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Justice David Hackett Souter and the Right to Privacy

Scott P. Johnson

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I. CONTENT WARNING AND DISCLAIMER

This Article contains explicit depictions and discussions of abortion and related medical procedures. Such descriptive discussions may be triggering or distressing for some readers. This Article also references passive euthanasia processes. Reader discretion is advised.

Additionally, this Article explores historic case law regarding abortion-related issues that consistently uses the term “woman” when referring to all persons impacted by abortion restrictions.

II. INTRODUCTION

On July 23, 1990, President George H. W. Bush nominated David H. Souter to the U.S. Supreme Court to replace Justice William Brennan Jr., one of the most liberal justices in the Court’s history. Souter was expected to solidify a conservative majority that Republican presidents began putting together in the 1970s and 1980s. Over roughly two decades, Presidents Richard Nixon, Gerald Ford, and Ronald Reagan were able to fill all nine seats on the Court without an appointment being made by a Democratic president.

* Professor of Political Science and Coordinator of Criminal and Legal Studies at Frostburg State University; Ph.D. Kent State University, 1998; M.A. University of Akron, 1990; B.A. Youngstown State University, 1987.


3 Smith & Johnson, supra note 2, at 21–22; see also Thomas R. Hensley, Christopher E. Smith & Joyce A. Baugh, THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES, 6–7 (1997).

Sununu, Chief of Staff in the Bush administration and former Republican governor of New Hampshire, convinced President Bush to nominate Souter, who was serving as a justice on the New Hampshire Supreme Court at the time of his appointment. According to Sununu, Souter was considered to be a “home run” for conservatives.

However, conservatives became concerned when Souter expressed during his Senate confirmation hearings that he recognized a right to privacy in the U.S. Constitution. While privacy is not explicitly mentioned in the Constitution, liberal jurists assert that the right to privacy exists within the shadows of the Bill of Rights and specifically in the Due Process Clause of the Fourteenth Amendment. Conservative scholars have denied the existence of or attempted to limit the scope of personal privacy as a constitutionally protected fundamental right by interpreting the Constitution based on strict constructionism. The right to privacy is controversial because it encompasses political issues such as abortion, the right to die, and gay marriage. This Article examines the judicial behavior of Justice Souter in privacy cases and concludes that Souter failed to provide a consistent vote for the conservative agenda, in part, because he cast more liberal votes.


7 Greenhouse, supra note 5.


9 See Griswold v. Connecticut, 381 U.S. 479 (1965). In Griswold, the Court struck down a Connecticut law banning the dissemination of information about the use of contraceptives. Id. at 484. There, Justice William O. Douglas argued in his majority opinion for the Court that the right to privacy could be found in the penumbras, or shadows, of the Bill of Rights. Id. In Roe v. Wade, Justice Harry Blackmun’s majority opinion established a right to privacy regarding the decision of whether to have an abortion and explained that privacy was implied within the fundamental liberties found in the Due Process Clause of the Fourteenth Amendment. 410 U.S. 113, 152–53 (1973), overruled by Dobbs v. Jackson Women’s Health Org., 597 U.S. 215 (2022).

10 BRUCE MIROFF, RAYMOND SEIDELMAN & TODD SWANSTROM, DEBATING DEMOCRACY: A READER IN AMERICAN POLITICS 305 (1997). Former U.S. Attorney General Edwin Meese III argues for interpreting the Constitution based upon strict constructionism, original intent, and judicial restraint. Id. at 305–06. Justice William Brennan, Jr. argues the opposing perspective that the Constitution is a flexible document and a blueprint for each generation to interpret based upon changing times. Id.

votes over time but also because of his respect for the law and his concern for the reputation of the Court as a neutral arbiter of the Constitution.\footnote{The privacy cases containing Souter's votes and opinions referenced in this Article were drawn from Washington University's Supreme Court Database. The Supreme Court Database, WASH. U. L., http://scdb.wustl.edu/analysis.php [https://perma.cc/BC62-39HN].}

III. PRIVACY AND ABORTION RIGHTS

A. Souter and the Freshman Effect

Judicial scholars have debated whether new justices experience a so-called “freshman effect” wherein new appointees to the Supreme Court experience bewilderment as they are socialized into the Court’s decision-making processes.\footnote{Smith & Johnson, supra note 2, at 26; see also Eloise C. Snyder, The Supreme Court as a Small Group, 36 SOC. FORCES 232 (1957–1958). Snyder studied the social dynamics and behavioral patterns of newly appointed justices. Snyder, supra, at 237–38.} New justices tend to receive fewer writing assignments than other justices as the senior justices try to avoid placing a burden on the new jurist until he or she becomes familiar with the Court’s procedures.\footnote{Smith & Johnson, supra note 2, at 26. If the Chief Justice is in the majority, he assigns the Court’s opinion and may keep cases for himself. 2 DAVID M. O’BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 185 (8th ed. 2011). If the Chief Justice is not in the majority, then the senior most justice exercises the power of opinion assignment. Id.} A freshman justice generally attempts to remain neutral by oscillating back and forth between the two ideological blocs.\footnote{Snyder, supra note 13, at 237; see Smith & Johnson, supra note 2, at 26.} Souter appeared to experience some bewilderment as a newcomer based on the fact that during his first term, he authored only eight majority opinions—by far the lowest among the nine justices.\footnote{See Smith & Johnson, supra note 2, at 30–31; see also Souter: Slow Off the Mark, NEWSWEEK (May 26, 1991), https://www.newsweek.com/souter-slow-mark-204022 [https://perma.cc/BRA6-FPKQ].} Souter was quoted as saying that the workload of the Court made him feel as if he were “walking through a tidal wave.”\footnote{Tony Mauro, Souter’s Slow Pen Earns Him Dubious Distinction, USA TODAY, June 18, 1991, at 11A.}

However, contrary to the freshman hypothesis, Souter failed to show any oscillation in his voting behavior, as he quickly aligned with the conservative wing of the Court during the 1990–1991 term.\footnote{Smith & Johnson, supra note 2, at 28–29.} During Souter’s freshman term, he played a decisive role by casting a conservative vote in several
cases that resulted in 5–4 rulings. 19 One such case involved the issue of government funding of abortion providers. 20 In Rust v. Sullivan, Souter’s tie-breaking vote upheld the Reagan administration’s “gag rule,” 21 which prevented physicians in federally funded clinics from discussing abortion with patients despite claims that the rule violated the patients’ privacy rights of family planning. 22 It has been speculated that Souter played a role in modifying Chief Justice William Rehnquist’s opinion for the Court in Rust because, during oral arguments, Souter expressed reservations that the gag rule might jeopardize the health of a woman in some instances. 23 Perhaps to retain Souter as a fifth vote, Justice Rehnquist’s majority opinion noted that the gag rule did not necessarily apply to “the circumstance of a medical emergency.” 24 If Rust had been argued the previous term, Justice Brennan would likely have voted with the liberal bloc and the gag rule would have been struck down as unconstitutional. 25

B. Souter’s Sophomore Year: RU486 and Reconsidering Roe


Benten involved a ban on the importation of Mifepristone, also referred to as RU486, a drug that can

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20 Rust, 500 U.S. at 196.

21 Id. at 203; Ruth Macklin, The “Global Gag Rule”: Curtailing Women’s Reproductive Rights, 4 INDIAN J. MED. ETHICS 198, 198 (2019).

22 Rust, 500 U.S. at 196.


24 Rust, 500 U.S. at 195 (dictum).


induce an abortion during the first eight weeks of pregnancy without surgery or hospitalization.28 Leona Benten, a twenty-nine-year-old woman from California, attempted to bring the drug from London, England, into the United States.29 The drug was confiscated at the airport because importation of the drug was banned, as it had not yet been approved by the Food and Drug Administration (FDA).30 However, a 1989 change to the FDA’s Regulatory Procedures Manual allowed importation of unapproved drugs for treating AIDS and other serious conditions lacking effective treatments in the United States.31 While the FDA subsequently determined that such an exception did not apply to RU486, there was no official announcement or any opportunity for the public to comment on this decision, which appeared to violate the procedural requirements of the Administrative Procedure Act (APA) as well as FDA regulations.32 On July 14, 1992, New York Federal District Court Judge Charles P. Sifton ordered that the drug be returned to Benten because she was likely to succeed in her claim that the FDA had not complied with the APA when it issued the ban resulting in the seizure. 33 Judge Sifton, however, refused to issue a broader decision that would lift the importation ban altogether.34 In sum, Judge Sifton’s ruling was a narrow one in favor of Benten’s situation. The decision offered no guarantee that other women would be successful in challenging the FDA once the unmet procedural requirements were resolved.35

Before the drug could be returned to Benten, the Court of Appeals for the Second Circuit temporarily stayed Judge Sifton’s injunction, and the case was appealed to the U.S. Supreme Court.36 Just three days after Judge Sifton’s ruling, the Supreme Court denied Benten’s request to overturn the

29 Id. at 283–84.
30 Id. at 283.
31 Id. at 285.
32 Id. at 286, 289–90. The APA was passed by the seventy-ninth Congress in 1946 and created the process whereby federal agencies develop and issue regulations. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946). The APA requires notice of proposed rulemaking be published in the Federal Register and offers the public an opportunity to comment on planned regulations. 5 U.S.C. § 553.
34 Id. at 291.
35 See id.
Second Circuit. The Court held, by a 7–2 vote, that Benten failed to demonstrate that she would have been successful on the merits in challenging the legality of the FDA’s procedures. In a per curiam (meaning unsigned) opinion of the Court, seven justices, including Souter, ruled against the district court. Hence, the government was not required to return the drug to Benten.

