Despite the fact that Judge Souter very seldom voted to overrule criminal convictions, in Colbath he reversed a rape conviction, writing that evidence of a rape victim's allegedly "sexually suggestive" behavior toward several men at a bar other than the defendant should not have been excluded at trial. Colbath, supra, 540 A.2d at 1216.

Judge Souter's opinion in Colbath has been severely criticized. Shortly after it was issued, lawyers for women's rights organizations called it "an isolated ruling without precedent nationwide." United Press International (March 19, 1988). Although the ruling in Howard requires that evidence be admitted where its probative value truly outweighs its prejudicial effect, Judge Souter's opinion that this standard was met in Colbath undermines the purpose of the rape shield statute. Susan Estrich, author of a book on rape and professor of law at the University of Southern California, observed that the ruling "reflects the most traditional, backward, sexist view of women and sexual relations." Village Voice (August 7, 1990) at 24.

0 Opinion Excerpt

A witness for the State, Candice Lepene, testified that
the complainant

had left the tavern in the company of various men several times during the afternoon, and the court admitted her statement to the police, quoted above, that she had seen "a girl with dark hair hanging all over everyone and making out with Richard Colbath and a few others." On cross-examination Lepene was permitted to testify further about her earlier statement.

But the ^{trial} court directed the jury to disregard evidence of
the complainant's sexual conduct with third parties.
The issue was whether this was error under Howard.

The defendant has suggested that we address this issue simply as one of statutory construction, by holding that the shield law's mandate to exclude evidence of "consensual sexual activity" with others can have no application to overt sexual activity of the complainant in a bar open to the public. This was, indeed, the position taken by defendant's trial counsel, who relied on prior construction of the act as intended to honor the complainant's interest in preserving the privacy of intimate activity. See, e.g., *State v. Howard*, 121 N.H. 53, 59, 426 A.2d 457, 461 (1981); Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 41 (1977) ("[T]he trauma of baring one's intimate past to the eyes of the world—turning one's bedroom into a showcase—overshadows the usual discomfort of testifying . . . to one's biases, lies or even convictions of criminal acts." (Footnote omitted.)).

While we do not reject this argument, we are not disposed to rule on it here. The State did not address the argument's merits at all in its brief, and we prefer not to rule on a legal position so little remarked upon by one side of the case when, as here, existing precedent provides a clear conceptual framework for the resolution of the issue before us.

That framework began to emerge in the first appeal to question the applicability of the shield law after its enactment in 1975. See Laws 1975, 302:1; *State v. Howard supra*. Despite the absolute terms of the shield law's prohibition, our cases have consistently reflected the common recognition that such a statute's reach has to be limited by a defendant's State and national constitutional rights to confront the witnesses against him and to present his own exculpatory evidence. N.H. CONST. pt. I, art. 15; *State v. Howard supra*; U.S. CONST. amend. VI; see *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (amend. VI confrontation right includes right to cross-examine); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (amend. VI guarantees right to present defense witnesses); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (amend. VI applicable against States). Thus, this court has held that a rape defendant must be given an

opportunity to demonstrate that the "probative value [of the statutorily inadmissible evidence] in the context of that particular case outweighs its prejudicial effect on the prosecutrix." *State v. Howard*, *supra* at 59, 426 A.2d at 461. *But see* Tanford and Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 570 (1980) (countervailing prejudice is risk of jury irrationality, not harm to victim's feelings).

It is on such a determination of relative weight, then, that the jury instruction in question must stand or fall. In the normal case, of course, this weighing process takes place in a hearing outside the jury's presence, before any evidence is admitted, *see State v. Howard*, 121 N.H. at 58-59, 426 A.2d at 427, and the record of that hearing is a principal focus of any later review by this court. In this case, however, where the shield law is assumed to be the basis for the instruction striking evidence previously admitted, we look to the record of testimony that the jury actually heard, to determine whether it was inadmissible in the first place, and therefore properly subject to being stricken later on.