Justices John Paul Stevens and Harry Blackmun dissented from the per curiam opinion. Justice Blackmun simply would have ruled in favor of Judge Sifton by granting the application to vacate the stay issued by the Second Circuit, while Justice Stevens argued that an undue burden had been placed upon Benten’s abortion rights. Interestingly, Justice Stevens noted that the government’s interest in protecting Benten from a drug that might be unsafe, because it was not approved by the FDA, was insignificant compared to the burden placed on Benten. Instead, Justice Stevens reasoned that the use of the drug actually would have allowed Benten to avoid the serious health risk of undergoing a surgical abortion with general anesthesia after eight weeks of pregnancy.

While Souter voted with the conservative bloc of the Court in both Rust and Benten, that same year he displayed an independent streak by voting with the liberal bloc to uphold the Roe v. Wade precedent in the landmark case of Planned Parenthood of Southeastern Pennsylvania v. Casey. In Casey, the Pennsylvania State Legislature had enacted several laws to regulate abortion procedures. Beginning in 1989, Pennsylvania law required informed consent of a patient; a twenty-four-hour waiting period prior to receiving abortion services; consent from at least one

38 Id. at 1085.
39 Id.
41 Benten, 505 U.S. at 1085.
42 Id. at 1085 (Blackmun, J., dissenting).
43 Id. (Stevens, J., dissenting).
44 Id. at 1086.
45 See id.
48 Id. at 844.
parent for minors; abortion facilities to comply with certain reporting and recordkeeping mandates; and finally, spousal notification wherein a wife was required to notify her husband if she intended to obtain an abortion.49

Because Souter replaced Justice Brennan, whose votes had consistently protected abortion rights, many conservatives had hoped that Souter would provide the fifth vote to overturn Roe.50 However, in Casey, Souter cast the tie-breaking vote to uphold Roe as the law of the land and reinforce the right to abortion within the privacy right found in the Due Process Clause of the Fourteenth Amendment.51

Souter teamed up with Justices Anthony Kennedy and Sandra Day O’Connor to draft the Casey opinion for the deeply divided Court. 52 The plurality upheld the Roe precedent; however, the Court abandoned Roe’s trimester approach, which had been used to regulate abortion restrictions since 1973, in favor of the undue burden test.53 The undue burden test prescribed that if a law regulating abortion placed an undue burden on a woman seeking an abortion by creating a “substantial obstacle,” then courts should apply strict scrutiny to determine the constitutionality

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49 Id.
50 See Smith & Johnson, supra note 2, at 22.
51 See Casey, 505 U.S. at 845–46 (plurality opinion).
52 See id. at 843.
53 Id. at 873–74. Justice Harry Blackmun created the trimester approach in Roe v. Wade and held that the right to privacy for abortion was found in the Due Process Clause of the Fourteenth Amendment. Roe v. Wade, 410 U.S. 113, 162–65 (1973), overruled by Dobbs v. Jackson Women’s Health Org., 597 U.S. 215 (2022). Hence, abortion was established as a fundamental right to which the strict scrutiny standard of review applied, where laws restricting abortion would be found unconstitutional if they were not narrowly tailored to further a compelling government interest. See id. at 154–55. The thirty-six-week pregnancy term was divided into three parts. Id. at 164–65. The first twelve weeks of pregnancy necessitated absolute privacy for women regarding the abortion decision. See id. at 163–64. The second twelve-week period (weeks twelve to twenty-four) required a compelling interest for states to regulate the abortion procedure in the interests of maternal health. Id. Finally, the last twelve-week period (weeks twenty-four to thirty-six) allowed states to ban abortions after twenty-four weeks to protect the life of the unborn child, or fetus, based on viability. See id. at 164–65. The trimester approach became time-bound and unworkable as technology altered the viability of a fetus (meaning the timeframe when the fetus can survive on its own). City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 456–58 (1983) (O’Connor, J., dissenting), overruled by Casey, 505 U.S. 833, overruled by Dobbs, 597 U.S. 215. Moreover, later-term abortions had become safer because of advances in medical technology. Id. at 454–55. As a result, Justice Sandra Day O’Connor suggested in the 1983 case City of Akron v. Akron Center for Reproductive Health, Inc. that the trimester approach should be replaced by the undue burden standard. 462 U.S. at 453 (O’Connor, J., dissenting).
of the law. If it were deemed that a law did not place an undue burden on a woman seeking an abortion, then courts must assess the law according to the more deferential standard of rational basis review. In *Casey*, the plurality opinion applied the undue burden test to the Pennsylvania laws and upheld all of the restrictions except for the spousal notification rule, which the plurality found placed an undue burden on a woman seeking an abortion because it gave too much decisional power to her husband and had the potential to give rise to spousal abuse.

On the day the opinion was announced, Justices Souter, Kennedy, and O’Connor read aloud from the bench portions of the opinion that each had authored. Souter provided “the most eloquent section” of the *Casey* opinion with his defense of and respect for the precedent established in *Roe*. Souter expressed his concern that any political attempt to overturn a precedent involving such a highly divisive issue as abortion undoubtedly threatened the legitimacy of the Court as an institution.

Justices John Paul Stevens and Harry Blackmun agreed with the plurality that the *Roe* precedent must be preserved and the spousal notification rule was unconstitutional, which technically formed a five-person majority. But Justice Stevens and Justice Blackmun authored separate opinions concurring in part and dissenting in part because they disagreed with the plurality’s decision to uphold most of the Pennsylvania laws at issue. In his application of the undue burden test, Justice Stevens wrote that the informed consent requirement and the twenty-four-hour waiting period rule should also have been struck down.

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54 See *Casey*, 505 U.S. at 877 (plurality opinion).
55 See id. at 877–78. Under the rational basis test, also known as minimal scrutiny, states simply needed to justify an abortion law by arguing it served a legitimate goal, such as protecting the health of the mother or life of the fetus. See id.
56 See id. at 879, 897–98.
58 See id.
59 Id.; *Casey*, 505 U.S. at 836 (plurality opinion).
60 See *Casey*, 505 U.S. at 911–22 (Stevens, J., concurring in part and dissenting in part); id. at 922–43 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
61 See opinions cited supra note 60.
62 *Casey*, 505 U.S. at 920–22 (Stevens, J., concurring in part and dissenting in part).
Justice Blackmun went further and argued that all of the Pennsylvania laws should have been declared unconstitutional. He maintained that the Roe trimester approach and strict scrutiny standard should have been applied to each of the laws even if the law was judged not to have placed an undue burden on a woman seeking an abortion. Justice Blackmun argued this approach would provide the greatest protection for women’s reproductive choices.

Chief Justice Rehnquist and Justice Antonin Scalia, joined by Justices Byron White and Clarence Thomas, also authored opinions that concurred in part and dissented in part. Chief Justice Rehnquist agreed with the plurality in upholding most of the restrictions but disagreed with the preservation of Roe and the decision to strike down the spousal notification rule. In doing so, Chief Justice Rehnquist aligned with Justice Scalia’s opinion. In judging abortion restrictions, Chief Justice Rehnquist and Justice Scalia both rejected the strict scrutiny approach in favor of applying the rational basis test, which would have allowed for all the Pennsylvania laws to withstand constitutional scrutiny. Moreover, Chief Justice Rehnquist expressed uncertainty about whether the right to privacy even exists in the Constitution protecting the right to access abortion, while Justice Scalia firmly argued that the right to an abortion is not a constitutionally protected liberty.

In contrast with Souter’s conservative vote in Benten, he sided with the liberal justices in upholding the Roe precedent in Casey. Souter’s defense of Roe was at least partly based on his respect for precedent and his concern for the reputation and legitimacy of the Court as an interpreter of

63 Id. at 930, 934–40 (Blackmun, J., concurring in part and dissenting in part).
64 Id. at 929–34 (Blackmun, J., concurring in part and dissenting in part).
65 Id. at 930 (Blackmun, J., concurring in part and dissenting in part).
66 Id. at 944–79 (Rehnquist, C.J., concurring in part and dissenting in part); id. at 979–1002 (Scalia, J., concurring in part and dissenting in part).
67 Id. at 966–79 (Rehnquist, C.J., concurring in part and dissenting in part).
68 Id. at 944, 974–76 (Rehnquist, C.J., concurring in part and dissenting in part).
69 Id. (Rehnquist, C.J., concurring in part and dissenting in part); id. at 983–85, (Scalia, J., concurring in part and dissenting in part).
70 Id. at 953, 964, 966 (Rehnquist, C.J., concurring in part and dissenting in part); id. at 981 (Scalia, J., concurring in part and dissenting in part).
71 Id. at 951–53 (Rehnquist, C.J., concurring in part and dissenting in part); id. at 979–81 (Scalia, J., concurring in part and dissenting in part).
72 Benten v. Kessler, 505 U.S. 1084 (1992); Casey, 505 U.S. at 843 (plurality opinion).
the law. 73 In *Casey*, Souter refused to serve as an ideological vote for the conservative bloc. 74 Souter’s concern about following case law outweighed any personal views he might have harbored on privacy and abortion. 75

**C. Souter in the Post-Casey Era**

Four years after the *Casey* ruling, Souter again joined the liberal bloc with his vote in *Leavitt v. Jane L.* 76 In *Leavitt*, the Court reviewed a 1991 Utah statute that limited both earlier- and later-term abortions. 77 Under the statute, prior to twenty weeks of pregnancy, earlier-term abortions were only permitted under five circumstances: (1) if the abortion was necessary to save the life of the mother as determined by a medical professional, (2) if the pregnancy resulted from the rape of a child that was reported to law enforcement prior to the abortion, (3) if the pregnancy resulted from incest that was reported to law enforcement prior to the abortion, (4) if the abortion was necessary to avoid grave danger to the health of the woman as determined by an attending physician, or (5) if the pregnancy would result in a child born with serious defects. 78 After twenty weeks of pregnancy, the statute permitted later-term abortions under only three circumstances: (1) if the abortion was necessary to save the life of the mother, (2) if the pregnancy was necessary to avoid grave danger to the health of the woman, or (3) if the pregnancy would result in a child born with serious defects. 79

In 1992, the U.S. District Court for the District of Utah struck down the earlier-term provision as unconstitutional under *Casey*, determining that the law failed to pass the undue burden test and therefore violated a woman’s right to privacy. 80 The district court also held that the later-term provision was severable from the earlier-term provision. 81 Therefore, the later-term provision was upheld as

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73 *Casey*, 505 U.S. at 843; see Garrow, *supra* note 57.
74 See Garrow, *supra* note 57.
75 See *Casey*, 505 U.S. at 845–46.
77 *Id.* at 138.
78 *Id.* at n.1.
79 *Id.*
81 *Id.* at 871.
constitutional. The district court based its severability ruling on two Utah Supreme Court decisions from the mid-1980s that held that a provision could be judged separately if it “[could] stand alone and serve a legitimate purpose.”