As soon as we address this process of assigning relative weight to prejudicial and probative force, it becomes apparent that the public character of the complainant's behavior is significant. On the one hand, describing a complainant's open, sexually suggestive conduct in the presence of patrons of a public bar obviously has far less potential for damaging the sensibilities than revealing what the same person may have done in the company of another behind a closed door. On the other hand, evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners. *See State v. Goulet*, 129 N.H. 348, 351, 529 A.2d 879, 881 (1987) (evidence of sexual promiscuity not necessarily admissible in spite of shield law); *State v. Shute*, 122 N.H. 498, 446 A.2d 1162 (1982) (evidence of mere predilection for promiscuity too remote).

In this case, for example, the jury could have taken evidence of the complainant's openly sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group. Evidence that the publicly inviting acts occurred closely in time to the alleged sexual assault by one such man could have been viewed as indicating the complainant's likely attitude at the time of the sexual activity in question. It would, in fact, understate the importance of such evidence in this case to speak of it merely as relevant. We should recall that the fact of intercourse was not denied, and that the evidence of assault was subject to the explanation that the defendant's jealous living companion had inflicted the visible injuries. The companion's furious behavior had a further bearing on the case, as well, for the jury could have regarded her attack as a reason for the complainant to regret a voluntary liaison with the defendant, and as a motive for the complainant to allege rape as a way to explain her injuries and excuse her undignified predicament. With the sex act thus admitted, with the evidence of violence subject to exculpatory explanation, and with a motive for the complainant to make a false accusation, the outcome of the prosecution could well have turned on a very close judgment about the complainant's attitude of resistance or consent.

[6] Because little significance can be assigned here either to the privacy interest or to a fear of misleading the jury, the trial court was bound to recognize the defendant's interest in presenting probably crucial evidence of the complainant's behavior closely preceding the alleged rape. Thus, the facts of this case well illustrate the court's previous observation that the sexual activities of a complainant immediately prior to an alleged rape may well be subject to a defendant's constitutional right to present evidence. See *State v. LeClair*, 121 N.H. 743, 746, 433 A.2d 1326, 1329 (1981) and cases cited; cf. *State v. Goulet supra*; *State v. Shute supra*. The demand of the Constitution is all the clearer when those activities were carried on in a public setting. Because the jury instruction effectively excluded the evidence in question, the conviction must be reversed and the case remanded for a new trial.

Reversed and remanded.

All concurred.

0 Excerpt from Howard applying balancing test

(6) We believe that the average juror would perceive the average twelve-year-old girl as a sexual innocent. Therefore, it is probable that jurors would believe that the sexual experience she described must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it. However, if statutory rape victims have had other sexual experience, it would be possible for them to provide detailed, realistic testimony concerning an incident that may never have happened. To preclude a defendant from presenting such evidence to the jury, if it is otherwise admissible, would be obvious error. Accordingly, a defendant must be afforded the opportunity to show, by specific instances of sexual conduct, that the prosecutrix has the experience and ability to contrive a statutory rape charge against him.

(7) It is also claimed that the prosecutrix in this case has lived in a decadent sexual environment and that due to this environment she has suffered certain psychological trauma. It is alleged that the environment was so abnormal that the prosecutrix has never been truly assimilated into normal society. If true, these allegations could raise questions as to whether she places any value on the telling of the truth or other values one would normally expect of a twelve-year-old child when placed in the impressive surroundings of a courtroom. Moreover, it may also be concluded that a person with the prior experience which the offer or proof made by defense counsel in this case reveals would not be likely to complain about non-coerced intercourse with anyone. Questions may be raised as to why the complaint was brought in this case. At trial, it could be argued that the complaint is not true and that it was motivated by ill will toward the defendant. We hold therefore that testimony concerning the environment in which this girl has lived may, in the discretion of the trial judge, be found relevant and admissible in this case provided, of course, that its admission is not otherwise barred by other rules of evidence. In the exercise of its sound discretion, the trial court should be mindful of the important policy considerations underlying the rape-shield statute. It should limit the admission of evidence of specific instances of the complainant's sexual conduct to the extent that is possible without unduly infringing upon the defendant's constitutional right to confrontation. *Commonwealth v. Joyce*, --- Mass. ---, at ---, 415 N.E.2d 181 at 185 (Mass. January 6, 1981).

B. Baker

In
State v. Baker, 508 A.2d 1059 (N.H. 1986), Judge Souter and the court reversed the conviction of a defendant for felonious sexual assault on the grounds that the defense counsel had not been given an opportunity to demonstrate that the rape shield law did not apply to testimony about the victim's prior consensual activity.

Judge Souter simply refused to recognize the importance of the rape shield law. Although the New Hampshire legislature clearly meant to ensure the victim's privacy rights, Judge Souter showed little deference to the lawmakers' intentions. In addition to ignoring the intent of the legislature, his approach echoes the harmful, stereotypical notions of "she asked for it" and "she made it up". Interestingly, his decision for the convicted rapist in Colbath is one of the few in his judicial career in which he ruled in favor of the defendant. In nearly all of his criminal cases, he upheld convictions and took a narrow view of constitutional protection for the accused.

The trial record indicates that the defendant paid a male juvenile to introduce him to the thirteen-year-old male victim named in the indictment, and that over a course of two years the defendant paid money to these boys in return for sexual activity with them. The victim named in the indictment described specific sexual acts that the defendant had performed.

Counsel for the defendant was aware of evidence that the victim had engaged in sexual activity with persons other than the defendant, and he sought to bring this out during the victim's cross-examination, in order to preclude any inference that so young a victim would not have known about the sexual practices he described unless he had experienced them with the defendant. Accordingly, defense counsel asked the victim whether he had had any "experiences" with a named third person. When counsel for the State objected that the question was "confusing or not clear," the court sustained the objection. The court then allowed defense counsel to come to the bench to make a requested offer of proof, and counsel explained that the object of his questioning was "to show [the victim's] experience with regard to these matters and his ability . . . to fabricate a story. . . ."

Although at one point thereafter the court questioned the relevance of the proposed inquiry, the remainder of the colloquy at the bench concerned the applicability of RSA 632-A:6 (Supp. 1983), the rape shield law, as construed in *State v. Howard supra*. *Howard* held that the rape shield law's bar to the admission of evidence of "[p]rior consensual sexual activity between the victim and any person other than the [defendant in a prosecution under RSA chapter 632-A]" is constitutional only if the defendant is "given an opportunity to demonstrate that due process requires the admission of such evidence[.] because the probative value in the context of that particular case outweighs its prejudicial effect" on the victim. *State v. Howard, supra* at 58-59, 426 A.2d at 460-61.

At the bench conference, defense counsel requested that opportunity. Counsel for the State then objected "on timeliness as to right now to bring this up unless the [j]udge wants to send the jury home and have a full hearing of some kind." After further discussion, the bench conference concluded with this exchange between the court and defense counsel:

"THE COURT: At this state of the proceedings . . . I am going to sustain your objection and note [the] exception, and we will proceed from there.

[Defense counsel]: Would Your Honor grant a hearing tomorrow morning, then?

THE COURT: No, the Court will not grant a hearing at this particular stage of the proceeding."

The defendant submits that this ruling was reversible error, and we agree.

The State argues, as a preliminary matter, that the claim of error is not properly before us, because defense counsel failed to preserve it by timely exception to the trial court's ruling. This assertion, however, flies in the face of the record as we have quoted it, which indicates that at the end of the discussion about *Howard*, the trial court noted an exception to the ruling. See SUPER. CT. R. 77-A; N.H. R. Ev. 103(e) (exceptions not required after July 1, 1985).

[1] Next, the State argues that the court was correct in finding that the request for a *Howard* hearing was untimely, and in denying it for that reason. In responding to this, we have to say in all candor that we share the exasperation of the trial judge and State's counsel at receiving a motion for a *Howard* hearing after a jury was in the box and a witness was on the stand. But in fairness we also have to say that defense counsel's timing does not violate anything we explicitly said in *Howard*, and that the State has not cited any rule of the superior court requiring more timely practice.