The Court of Appeals for the Tenth Circuit overturned the district court’s ruling in part and held that the later-term provision was not severable from the earlier-term provision, and, therefore, both provisions were struck down. The Tenth Circuit concluded that the Utah State Legislature would not have wanted to limit later-term abortions unless it could also limit the earlier-term abortions because the goal of the statute was to ban all abortions.

Utah Governor Michael O. Leavitt appealed the Tenth Circuit’s decision and the U.S. Supreme Court granted certiorari. In a 5–4 decision, the conservative bloc of the Court prevailed and reversed the Tenth Circuit’s decision. In a per curiam opinion for the Court, Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas stated that the Tenth Circuit was mistaken in its interpretation of the state legislature’s intent. As highlighted by the majority, the Utah Legislature amended the state code to clarify that if one provision is struck down, then other provisions are severable and effective until they are judged to be unconstitutional. Moreover, the Court found that the Tenth Circuit erred in holding the later-term provision was not severable simply because the provision’s effectiveness was dependent on the earlier-term provision being found constitutional. The majority of the Court asserted that Utah law does not require one provision to be subordinate to another, and, therefore, the fate of separate provisions can be distinct.

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82 Id.
83 Id. (citing Berry v. Beech Aircraft, 717 P.2d. 670, 686 (Utah 1985); Utah Tech. Fin. Corp. v. Wilkinson, 723 P.2d. 406, 414 (Utah 1986)). In terms of a legitimate purpose, the district court cited Roe in arguing that a state may ban post-viability abortions if the ban provides exceptions, as the Utah later-term provision did. See id. (citing Roe v. Wade, 410 U.S. 113, 164 (1973)).
85 Id. at 1497, 1499.
86 See Leavitt, 518 U.S. at 146 (5–4 decision), rev’g per curiam sub nom. Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995).
87 Id.
88 Id. at 140.
89 Id. at 139–40.
90 Id. at 140–42.
91 Id.
Justice Stevens authored the dissenting opinion and was joined by Justices Ginsburg, Breyer, and Souter. Justice Stevens argued that the Court should not have granted certiorari to a case involving state law because the Court of Appeals for the Tenth Circuit was better equipped to judge the constitutionality of state laws within its jurisdiction. Thus, Justice Stevens concluded that the Court should have exercised judicial restraint. Interestingly, the conservative majority in Leavitt was critical of the appellate court, claiming that it failed to exercise judicial restraint in having a panel of judges from Oklahoma, Colorado, and Kansas reverse the Utah district court’s decision regarding its own state law. In response to the conservative majority, Justice Stevens noted that circuit courts do not owe any deference to federal district courts on questions regarding state law.

After the Leavitt ruling, Souter rejoined the conservative wing of the Court the following term with his vote in Mazurek v. Armstrong. In Mazurek, the Court considered a 1995 Montana state law that required that abortions be performed only by licensed physicians. The Court of Appeals for the Ninth Circuit suggested that the law likely imposed an undue burden on women under the Casey standard. While the Ninth Circuit was still in the preliminary stages of reviewing the case, the U.S. Supreme Court intervened and granted certiorari. In a per curiam opinion, the Court applied the undue burden test and held, by a 6–3 vote, that there was not sufficient evidence that the Montana law presented a substantial obstacle to a woman attempting to secure an abortion. According to the majority, the licensed physicians and physician assistants who challenged the law failed to show that the State of Montana possessed any unlawful intent and, therefore, their chances of

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92 See id. at 146 (Stevens, J., dissenting).
93 Id.
94 Id.
95 Id. at 145 (majority opinion).
96 Id. at 146 n.* (citing Salve Regina Coll. v. Russell, 499 U.S. 225, 235–40 (1991)).
98 Id. at 969.
99 See Armstrong v. Mazurek, 94 F.3d 566, 567–68 (9th Cir. 1996), rev’d, Mazurek, 520 U.S. 968.
100 See Mazurek, 520 U.S. at 976.
101 Id. at 972.
success on the merits were minimal. Souter joined the per curiam opinion, along with five conservative justices, which explained that states have wide discretion to determine whether specific medical procedures should be restricted to licensed physicians. Under that reasoning, as long as abortion regulations did not pose an undue burden on a woman under *Casey*, states had broad flexibility in crafting such legislation.

Justice Stevens authored a dissenting opinion, joined by Justices Ginsburg and Breyer. Justice Stevens maintained that the Ninth Circuit may have erred in concluding that a fair chance of success existed in challenging the statute, but he noted that the Court should not have accepted the case for review because the circuit court was still in the early stages of proceedings when certiorari was granted. He also expressed concern that the 1995 Montana law targeted a single person, Susan Cahill, who was the only physician assistant performing abortions in the state at the time. Justice Stevens concluded that there may have been sufficient evidence that the State Legislature demonstrated unlawful intent by targeting Cahill to make it more difficult for women in Montana to obtain abortions. Cahill had been the focus of anti-abortion groups for years, and Justice Stevens emphasized that the Montana law effectively restricted the only non-physician in the state who performed abortions without any evidence that her practice posed any more of a health risk than a licensed physician’s. According to Justice Stevens, the law likely placed an undue burden on women seeking to exercise their right to abortion.

During the same term as the *Mazurek* ruling, the Court voted unanimously in *Lambert v. Wicklund* to uphold a Montana statute involving parental notification for a minor to access abortion. In 1995, the Montana State Legislature passed the Parental Notice of Abortion Act, which required at least one parent be notified forty-eight hours prior to a minor

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102 Id. at 972–74.
103 Id. at 973.
104 Id.
105 Id. at 977 (Stevens, J., dissenting).
106 Id.
107 Id. at 977–78.
108 Id. at 979–80.
109 Id. at 980.
110 Id. at 979–80.
having an abortion.\textsuperscript{112} The notification requirement could be avoided by meeting one of three conditions under a judicial bypass provision; \textsuperscript{113} one of those conditions allowed an unemancipated minor to prove to the court that the notification was not in her best interests.\textsuperscript{114} The Ninth Circuit held that the judicial bypass provision was unconstitutional because it was too restrictive and failed to provide a waiver if the minor simply showed that the abortion, by itself, was in her best interests.\textsuperscript{115} The Ninth Circuit relied upon a 1979 case, \textit{Bellotti v. Baird}, where the Supreme Court established the necessary criteria for a minor’s use of a judicial bypass provision.\textsuperscript{116} One such requirement involved providing an opportunity for the minor to convince a judge that it was simply in her best interests to obtain an abortion, which provided another option beyond requiring a showing that the notification \textit{violated} her best interests.\textsuperscript{117} According to the Ninth Circuit, the narrow language of the Montana statute

\begin{footnotes}
\footnotetext[112]{Id.}
\footnotetext[113]{Id. at 294 (citing MONT. CODE. ANN. § 50-20-204 (1995)) (explaining that the notice requirement could be waived if the minor showed clear and convincing evidence that: (1) she was “sufficiently mature” to make a decision to undergo an abortion; (2) there existed “a pattern of physical, sexual, or emotional abuse” by one of the minor’s parents or guardians; or (3) the notification itself was not in her best interests).}
\footnotetext[114]{Id. at 293–94.}
\footnotetext[115]{Wicklund v. Salvagni, 93 F.3d. 567, 571–72 (9th Cir. 1996), rev’d per curiam sub nom. Lambert v. Wicklund, 520 U.S. 292 (1997).}
\footnotetext[116]{Id. at 571 (citing Bellotti v. Baird, 443 U.S. 622 (1979)). The Court of Appeals for the Ninth Circuit argued that the Montana statute conflicted with precedent. \textit{Id.} In \textit{Bellotti}, the Court struck down a Massachusetts statute that required an unemancipated minor to obtain consent from both parents before having an abortion. \textit{Bellotti}, 443 U.S. at 648–51. The judicial bypass provision of the statute was determined to be too restrictive and so violated a minor’s right to an abortion by imposing an undue burden because it forced a minor to show “good cause” if one or both parents refused to give their consent. \textit{See id.} at 633–51. The Court reasoned that to meet constitutional muster, a statute that requires a pregnant minor to notify or obtain consent of one or both parents must also include a judicial bypass alternative to that consent. \textit{Id.} at 643. Proper procedures for such a judicial bypass required: (1) that the minor show that she is mature and is making an informed decision in consultation with a physician though without parental consent, or that she is able to convince the judge that the abortion would be in her best interests even if she lacks such maturity; (2) that the minor retain anonymity; and (3) that the process be accelerated to guarantee the abortion will be performed. \textit{Id.} at 643–44. In a case out of Akron, Ohio, the Court ruled that an Ohio parental notification bill was constitutional and met the \textit{Bellotti} requirements as it allowed the minor to attempt to convince a judge that an abortion was in her best interests. Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 511–13 (1990).}
\footnotetext[117]{See Salvagni, 93 F.3d at 567, 571–72 (citing Bellotti, 443 U.S. at 643–44).}
\end{footnotes}
failed to satisfy this criterion and so placed an undue burden on minors seeking abortion.\textsuperscript{118}