[2, 3] What is more important, in any event, is that a *Howard* hearing is a due process requirement, which must be given a higher priority than efficiency in the use of jurors' and witnesses' time. The way to force an accommodation of sound judicial management with constitutionally mandated procedure is to issue and enforce scheduling rules or orders, with provisions for sanctions against counsel who violate their terms. When, as here, a court seeks to penalize the criminal defendant for his lawyer's untimeliness, the result is simply a colorable claim of ineffective assistance of counsel.

As a third point, the State relies on *State v. Miskell*, 122 N.H. 842, 451 A.2d 383 (1982) in maintaining that the defendant never perfected his right to a *Howard* hearing, because he failed to make an offer of proof to justify his request. This argument calls for careful attention both to *Miskell* and to the record in this case.

[4] *Miskell* held that the shield law is not merely a bar to the admission of evidence about a victim's prior consensual sexual activity, but is also the source of a personal privilege to protect the victim's privacy on that subject, a privilege that the victim may invoke not only at trial but at such pretrial proceedings as depositions and *Howard* hearings. When a victim has invoked that privilege, a defendant may defeat it only by demonstrating a "reasonable possibility" that the information sought will produce the type of evidence that due process will require to be admitted at trial." *Id.* at 846, 451 A.2d at 386. (Emphasis in original.) It is therefore accurate to describe *Miskell* as holding that an offer of proof may be demanded before the shield law's privacy privilege must yield to pretrial questioning.

[5] *Miskell* did not hold, however, that a defendant must make such an offer of proof before he is entitled even to insist that a *Howard* hearing be scheduled. The present defendant's demand for such a hearing was not, therefore, ineffective under *Miskell* simply because defense counsel at the bench failed to indicate that he could prove that the victim had had prior sexual experiences on the basis of which he could have fabricated a story.

[6] Finally, the State argues that the failure to grant a *Howard* hearing was not prejudicial, because the jury had evidence that the victim was a street-wise and experienced thirteen-year-old. This is true so far as it goes, but it begs the question, which is whether he was experienced enough to have known about the sexual acts he described unless he had experienced them with the defendant. We may, indeed, have our suspicions, but on the evidence before the jury there could be nothing more than that. *Howard* and *Davis v. Alaska*, 415 U.S. 308 (1974), teach that the due process right of confrontation requires more.

Reversed.

Other Points of Interest

- o Neither study mentions State v. Goulet, where you upheld a trial court's ruling that the prosecution could point out that the defendant had produced no evidence of the victim's promiscuity. You did so, however, on a ground different from the one the court below had used, which was that Howard required admission of any evidence of promiscuity on the victim's part, and that therefore had the defendant had any such evidence, he would have introduced it. You ruled that was error because it took too broad a view of the Howard exception to the Rape Shield Law:

[1] This assumption is troublesome because the term "promiscuity" is expansive enough to cover conduct within the scope of the rape shield law, but not necessarily admissible under the *Howard* exception. And even when *Howard* might apply, in a close case a court would run a serious risk of error in assuming the admissibility of evidence without following *Howard*'s procedure. While *Howard* recognizes that the State and National Constitutions may require admission of evidence of a victim's prior sexual activity, admissibility is not automatic simply because the evidence is relevant on credibility. The rape shield law authorizes a victim to claim a privilege of personal privacy, see *State v. Miskell*, 122 N.H. 842, 845, 451 A.2d 383, 385 (1982), which cannot be defeated without a defendant's offer to prove facts that could justify its invasion, *id.* at 846, 451 A.2d at 385-86; *State v. Baker*, 127 N.H. 801, 804, 508 A.2d 1059, 1062 (1986), followed by a hearing to establish those facts and to evaluate the strengths of the competing interests in privacy and effective confrontation. *State v. Howard supra*. Thus, without a *Howard* hearing, a court may have difficulty saying whether proffered evidence would come in, even when it is evidence of sexual activity that some people would describe as promiscuous. Therefore, without an order admitting the evidence, it would be prudent to assume that the rape shield law would keep it out and render any argumentative reference to it improper.

There is, however, a different basis to sustain the trial court in overruling the objection to the prosecutor's comment and refusing to give a curative instruction. The comment can reasonably be interpreted as nothing more than a response to defense counsel's attempts, in cross-examination and closing argument, to present the victim as a woman of small virtue seeking a stranger for sexual amusement. This intimation was the whole point of defense counsel's fishing for testimony that the victim and her friends went to the club to drink, mingle with the crowd and dance with men they did not know. Even though the fishing netted nothing much, defense counsel stuck to the point in a closing argument that held the victim up as someone who drank at the club, walked through the crowd, "maybe" danced, and invited male pursuit by her solitary departure.

[2] In a word, the defense tried to paint the victim as promiscuous, and there was nothing wrong with the prosecutor's plain contention that the try had failed.

- o Both Colbath and Baker were unanimous (as was Goulet).
- o Baker involved a male victim, casting doubt on the theory that these cases are explained by stereotypes about women.
- o Other cases where you reneedered "pro-victim" "anti-defendant" decisions in rape/sexual assault cases:

--State v. Dukette, 127 N.H. 540 (1986) (trial court properly barred discovery re: statement victim made to treating physician that she was raped when she was 14 and had not reported the rape, because the information sought was not reasonably calculated to lead to discovery of admissible evidence).

--State v. Cochran, 569 A.2d 756 (N.H. 1990).

--State v. O'Leary, 128 N.H. 661 (1986).

--State v. Campbell, 127 N.H. 112 (1985).

See also State v. Allen, 128 N.H. 390 (1986) (ruled against defendant in case of attempted murder of former wife).

Sex Discrimination

Further evidence of Mr. Souter's restrictive interpretation of law is apparent in the civil rights case of King v. New Hampshire Department of Resources and Economic Development, 420 F.Supp. 1317 (D. N.H. 1976). The Attorney General's office under David Souter argued that the plaintiff had failed to prove that sex discrimination had occurred.

The female plaintiff had been refused summer employment with a beach meter patrol for three consecutive summers. In one job interview she was asked whether she could wield a sledgehammer, whether she had any construction industry experience, and whether she could "run someone in." Despite the fact that these duties admittedly constituted "less than one percent" of the duties of the job, the attorney general's office contended that such questions were job-related and did not evidence any "discriminatory animus" toward the female applicant. Such questions, the office concluded, were not unlawful even if they resulted in a refusal to hire the plaintiff. The Second Circuit Court of Appeals rejected the argument and upheld the district court's findings that such questions evidenced a discriminatory state of mind on the part of the interviewer.

David Souter's office also contended that the plaintiff needed to show that the job was offered to male applicants with similar qualifications in order to make out a prima facie case of sex discrimination. However, the appeals court found that a prima facie case of sex discrimination was made and the burden was on the state to provide a legitimate nondiscriminatory reason for the employee's rejection.

Finally, the attorney general also contended that the district court had imposed an unreasonable burden on employers to check with every past employer reference of a female applicant. Such a requirement was described as "reverse discrimination", placing an onerous burden on small employers. The Court of Appeals disagreed, stating that an employer cannot use an isolated, negative reference as a pretext for not hiring an applicant, and such a negative reference was insufficient to overcome the showing of discriminatory animus has been made.

- o This seems to be about a brief on appeal filed in the First Circuit in King v. N.H. Dept. of Resources, 562 F.2d 80 (1977).
- o According to syllabi of both the d.ct. and ct. app. opinions, the only person involved from the A-G's office was Donald W. Stever, Jr.
- o The case is an unexceptional sex discrimination claim with conflicting witness accounts. There appears to be no obvious reason to have refused to defend it.
- o The study's reference to the State's brief's claim that the district court required the State to check all the plaintiff's references, and that this is "reverse discrimination" and imposes an unreasonable burden on small business, is curious. What the Court of Appeals actually held was that the district court had not imposed such a requirement, but had merely used the State's failure to check further references as one piece of evidence that its reasons for not hiring plaintiff were pretextual.

The New York Times

ON MY MIND | A. M. Rosenthal

Questions for the Judge

What is the one thing everybody wants to know about Judge David Souter of Weare, N.H.?