In a per curiam opinion, the U.S Supreme Court unanimously overturned the Ninth Circuit decision, relying on its prior application of \textit{Bellotti} in a 1990 case, \textit{Ohio v. Akron Center for Reproductive Health}.\textsuperscript{119} In \textit{Akron}, the Court upheld an Ohio state law that required one parent notification and contained a judicial bypass provision that was indistinguishable from the Montana provision.\textsuperscript{120} There, the justices voted 6–3 that the Ohio law satisfied the judicial bypass requirements established by the \textit{Bellotti} precedent.\textsuperscript{121} Following the earlier holding in \textit{Lambert v. Wicklund}, the language of the Ohio law and the opinions written in the \textit{Akron} case demonstrated that the phrase “notification is not in her best interests” in the Montana law satisfied the requirement that a minor establish that an abortion without any reference to notification is in her best interests.\textsuperscript{122} Hence, the language of the Ohio law went beyond the notification requirement by implying that a minor could also simply show that obtaining an abortion is in her best interests.

Souter split his votes in the post-\textit{Casey} rulings between the liberal and conservative wings of the Court.\textsuperscript{123} While the \textit{Lambert} ruling united the Justices based upon the language of the Montana law, Souter’s votes in the \textit{Leavitt} and \textit{Mazurek} decisions signaled his deference to the states regarding the constitutionality of laws restricting abortion access.\textsuperscript{124} Souter again appeared to show concern for the legitimacy of the Court as he was the only justice on the Court who voted for judicial restraint in both \textit{Leavitt} and \textit{Mazurek}.\textsuperscript{125} In \textit{Leavitt}, Souter joined the liberal justices in deferring to the lower federal court’s interpretation of Utah state law, but he did not join the liberal justices’ dissent in \textit{Mazurek} when they sought to intervene in a matter of Montana state law in order to

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\footnote{118 Id. at 567, 571–72.}
\footnote{119 \textit{Lambert}, 520 U.S. at 295, rev’g per curiam sub nom. Wicklund v. Salvagni, 93 F.3d. 567 (9th Cir. 1996).}
\footnote{120 See \textit{Akron}, 497 U.S. at 511–12.}
\footnote{121 Id.}
\footnote{122 \textit{Lambert}, 520 U.S. at 297–98.}
\footnote{123 See id. at 293 (per curiam) (where Souter joined the unanimous ruling); \textit{Leavitt} v. Jane L., 518 U.S. 137, 146 (1996) (5–4 decision) (Stevens, J., dissenting) (per curiam) (where Souter joined Justice Stevens’s dissent); \textit{Mazurek} v. Armstrong, 520 U.S. 968, 969 (1997) (6–3 decision) (per curiam) (where Souter joined the conservative majority).}
\footnote{124 See cases cited supra note 123.}
\footnote{125 See \textit{Leavitt}, 518 U.S. 137; \textit{Mazurek}, 520 U.S. 968.}
\end{footnotes}
support a physician assistant performing abortions. Of the nine justices who participated in these two cases, Souter was the lone justice who did not seem to cast his votes based on ideology.

D. Partial-Birth Abortion

In 2000, the Court was presented with the highly controversial issue of partial-birth abortion, also referred to as late-term abortion. In *Stenberg v. Carhart*, the Court held—in a 5–4 decision—that a Nebraska law prohibiting partial-birth abortion was unconstitutional. Souter cast a vote with the liberal Justices, joining Justice Breyer’s majority opinion along with Justices Ginsburg and Stevens, as well as Justice O’Connor—whose vote more often aligned with the conservative bloc. The five Justices in the majority ruled that the ban on partial-birth abortion increased physicians’ hesitance to perform abortions and thus placed an undue burden on a woman’s right to abortion in violation of the liberty implicit in the Due Process Clause of the Fourteenth Amendment.

In his majority opinion, Justice Breyer cited *Roe* and *Casey* in striking down the Nebraska law as unconstitutional. According to those precedents, it was the governing standard for states regulating abortion to provide exceptions to restrictions for the life or health of the mother. The Nebraska ban on partial-birth abortion contained an exemption to save the life of the mother but lacked an exception to preserve her health. Justice Breyer noted that under the Nebraska law, physicians who performed partial-birth abortions could lose their medical licenses, and

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126 *See Leavitt*, 518 U.S. 137; *Mazurek*, 520 U.S. 968.
127 *See Leavitt*, 518 U.S. 137; *Mazurek*, 520 U.S. 968.
128 *Stenberg v. Carhart*, 530 U.S. 914, 921–22 (2000). The Nebraska law at issue banned “partial birth abortion,” which the statute defined as an abortion performed during the partial vaginal delivery of a child. *Id.*
129 *Id.* at 918–19.
130 *Id.*
131 *Id.* at 945–46.
134 *Id.* at 921–22.
women who obtained an abortion could face felony convictions with the possibility of twenty years in prison and up to a $25,000 fine.135 The majority concluded that a woman deciding whether to obtain an abortion faced the real possibility of prosecution, conviction, and imprisonment, which constituted substantial obstacles and, in turn, undue burdens under the *Casey* test.136

In his discussion of abortion practices, Justice Breyer maintained that while Nebraska banned only the dilation and extraction (D&X) procedure, D&X is, at times, indistinguishable from the dilation and evacuation (D&E) procedure, which is the most common abortion procedure used by physicians during the second trimester.137 The D&X procedure involves removing part of the fetus intact before terminating it while it is partially outside the mother’s body. 138 In contrast, the D&E procedure involves the termination of the fetus while it is inside the mother’s body, after which it is removed in parts.139 The Court ruled that the statutory construction of the law placed an undue burden on a woman obtaining a second trimester abortion, as it failed to distinguish between the D&X partial-birth abortion method, which it deemed illegal, and the D&E procedure, which was technically legal but was entangled in the Nebraska ban.140

135 *Id.* at 922.
136 *Id.* at 945–46; see also *Casey*, 505 U.S. at 877.
137 *Stenberg*, 530 U.S. at 923–29. During the D&E procedure, the cervix is dilated and some fetal tissue is removed using either vacuum or non-vacuum surgical instruments. *Id.* at 924. After the fifteenth week of pregnancy, it is possible that a physician may need to use instruments to dismember the fetus or to evacuate the fetus from the uterus. *Id.* at 925. The D&E procedure is the most common procedure used by physicians early in the second trimester (at twelve to twenty weeks of pregnancy) and is considered relatively safe compared to other second trimester abortions, such as inducing labor. *Id.* at 924, 926. After sixteen weeks, a variation of the D&E procedure involves removing the fetus intact. *Id.* at 927. If the fetus presents itself head-first, then the D&E is utilized. *Id.* However, if it presents feet-first, then the D&X procedure, which is more commonly associated with the term “partial-birth abortion,” is performed instead. *Id.* at 986 n.5 (Thomas, J., dissenting). Interestingly, the D&X is safer for the pregnant person than even the D&E procedure because it always involves removing the fetus intact while variations of the D&E procedure involve the use of instruments to make several passes through the uterus to evacuate parts of the fetus which increases the risk of injury caused by perforation or other complications. See *id.* at 926, 928–29. Justice Breyer was critical of the Nebraska law because, in an attempt to prohibit only the D&X procedure, the state legislature failed to draw a clear distinction between D&X and a variation of the D&E procedure. *Id.* at 939.
138 *Id.* at 959 (Kennedy, J., dissenting).
139 *Id.* at 924–25 (majority opinion).
140 *Id.* at 945–46.
Justice Stevens authored a concurring opinion in which he emphasized that a state does not have a legitimate interest in dictating to a physician the type of medical procedure that is in the best interests of a woman.\textsuperscript{141} Similar to Justice Breyer’s majority opinion, Justice Stevens also expressed concern that the Nebraska law implicated the D&E method.\textsuperscript{142} Finding that the D&X procedure was not clearly distinguishable from the D&E procedure, Justice Stevens asserted that the law created an undue burden for women seeking abortion.\textsuperscript{143}

Justice O’Connor also wrote a concurring opinion focused on the failure of the Nebraska law to provide an exception that would permit an abortion when necessary for the health of the mother.\textsuperscript{144} According to Justice O’Connor, the law created confusion because it covered both the D&X and D&E procedures.\textsuperscript{145} Therefore, the law placed a substantial obstacle in a woman’s path to abortion because the D&E procedure, the most commonly used method, was linked to the ban.\textsuperscript{146} In conclusion, Justice O’Connor suggested she would vote to uphold an unambiguous ban on the D&X procedure with an exception for the health of the mother.\textsuperscript{147}

Justice Ginsburg authored a third concurring opinion and stressed that the nature of the Nebraska law did not protect the fetus or serve the interests of the mother’s health or life.\textsuperscript{148} She opined that the law simply attempted to ban an abortion procedure to weaken the precedents established in \textit{Roe} and \textit{Casey}.\textsuperscript{149} Justice Ginsburg also endorsed Justice Stevens’s concurrence, emphasizing that the law created a substantial obstacle to a woman’s decision to choose the