Why, what he thinks about abortion, of course — whether he believes it a right or a crime.

What is the one thing the Bush Administration is telling us would be crude and improper to ask Judge Souter?

Why, what he thinks about abortion.

This makes perfect sense, if you happen to be President Bush trying to get a critically important and delicate appointment through the Senate.

As the conservative replacing a liberal in a closely divided court, Judge Souter would have a central role in decisions that will affect the law and life of the country — the same thing, really.

So Mr. Bush, elected on an anti-abortion platform, is doing his job, well. As he sees it, his job is to get through the Senate a nominee conservative enough to persuade the anti-abortionists that he will vote their way but whose record is short enough to leave an area of doubt that would allow pro-abortion senators to vote for him.

Every politician knows that is the game. But to get the nomination through, Mr. Bush and the people around him have to put on a straight face and act as if they never thought much about the abortion issue when they selected Judge Souter. Abortion? Who said that word?

To help him out, the Bush Administration can count on a slew of lawyers and politicians who will argue that to question Judge Souter on abortion would force him to make judgments about issues confronting the Court before he has a chance to study the specifics — unfair, unfair.

Nonsense. It is perfectly possible for a judicial nominee to outline attitudes toward an important area of the law without being boxed in about the specifics of a case through which a judge is supposed to come to decision.

If a nominee declines to do this it is because he is more interested in votes than in reasonable self-disclosure.

So it is pietistic, self-serving nonsense to insist that it would be naughty to ask questions about abortion. The judge will not tell us, understandably, how he would vote on a specific challenge to *Roe v. Wade*. But he can certainly tell us whether he thinks there is a constitutional right to privacy, as pro-choice people insist, or whether it is a right that can be overridden legislatively.

But whether we are for the right to abortion, as I am, or against it, we all

know two things. One is that almost everybody in the country has a strong opinion about it. It would be an insult to Judge Souter to believe he does not.

No, he won't tell us flat out — just as you and I do — because that would risk his job. We do not expect a Supreme Court nominee to be straightforward about one of the most important public issues of the century. Isn't that strange and sad?

The second thing we know is that abortion cuts too deep into how a person sees the world, into deep, deep concepts of morality, religion and social decency, for most people to change their minds.

Yes, but Supreme Court justices are not supposed to be "most people."

The beautiful thing about the Supreme Court is that many justices — not all, not all — do change their minds while they are on the bench. The dignity and responsibility of the

Read any
new writers
lately?

job does bring new intellectual receptivity to some justices, and they are the ones the country should look for.

I do not believe Judge Souter would have been chosen if there was not a heavy chance that he would vote to overturn *Roe v. Wade*. The issue may come up before the Presidential election, and Mr. Bush would be awfully embarrassed if his first Supreme Court choice voted against the Republican platform — and the passionate beliefs of so many of his supporters.

But the White House could be wrong and so could I. Judge Souter may astonish everybody, including himself, by changing his mind. So I hope he is asked if and how he himself has changed.

Judge, what changes of judicial mind do you admire most, if any? Could you name a few cases where you have changed your first legal instincts? Any suggestions for constitutional amendments?

Judge, have you picked up any new interests since you left law school?

You like reading and music. Judge, what composers and writers do you find no longer to your taste? And which new ones have you suddenly found interesting?

Senators, ask questions about change and the judge — after the questions on abortion. □

A Key Question for Judge Souter

By Ronald Collins

JUDGE Souter, would you share with us your understanding of Article I, Section 8 of the Constitution?"

This is certainly not a made-for-TV question. It is deadly boring compared to the "hot" topic of the moment - abortion. Moreover, today's special interest groups have not rallied around one or another meaning of the Commerce Clause.

Conventional wisdom is dead wrong in all of this. In the constitutional, political, and economic scheme of things, few questions are more important than an Article I, Section 8 Commerce Clause one. It is this question the Senate Judiciary Committee should put to President Bush's Supreme Court nominee, David Souter.

Simply stated, Article I grants specific powers to Congress. Absent such clear authorization, Congress is without the legal power to act. Thus, for example, Congress cannot grant pardons (an executive function) or adjudicate cases (a judicial function). It can, however, collect taxes, declare war, and create lower courts and post offices, among other things. History has shown that the lion's share of its constitutional power lies with its right to "regulate commerce . . . among the several states."

By pressing Judge Souter for his views on the Commerce Clause, senators could learn much about the unknown jurist's grasp of constitutional history, the role of the courts, the power of

Congress, the rights of states, and the deference given to precedent. In fact, this inquiry could even reveal something about Souter's views on Congress's power to legislate abortion, in restrictive or permissive ways.

When interpreted broadly, the power to "regulate commerce" means that Congress has almost unfettered authority to manage everything from business practices to civil rights. Thus, it can establish minimum wages and dictate labor policies for state and local employees. Similarly, Congress can tap its commerce powers to structure state utility rates. It can regulate the amount of wheat produced by farmers for their own consumption. And with the blessing of the Warren Court, Congress invoked its commerce powers to combat race discrimination in public accommodations.

Today, there is virtually no limit on Congress's authority to regulate many state matters so long as national lawmakers paint with the brush of the Commerce Clause. But the history of the clause has fluctuated. In 1824, Chief Justice John Marshall gave the clause a very expansive reading, one that was restricted in 1895 and confined even more in between 1918 and 1936.

Ever since the FDR New Deal court, however, a majority of the justices has typically granted Congress free rein in passing many progressive laws.

But with Justice William Brennan's retirement, the Commerce Clause battle front could change considerably. Brennan was the crucial vote in a string of recent 5-4 cases further extending Congress's lawmaking pow-

ers. In one of those rulings, a 1985 case challenging Congress's power to set minimum-wage and overtime laws affecting state employees, then Justice William Rehnquist took pointed exception. The conservative jurist, who now sits as chief justice, predicted that in time his view would "again command the support of a majority of [the] Court."

Rehnquist's prediction may soon be realized since Justices Antonin Scalia, Anthony Kennedy, and Sandra Day O'Connor are likely to form a conservative phalanx hostile to any generous interpretation of Congress's lawmaking powers under the Commerce Clause. That leaves the tie-breaking vote to David Souter.

Would Judge Souter break with the Brennan liberal precedents? How deferential does he think the court should be when it comes to Congress's Article I powers? Conversely, how much constitutional latitude would he give the states in bucking the will of national lawmakers?

As with other topical issues, the New Hampshire judge's record is more obscure than revealing. What little we do know comes partly from some April 13, 1990, statements he made in a criminal sentencing case. During oral argument in the state Supreme Court, Justice Souter pushed counsel squarely to identify the state constitutional source of government authority. Said Souter, "The question is, where do they get the power. . . .?"

Of course, it is senseless to make too much of such fragments of a man's thought. Still, these statements do reveal that Judge

Souter does have something to say on the general matter.

Liberals nourished on the constitutional milk of the Warren Court forget that over the long historical haul, Congress, not the court, has been their truest ally. Since at least the turn of the century, liberals have sought to keep the court off Congress's back matters of economy, environment, and the general welfare.

It would be a nightmare world for liberals if a Rehnquist majority denied them redress in both the Supreme Court and Congress. Similarly, such threats to the edifice of large central government, combined with the corresponding revival of state rights, would send ideological conservatives dancing into the streets.

A showdown could come soon. For example, the Freedom of Choice Act, with some 130 co-sponsors in the House and 25 in the Senate, seeks to codify the abortion law of the controversial 1973 *Roe v. Wade* precedent.

Question: Does Congress have the authority under Article I (or the 14th Amendment) to impose any national abortion law on the states? Of course, the same could be asked of Congress's powers to pass a variety of other laws affecting state powers.

Congress has a vested interest in pressing Judge Souter to speak long and hard on this constitutional principle. If the senators can see beyond the abortion issue, perhaps they will ask the fundamental question.

■ Ronald Collins is a visiting associate professor of law at the Catholic University of America.

(Seabrook to follow separately)