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\item\textsuperscript{141} Id. at 946 (Stevens, J., concurring).
\item\textsuperscript{142} Id. at 946–47.
\item\textsuperscript{143} Id. Justice Stevens concluded his concurring opinion by stating that it was irrational to ban either the D&E or the D&X procedures because the two methods were “equally gruesome” and the state had no legitimate interest in prohibiting one approach over the other. \textit{Id}.
\item\textsuperscript{144} Id. at 947 (O’Connor, J., concurring).
\item\textsuperscript{145} Id. at 948–49 (asserting that the language defining the banned D&X procedure also applied to the unbanned D&E procedure).
\item\textsuperscript{146} Id. at 949–50.
\item\textsuperscript{147} Id. at 950–51. Justice O’Connor explained that Kansas, Utah, and Montana had passed statutes involving partial-birth abortion that banned only the D&X procedure with an exception for the life of the mother. \textit{Id}. at 950. She wrote that in so doing those states had “avoid[ed] a principal defect of the Nebraska law.” \textit{Id}.
\item\textsuperscript{148} Id. at 951 (Ginsburg, J., concurring).
\item\textsuperscript{149} Id. at 952.
\end{enumerate}
\end{footnotesize}
medical option that her physician believes best protects her health and liberty.\textsuperscript{150}

There were four separate dissenting opinions.\textsuperscript{151} Justice Kennedy’s dissent argued that the Nebraska law was consistent with the \textit{Casey} precedent and asserted that states have a legitimate interest in protecting the life of the unborn under some circumstances.\textsuperscript{152} While the various opinions in \textit{Stenberg} focused on the interests of the mother and the fetus, Justice Kennedy noted that \textit{Casey} also emphasized the state interest in protecting the life of the unborn.\textsuperscript{153} He opined that the states have a substantial interest in regulating abortion and the majority neglected to recognize that fact.\textsuperscript{154} Justice Kennedy also expressed that \textit{Casey} did not grant absolute discretion to individual physicians in deciding which medical procedures are reasonable.\textsuperscript{155} He noted that states play a critical role in determining the appropriateness of medical treatments performed by physicians.\textsuperscript{156} Finally, Justice Kennedy concluded that the majority incorrectly interpreted the Nebraska law.\textsuperscript{157} He maintained that the statutory construction of the law was clear in prohibiting only the D&X procedure and did not implicate any variation of the D&E procedure.\textsuperscript{158}

The other three dissenting opinions represent more conservative perspectives on the right to privacy and abortion.\textsuperscript{159} Unlike Justice Kennedy, Chief Justice Rehnquist and Justices Scalia and Thomas refused to apply \textit{Roe} or \textit{Casey} as precedent.\textsuperscript{160} All three justices did not recognize the right to abortion or the right to privacy in the U.S. Constitution.\textsuperscript{161} In Justice Thomas’s dissent, he referred to partial-birth abortion as “hard to distinguish from infanticide” and referenced the trauma imposed upon physicians who had

\textsuperscript{150} Id.
\textsuperscript{151} Id. at 952 (Rehnquist, C.J., dissenting); id. at 953 (Scalia, J., dissenting); id. at 956 (Kennedy, J., dissenting); id. at 980 (Thomas, J., dissenting).
\textsuperscript{152} Id. at 956–57 (Kennedy, J., dissenting). At the time of the \textit{Stenberg} ruling in 2000, thirty states had prohibited partial-birth abortion in some manner. Id. at 983, 1020 (Thomas, J., dissenting).
\textsuperscript{153} Id. at 956–57 (Kennedy, J., dissenting).
\textsuperscript{154} Id. at 961.
\textsuperscript{155} Id. at 968–70.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 972–78.
\textsuperscript{158} Id.
\textsuperscript{159} See id. at 952 (Rehnquist, C.J., dissenting); id. at 955–56 (Scalia, J., dissenting); id. at 980 (Thomas, J., dissenting).
\textsuperscript{160} See opinions cited supra note 159.
\textsuperscript{161} See opinions cited supra note 159.
carried out the procedure. In Justice Scalia’s dissent, he criticized the undue burden test, and he claimed that it simply provided the justices in the majority an opportunity to impose their attitudes and values on their interpretation of the Nebraska law. Justice Scalia also asserted that it was absurd to think that states could not prohibit “this visibly brutal means of eliminating our half-born posterity.”

In 2007, the Supreme Court returned to the issue of partial-birth abortion in Gonzales v. Carhart, a case centered around the constitutionality of a federal statute passed by Congress and signed into law by President George W. Bush in 2003. The Partial-Birth Abortion Ban Act of 2003 prohibited second trimester abortions involving the delivery of an intact fetus through a specific type of D&E, which is almost identical to the intact D&X method. Unlike the partial-birth abortion ban struck down in Stenberg, the federal law at issue in Gonzales specifically targeted the D&E and D&X methods, which were considered intact procedures where the intent of the physician was to terminate the fetus while it was partially outside the body of the mother. As discussed above, the Nebraska law at issue in Stenberg was declared unconstitutional because it failed to differentiate between the intact D&E and other D&E methods where the fetus was removed in pieces from inside the body of the mother and, therefore, obstructed access to the D&E procedures.

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162 Stenberg, 530 U.S. at 982–83 (Thomas, J., dissenting).
163 Id. at 954–55 (Scalia, J., dissenting).
164 Id. at 953.
166 See id. at 136. An intact D&E procedure is considered a partial-birth abortion involving terminating a fetus when the entire head is outside the body of the mother. Id. at 147–48. An intact D&X is almost identical to an intact D&E except that the intact D&X procedure is used when the delivery is a breech and the fetus exits the mother’s body feet-first. See id. In an intact D&X, the fetus is terminated when “any part of the fetal trunk past the navel is outside the body of the mother.” Id. at 142. Intact D&E and D&X are prohibited by the Partial-Birth Abortion Ban Act of 2003 and are distinct from a standard, and more common, D&E performed during the second trimester, because the fetus is not partially delivered intact but instead is removed in several pieces from inside the mother’s body. Id. at 134–36.
167 Id. at 141–42.
168 Stenberg, 530 U.S. at 929–30. The Nebraska law created confusion among physicians and patients by prohibiting the delivery of a “substantial portion” of the fetus which could be broadly interpreted to include the standard D&E procedure during the second trimester, which was technically legal. Id. at 948–50 (O’Connor, J., concurring). In short, the Nebraska law inadvertently criminalized
Prior to the *Gonzales* case reaching the Supreme Court, the Partial-Birth Abortion Ban Act of 2003 was deemed unconstitutional by district courts in California, New York, and Nebraska, as well as the Courts of Appeals for the Second, Eighth, and Ninth Circuits based on the reasoning laid out in *Stenberg*.\(^{169}\) The Ninth Circuit and California District Courts held that the federal law was vague and, while it contained an exception to save the mother’s life, it did not include an exception for the health of the mother.\(^{170}\) Similar to the *Stenberg* ruling, the Ninth Circuit and lower courts in California found that the Partial-Birth Abortion Ban Act was vague because it did not provide physicians with sufficient notice of the prohibited procedures.\(^{171}\) The lower courts also found that the Partial-Birth Abortion Ban Act created an undue burden for a woman because it failed to include an exception for the health of the mother.\(^{172}\) Because the Eighth Circuit concluded that there was a lack of consensus regarding how the medical community viewed the health exception, the court reasoned that legislatures must err on the side of protecting the health of the mother based upon the *Stenberg* precedent.\(^{173}\)

Justice Kennedy wrote for the five-person majority, holding that the Partial-Birth Abortion Ban Act was constitutional and did not violate the Due Process Clause of the Fifth Amendment.\(^{174}\) The opinion reiterated “that the government has a legitimate and substantial interest in preserving and promoting fetal life,” citing both *Roe* and *Casey*.\(^{175}\) The majority also challenged the lower courts’

\(^{169}\) *Gonzales*, 550 U.S. at 134, 144.

\(^{170}\) *Id.* at 143–44.

\(^{171}\) *See id.* at 144.

\(^{172}\) *Id.*

\(^{173}\) *Id.* at 143.

\(^{174}\) *Id.* at 168, rev’g *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005). The Eighth Circuit had concluded that the Partial-Birth Abortion Ban Act of 2003 violated the Fifth Amendment. *See Carhart*, 413 F.3d at 792, 795 n.2. The Due Process Clause in the Fifth Amendment is identical to the Due Process Clause of the Fourteenth Amendment. *Id.* at 795 n.2. In *Carhart*, the Fifth Amendment was invoked because it pertained to federal law, while the Fourteenth Amendment was raised in *Stenberg* because that case involved a Nebraska state law. *Id.* at 801–02.

\(^{175}\) *Gonzales*, 550 U.S. at 145.
conclusion that the federal statute was vague, noting that its language drew a clear distinction between the standard D&E procedures and the intact D&E and D&X methods defined as partial-birth abortion.\footnote{176 Id. at 147–49. However, it should be recognized that a change in the membership of the Court also played a significant part in the Gonzales ruling. Justice Sandra Day O'Connor, who voted with the majority to strike down the Nebraska statute in Stenberg, retired from the Court on January 31, 2006, and President George W. Bush replaced her with Justice Samuel Alito, a staunch conservative, who joined Justice Kennedy's majority opinion in Gonzales to uphold the federal law. David Stout, Samuel Alito Confirmed for U.S. Supreme Court, N.Y. TIMES (Jan. 31, 2006), https://www.nytimes.com/2006/01/31/world/americas/samuel-alito-confirmed-for-us-supreme-court.html [https://perma.cc/J4GJ-JQ7R].}

In response to the concerns about the absence of a health-of-the-mother exception, Justice Kennedy cited the medical community's division over whether it was necessary to require such an exception.\footnote{177 Gonzales, 550 U.S. at 162–63.} The majority disagreed with the lower courts and concluded that the Court's precedent gave Congress and State Legislatures broad discretion where there is uncertainty in medicine and science.\footnote{178 Id. at 163 (citing Kansas v. Hendricks, 521 U.S. 346, 360 (1997); Jones v. United States, 463 U.S. 354, 364–65, 370 (1983); Lambert v. Yellowley, 272 U.S. 581, 597 (1926); Collins v. Texas, 223 U.S. 288, 297–98 (1912); Jacobson v. Massachusetts, 197 U.S. 11, 30–31 (1905); Stenberg v. Carhart, 530 U.S. 914, 969–72 (2000) (Kennedy, J., dissenting); Marshall v. United States, 414 U.S. 417 (1974)).}

While the ruling in Gonzales was a victory for the pro-life movement, it should be noted that the decision did not overturn the Stenberg precedent, but rather distinguished itself from the earlier case.\footnote{179 Id. at 166–67.} Justice Kennedy's majority opinion upheld the Partial-Birth Abortion Ban Act on its face but left the door open to challenges over health exceptions if a particular situation demanded that a partial-birth abortion was necessary.\footnote{180 Id. at 167.} He cited the 2006 case Ayotte v. Planned Parenthood of Northern New England, where a unanimous Court held that a New Hampshire parental notification law, without a health exception for the minor, was constitutional.\footnote{181 Id. at 161 (citing Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006)); see Ayotte, 546 U.S. at 331.} In Ayotte, the Court refused to strike down the New Hampshire law on a facial challenge (meaning an attempt to have the entire law declared unconstitutional rather than only unconstitutional in a specific application).\footnote{182 Ayotte, 546 U.S. at 331.}
However, while a law without the health exception may be facially constitutional, it could be challenged as a violation of the right to privacy if certain circumstances arise during the application of the law.\^{183}

Souter, along with Justices Breyer and Stevens, joined Justice Ginsburg’s dissent in Gonzales.\^{184} Justice Ginsburg criticized the majority for ignoring the precedent in Casey and Stenberg, which held that any government regulation of the abortion procedure required a health exception for women.\^{185} Instead of focusing on the right to privacy, Justice Ginsburg argued that abortion restrictions must be judged based upon the personal autonomy and equality of women who have a right to control their reproductive lives.\^{186} In regard to the health risks for women, Justice Ginsburg noted that the intact D&E procedure was considered much safer than the other types of D&E procedures where the fetus is removed in parts.\^{187} Hence, Justice Ginsburg posited that banning one of the safest procedures for women while retaining methods performed during the second trimester that are less safe served no legitimate interest.\^{188} Finally, Justice Ginsburg stated that the majority failed to specify the type of challenge to the statute that might create the circumstances where an

\^{183} See Benjamin Wittes, The Supreme Court’s Shift on Abortion Is Not What You Think, BROOKINGS INST. (Apr. 30, 2007), https://www.brookings.edu/articles/the-supreme-courts-shift-on-abortion-is-not-what-you-think [https://perma.cc/46D9-XW4D]. While a law may be upheld against a facial challenge, the law may also be evaluated based upon narrower “as applied” challenges. Id. The Partial-Birth Abortion Ban Act of 2003 was upheld as constitutional as a facial matter, but pro-choice activists can file lawsuits targeted to determine if specific applications of the law could be blocked. Id. Hence, Gonzales is, in a sense, a compromise where pro-choice litigants can try to stop those applications of a law that might violate the Constitution while the bulk of the law would survive as favored by pro-life groups. For example, the courts could create a health exception that plausibly would be consistent with the state interest in protecting the life of the mother. Id. Gonzales, 550 U.S. at 169 (Ginsburg, J., dissenting).

\^{184} Id. at 170–71.

\^{185} Id. at 171–72.

\^{186} Id. at 177–78. Justice Ginsburg noted that expert witnesses had contended that the intact D&E procedure is safer for women with certain medical conditions, such as scarring, bleeding, heart disease, or compromised immunity. Id. She also noted that intact D&E limits the number of times that a physician must enter the cervix and uterus with surgical instruments, reducing the risk of trauma or perforation, which are considered to be the most serious complications for the nonintact D&E methods. Id. at 178. Moreover, Justice Ginsburg asserted that as opposed to removing the fetus in parts, the intact procedure reduces the possibility that any fetal tissue will remain in the uterus which could result in infection, bleeding, or infertility. Id.

\^{188} Id. at 181–82.
intact D&E, or D&X, might be used in the interest of the woman’s health. If such hypothetical circumstances arose, there would be no time for the courts to address the challenge because complications would likely require immediate medical attention.

Regarding the partial-birth abortion controversy, Souter consistently voted with the liberal justices. In both \textit{Stenberg} and \textit{Gonzales}, Souter supported the pro-choice position, but based upon his judicial philosophy, he was most likely motivated by respect for the precedent in \textit{Casey}. In \textit{Gonzales}, Souter joined Justice Ginsburg’s dissent, voting to strike down the federal ban on partial-birth abortion and to uphold the \textit{Casey} and \textit{Stenberg} precedents. While Justice Ginsburg’s dissent was grounded in her defense of women’s rights, Souter likely prioritized stare decisis and the Court’s reputation.

\section*{IV. Privacy and the Right to Die}

Euthanasia, which means to die “a good death,” has implicated the right to privacy in the modern era. Within the right to privacy exists a right for competent persons who are terminally ill to end their life by refusing treatment. However, in regard to physician-assisted suicide, the U.S. Supreme Court has refused to identify a right to die within the Due Process Clause of the Fourteenth Amendment and, for the most part, has granted deference to the states on this issue.

\subsection*{A. Cruzan v. Director, Missouri Department of Health}

On June 25, 1990, one month before Souter was appointed to the U.S. Supreme Court, the Justices issued their first ruling related to euthanasia in \textit{Cruzan v. Director, Missouri Department of Health}. The case involved a young woman, Nancy Cruzan, who was left in a vegetative state
following an automobile accident. When her parents requested state hospital officials in Missouri remove her feeding tube, the hospital employees refused to withdraw the life support system without a court order. Passive euthanasia, which is the practice of allowing someone to die by withholding medical treatment, was allowed by many states at the time, but the Missouri Supreme Court expressed doubt that the right to refuse treatment existed in every circumstance. The Missouri Supreme Court ultimately ruled in favor of the state hospital officials to protect the life of Cruzan, and the case was appealed to the U.S. Supreme Court.

In a 5–4 ruling, the Court affirmed the Missouri Supreme Court’s decision. Chief Justice Rehnquist wrote the opinion for a conservative majority comprised of Justices White, O’Connor, Scalia, and Kennedy, finding that, while competent persons possessed the liberty under the Fourteenth Amendment to refuse medical treatment, Missouri chose to preserve the life of an incompetent person in Cruzan absent a proper showing of evidence that the incompetent person wished to end life-saving treatment. Missouri maintained a heightened evidentiary standard in cases involving an incompetent person’s decision to refuse life-sustaining medical treatment wherein “clear and convincing evidence” (such as a living will) was necessary to prove that the decision to withdraw treatment was desired by the patient. Chief Justice Rehnquist emphasized that there was no certainty that family members would, at all times, act in the best interests of the incompetent patient and, moreover, an incorrect decision to withdraw treatment could not be reversed.

Justice Brennan’s Cruzan dissent was one of his last dissenting opinions before he retired and was replaced by Souter. Justice Brennan argued in favor of striking down the heightened evidentiary standard, reasoning that the

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197 Id. at 266.
198 Id. at 267–68.
199 Id. at 270–80.
200 Id. at 268–69.
201 Id. at 265.
202 Id. at 282.
203 Id. at 281–83.
204 Id.
205 Id. at 301 (Brennan, J., dissenting); see Epstein et al., supra note 4, at 723 (noting that Justice Brennan retired in 1990).
interests of the patient to be free of unwanted treatment outweighed the interests of the State of Missouri. Justice Brennan noted that family members were more likely than the state to act properly on behalf of their loved ones. In addition, he expressed concern that future medical technology would be able to extend life beyond any meaningful value, resulting in a significant increase of persons kept alive in a vegetative state.

B. Washington v. Glucksberg

In 1997, after Souter had been appointed, the Court issued unanimous rulings in two cases involving physician-assisted suicide (PAS), *Washington v. Glucksberg* and *Vacco v. Quill*. In *Glucksberg*, the justices upheld a ban on PAS enacted by the State of Washington. Relying upon the *Casey* precedent, Chief Justice Rehnquist wrote for the entire Court, holding that the ban on PAS did not place an undue burden on persons in violation of the right to privacy implicit in the Due Process Clause of the Fourteenth Amendment. The opinion asserted that the right to die was not a fundamental freedom rooted in the history and traditions of the nation. Thus, the Court applied the rational basis standard of review and found that the ban on PAS was connected to the state’s legitimate interest in protecting human life—particularly vulnerable groups in society, such as disabled and terminally ill patients, who could be susceptible to persuasion to end their lives unnecessarily. Chief Justice Rehnquist concluded the opinion by noting that Americans were currently debating the complexities of PAS, including its morality, legality, and practicality. Therefore, the Court

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206 *Cruzan*, 497 U.S. at 302.
207 *Id.* at 327–28.
208 *Id.* at 328–29.
211 206 *Glucksberg*, 521 U.S. at 735–36. The Washington law, entitled the Natural Death Act of 1979, states that “[a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.” WASH. REV. CODE § 9A.36.060(1) (1994). At the time of the decision, anyone violating the law potentially faced a felony conviction with the possibility of five years in prison and a $10,000 fine. WASH. REV. CODE §§ 9A.36.060(2), 9A.20.021(1)(c) (1994).
212 *Glucksberg*, 521 U.S. at 735.
213 *Id.* at 723–28.
214 *Id.* at 728–31.
215 *Id.* at 735.
deferred to the states in allowing this debate to continue in our free society.  

C. Vacco v. Quill

In Vacco v. Quill, a unanimous Court held that a New York ban on PAS did not violate the Equal Protection Clause of the Fourteenth Amendment. As in Glucksberg, Chief Justice Rehnquist authored the opinion for the Court where he rejected Dr. Timothy E. Quill’s argument that prohibiting PAS while allowing for passive euthanasia violated the equal protection rights of patients seeking PAS. The Court found that the distinction between active and passive euthanasia was rational. PAS, or active euthanasia, involves a physician directly assisting someone in ending their life, while passive euthanasia simply entails withholding treatment and allowing someone to die naturally without any direct assistance from a physician.

Souter authored concurrences in both Glucksberg and Quill. These concurrences are noteworthy because they were his first writings as a justice of the U.S. Supreme Court that expressed his views on privacy. In Glucksberg, Souter relied heavily on a dissenting opinion written by Justice John Marshall Harlan II in Poe v. Ullman, where Justice Harlan argued that a ban on contraception violated the right to privacy. In his discussion of substantive due process in Poe, Justice Harlan interpreted the Due Process Clause of the Fourteenth Amendment to contain an implicit right to privacy that includes the liberty to be free from “substantial arbitrary impositions and purposeless restraints.” Justice Harlan

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216 See id.
218 Id. at 807–08.
219 Id. at 800–01.
220 See id.
221 Glucksberg, 521 U.S. at 752–89 (Souter, J., concurring); Quill, 521 U.S. at 809–10 (Souter, J., concurring).
222 See Glucksberg, 521 U.S. at 752–89 (Souter, J., concurring); Quill, 521 U.S. at 809–10 (Souter, J., concurring).
223 See Glucksberg, 521 U.S. at 752–89 (Souter, J., concurring) (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).
224 Poe, 367 U.S. at 543. Justice Harlan’s legendary dissent in Poe became the Court’s holding in the 1965 Griswold case. See Griswold v. Connecticut, 381 U.S. 479 (1965). In Griswold, the Court recognized a right to personal privacy for the first time in striking down a Connecticut ban on the dissemination of information pertaining to contraception. See id. at 485–86.
also argued that the state interest in any regulation aimed at such a freedom demanded careful scrutiny. 225

In evaluating the constitutionality of the Washington ban on PAS, Souter adopted Justice Harlan’s approach, that the liberty of the individual must be balanced with the demands of organized society. 226 While Justice Harlan did not utilize any prescribed formula in the context of constitutional due process, he judged a law based on whether it fell within the boundaries of reasonableness. 227 Applying that same approach, Souter concluded that the Washington law was reasonable because the state has an interest in protecting persons from the use of the law beyond the narrow boundaries of the terminally ill, who were deemed competent. 228 Souter expressed concern that persons without terminal illnesses might be irresponsibly persuaded to end their lives. 229 He also raised the issue of how to determine competency, and that there can be no certainty in determining whether a person possesses the ability to make the correct decision. 230 In an attempt to demonstrate the risks associated with assisted suicide, Souter referenced the movement in the Netherlands that legalized euthanasia. 231 He cited studies with findings that suggested the guidelines employed in the Netherlands may have failed to protect persons from involuntary euthanasia. 232 Given the scholarly disagreement about the risks of euthanasia in the Netherlands, Souter refused to support the due process claim in Glucksberg at that time. 233

While Souter maintained that the judiciary has an obligation to review substantive due process claims, such as privacy claims, he endorsed the practice of judicial restraint, arguing that legislatures are better equipped to deal with euthanasia based upon their ability to conduct research on the issue as it evolves. 234 Souter noted that since historical practices and traditions of assisted suicide are in the early stages, the Court’s ruling in Glucksberg stands for the present

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225 Poe, 367 U.S at 543 (Harlan, J., dissenting).
226 Glucksberg, 521 U.S. at 765 (Souter, J., concurring).
227 Id.
228 Id. at 787–89.
229 Id. at 784. Souter also expressed concern about how the financial incentives of family members, physicians, or hospital administrators might factor into the decision to carry out an assisted suicide. Id. at 784–85.
230 Id. at 755.
231 Id. at 785–86.
232 Id. at 786.
233 Id.
234 Id. at 788.
but may be reconsidered in the future as lower courts encounter challenges to currently-held assumptions.\(^{235}\)

Souter’s concurrence in Quill reiterated his Glucksberg concurrence.\(^{236}\) In Quill, Souter again stressed that assisted suicide was not a fundamental right found within the Due Process Clause of the Fourteenth Amendment.\(^{237}\) However, he asserted that claims of physicians and patients were of great importance and must be respected.\(^{238}\) Souter applied the same reasoning in Quill as he had in Glucksberg, concluding that the New York law was not arbitrary under the due process criterion espoused by Justice Harlan in his Poe dissent.\(^{239}\) According to Souter, the New York ban on PAS fell within the zone of reasonableness because of the sharp distinction the ban drew between withdrawing medical treatment, which allows someone to die passively, and administering drugs to hasten the death of a person.\(^{240}\)

D. Gonzales v. Oregon

In the 2005–2006 term, the Court returned to the issue of privacy when it addressed whether an interpretive rule allowing for criminal prosecution of physicians infringed upon a state law authorizing physician-assisted suicide.\(^{241}\) Gonzales v. Oregon involved the Oregon Death with Dignity Act (ODWDA) of 1994, which was passed by Oregon voters through a ballot initiative.\(^{242}\) The law was the first of its kind, allowing physicians to prescribe lethal doses of medicine to terminally ill patients.\(^{243}\) President George W. Bush’s administration issued an interpretive rule regarding the enforcement of the ODWDA.\(^{244}\) The interpretive rule asserted

\(^{235}\) Id. at 787.


\(^{237}\) Id. at 809.

\(^{238}\) Id.

\(^{239}\) See id. at 809–10.

\(^{240}\) Id.


\(^{242}\) Gonzales, 546 U.S. at 249.

\(^{243}\) Id. The law authorized doctors to prescribe medication to end the life of an adult who had been judged competent by two physicians. Id. at 251–52. To be eligible, a person must have been within six months of dying from a terminal condition. Id.

\(^{244}\) Id. at 253–54.
that physician-assisted suicide was not a legitimate practice and, therefore, the ODWDA violated the Controlled Substances Act (CSA) of 1970.\textsuperscript{245} Under the interpretive rule, any physician administering federally controlled substances for the purpose of ending a life could face revocation of their medical license.\textsuperscript{246}

In a 6–3 ruling, the Court held that the Oregon law did not violate the CSA.\textsuperscript{247} Justice Kennedy wrote the majority opinion, joined by Justices Souter, Ginsburg, O’Connor, Breyer, and Stevens, holding that the CSA did not give the Attorney General the authority to intrude upon the State of Oregon’s police power to regulate physicians’ practice within the state.\textsuperscript{248} The Attorney General had issued an interpretive rule to show that the Oregon law violated the CSA and to permit enforcement of the CSA against physicians abiding by that law.\textsuperscript{249} However, the Court refused to grant deference to the Attorney General’s interpretation because the rule’s language was taken verbatim from the language of the CSA.\textsuperscript{250} The Court noted that the Attorney General was not authorized to determine whether a controlled substance was being used legally simply by restating the phrase “legitimate medical purpose” in a regulation.\textsuperscript{251} The Attorney General claimed he was interpreting his own agency’s rule but, in fact, he was interpreting the CSA, a law of Congress.\textsuperscript{252} The Court declined

\textsuperscript{245} Id. John Ashcroft was serving as Attorney General when the case began in the lower courts. Oregon v. Ashcroft, 368 F.3d 1118 (9th Cir. 2004), aff’d sub nom. Gonzales v. Oregon, 546 U.S. 243 (2006). By the time the U.S. Supreme Court accepted the case for review, Alberto Gonzales had taken over the case during his later tenure as Attorney General. \textit{See} Gonzales, 546 U.S. 243.

\textsuperscript{246} Gonzales, 546 U.S. at 254.

\textsuperscript{247} Id. at 274–75.

\textsuperscript{248} Id. at 274.

\textsuperscript{249} Id. at 257.

\textsuperscript{250} Id.; \textit{see also} Auer v. Robbins, 519 U.S. 452 (1997) (setting forth the test for when deference should be given to a government agency regarding its interpretation of its own administrative rule).

\textsuperscript{251} Gonzales, 546 U.S. at 257–61.

\textsuperscript{252} Id. The level of deference that a court gives to a government agency’s interpretation of a congressionally enacted law, such as the CSA, is instead based upon the \textit{Chevron} rule. \textit{See} \textit{Chevron}, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). \textit{Chevron} is a landmark case that established a two-part test to determine whether an agency interpretation of a congressional law receives deference. \textit{Id.} That test is: (1) did Congress unambiguously determine the issue involved in a legal dispute?; and (2) if there was ambiguity, did the agency respond with an acceptably reasonable construction of the law? \textit{Id.} at 842–43. In \textit{Gonzales v. Oregon}, Justice Kennedy concluded that the Justice Department and the Attorney General failed to satisfy the \textit{Chevron} rule because while Congress had used ambiguous language within the CSA, such as the phrase “legitimate
to grant deference to the Attorney General’s interpretation of the CSA.\textsuperscript{253} The Court noted that the CSA specifically states that determinations about legitimate medical decisions are to be made by the Secretary of Health and Human Services, not the Attorney General.\textsuperscript{254} Moreover, the Court reasoned that Congress would have provided more clarity in the CSA’s language if it had intended to permit the Attorney General to criminalize a medical procedure through the interpretation of his own rules.\textsuperscript{255} Instead, the Court maintained that the CSA only prohibited physicians from engaging in drug trafficking and did not dictate states’ medical practices and evaluations of the legitimacy of various procedures.\textsuperscript{256}

Justice Scalia authored a dissenting opinion, in which he argued that substantial deference must be granted to the Attorney General in interpreting his own regulation.\textsuperscript{257} According to Scalia, the interpretative rule passed the test for \textit{Auer} deference because it was not “erroneous or inconsistent with the regulation.”\textsuperscript{258} Hence, he reasoned that the regulation did not simply restate the language of the CSA but, instead, clarified the meaning of the statute.\textsuperscript{259} Justice Scalia also maintained that the Department of Justice should be granted deference in its interpretation of the CSA because the statute included language detailing an extensive role for the Attorney General.\textsuperscript{260} Justice Scalia concluded that, even if deference was not granted to the agency, the Attorney General would still be correct in his determination that PAS is not a “legitimate medical purpose” because medical professionals have offered widespread condemnation of assisted suicide.\textsuperscript{261} Moreover, fifty jurisdictions within the United States had

\textsuperscript{253} \textit{Gonzales}, 546 U.S. at 265–67. The Court ruled similarly on issues in \textit{Auer} and \textit{Chevron} in majority opinions authored by Justices Scalia and Stevens, respectively. \textit{Auer}, 519 U.S. at 457; \textit{Chevron}, 467 U.S. at 862–64.

\textsuperscript{254} \textit{Gonzales}, 546 U.S. at 250.

\textsuperscript{255} Id. at 252.

\textsuperscript{256} Id. at 268–70.

\textsuperscript{257} Id. at 275 (Scalia, J., dissenting).

\textsuperscript{258} Id. at 277 (quoting \textit{Auer}, 519 U.S. at 461).

\textsuperscript{259} Id. at 279.

\textsuperscript{260} Id. at 283–84; see also \textit{Chevron}, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). \textit{Chevron} held that courts must defer to an administrative agency in its interpretation of a law or rule, as long as the authority provided by Congress to the agency is clear and the interpretation is reasonable. 467 U.S. 837.

\textsuperscript{261} \textit{Gonzales}, 546 U.S. at 286–87 (Scalia, J., dissenting).
already prohibited the practice. 262 Justice Scalia famously ended his dissent by emphasizing that “[i]f the term ‘legitimate medical purpose’ has any meaning, it surely excludes the prescription of drugs to produce death.”263

Justice Thomas also authored a dissenting opinion in Gonzales v. Oregon where he argued that it is “at least reasonable” for the Attorney General to conclude that the CSA bans the states from practicing PAS.264 Hence, he reasoned that the Attorney General’s interpretive rule addressing whether controlled substances were being used for a legitimate medical purpose should have been granted deference.265 Justice Thomas was critical of the majority in Gonzales v. Oregon for contradicting the precedent established in Gonzales v. Raich,266 where the Court ruled that the Attorney General possessed the power under the CSA to strike down a California law that legalized the intrastate possession of medical marijuana.267 Justice Thomas reasoned that there was no reason to allow the Attorney General to regulate a controlled substance under the CSA in Raich but to later deny the chief law enforcement officer the authority to regulate the controlled substances involved in physician-assisted suicide in Gonzales v. Oregon.268

Using Justice Harlan’s approach to substantive due process, Souter voted to uphold state laws whether or not they

262 Id. The fifty jurisdictions prohibiting assisted suicide included forty-seven states, the District of Columbia, and two territories. Id. (citing Washington v. Glucksberg, 521 U.S. 702, 710 n.8 (1997)).
263 Id. at 299.
264 Id. at 300–02 (Thomas, J., dissenting). While Justice Thomas is not often supportive of federal power interfering with traditional state powers, he maintained that in Gonzales v. Oregon the legal issue centered on statutory interpretation of the Controlled Substances Act of 1970 as it related to the authority of the Attorney General to prohibit physician-assisted suicide and not on the relationship between the state and the federal government. Id. at 301–02. Justice Thomas asserted that the Attorney General had unambiguous authority under the CSA to regulate the production, distribution, and possession of controlled substances based upon their use for legitimate medical purposes. Id. at 299–301.
265 Id. at 301.
266 Id. at 299–302; Gonzales v. Raich, 545 U.S. 1 (2005). The Raich decision was handed down seven months prior to Gonzales v. Oregon. See Raich, 545 U.S. 1. In Raich, the Court voted 6–3 that Congress had authority under the Commerce Clause to criminalize medical marijuana. Id. at 22. Angel Raich had produced and used marijuana after California voters passed Proposition 215 in 1996, which had legalized marijuana for medicinal purposes. Id. at 5–7.
267 Raich, 545 U.S. at 22.
268 Gonzales, 546 U.S. at 299–300 (Thomas, J., dissenting).
banned PAS or upheld euthanasia. He refused to recognize any right to die within the right to privacy and reasoned that more information would be necessary in the future to revisit and properly address the controversial issue. Again, Souter did not vote strictly along ideological lines, and instead he exercised judicial restraint in deferring to the states on the issue of euthanasia.

V. PRIVACY AND GAY RIGHTS

Souter participated in two cases involving gay rights and privacy during his tenure on the Court: Romer v. Evans and Lawrence v. Texas. In both cases, Souter voted with the liberal bloc to recognize the privacy rights of gay persons.

A. Romer v. Evans

In Romer, the Court laid the groundwork for establishing a right to privacy for homosexual persons through the Equal Protection Clause of the Fourteenth Amendment. Romer concerned a Colorado state constitutional amendment that was approved by voters by referendum in 1992. Amendment 2 to the Colorado State Constitution prohibited any branch of the state government from providing special protection for gays, lesbians, and bisexuals as a class of people. Amendment 2 was a response to large cities in Colorado enacting anti-discrimination laws to protect gay people from the denial of basic rights related to

270 Glucksberg, 521 U.S. at 787–88 (Souter, J., concurring).
271 Id.
274 See Romer, 517 U.S. at 622; Lawrence, 539 U.S. at 561.
275 See 517 U.S. at 632–35. In Lawrence, Justice O’Connor wrote a concurring opinion where she referenced Justice Scalia’s dissenting opinion in Romer. 539 U.S. at 583 (O’Connor, J., concurring). Justice Scalia conceded that Romer paved the way for establishing greater protection of the rights of gay people. See id. at 588 (Scalia, J., dissenting). He noted that, by following the precedent in Romer, discriminatory laws against gay people would be struck down as violating the Due Process Clause of the Fourteenth Amendment under the rational basis test. See id. at 588–89.
277 Romer, 517 U.S. at 624.
housing, health services, education, public accommodation, and employment.\textsuperscript{278}

In a 6–3 ruling, the Court struck down the state constitutional amendment as a violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{279} Justice Kennedy authored the majority opinion and was joined by Justices Souter, Ginsburg, Stevens, Breyer, and O'Connor.\textsuperscript{280} The Court applied the rational basis test and determined that the amendment was not rationally related to a legitimate state interest.\textsuperscript{281} The \textit{Romer} decision marked the first time that the Court conducted an equal protection analysis of a law to determine whether it discriminated against gay individuals as a class.\textsuperscript{282} The opinion noted that the amendment was a result of hostility toward gay people—an unpopular group in political society—and was too broad in that it could deprive gay individuals of protections under general anti-discrimination laws.\textsuperscript{283}

Justice Scalia wrote a dissenting opinion in \textit{Romer}, where he argued that the majority decision contradicted the Court’s 1986 precedent in \textit{Bowers v. Hardwick}.\textsuperscript{284} In \textit{Bowers}, the Court voted 5–4 to uphold anti-sodomy laws passed by several states that basically criminalized homosexual conduct and denied gay individuals a right to privacy.\textsuperscript{285} Justice Scalia argued that if it is rational for a state to discriminate against a class based upon sexual conduct, then it should also be rational for a state to deny special protections in regard to homosexual orientation.\textsuperscript{286} Hence, Justice Scalia concluded

\begin{itemize}
  \item \textsuperscript{278} Id. at 623–24.
  \item \textsuperscript{279} Id. at 635.
  \item \textsuperscript{280} Id. at 622.
  \item \textsuperscript{281} Id. at 632.
  \item \textsuperscript{282} See Nan D. Hunter, \textit{Proportional Equality: Readings of Romer}, 89 Ky. L.J. 885, 893 (2001). While the Colorado Supreme Court applied the highest possible standard of review (strict scrutiny) in \textit{Romer}, in striking down the law, Justice Kennedy’s majority opinion did not directly address whether strict scrutiny applied to the constitutional amendment, and instead he argued that the referendum would not pass even the lowest level of protection, rational basis review. \textit{Romer}, 517 U.S. at 640.
  \item \textsuperscript{283} See \textit{Romer}, 517 U.S. at 634.
  \item \textsuperscript{284} Id. at 636 (Scalia, J., dissenting) (discussing \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986), overruled by \textit{Lawrence v. Texas}, 539 U.S. 558 (2003)).
  \item \textsuperscript{285} \textit{Bowers}, 478 U.S. at 187, 196; see \textit{Romer}, 517 U.S. at 640 (Scalia, J., dissenting).
  \item \textsuperscript{286} See \textit{Romer}, 517 U.S. at 640–41. Justice Scalia also took issue with the majority ruling in \textit{Romer} as inconsistent with the Court’s decision in \textit{Davis v. Beason}, which had held that laws against polygamy were constitutional because they served a legitimate government interest. Id. at 648–49 (citing \textit{Davis v. Beason},
that Amendment 2 served a rational basis in denying a group of people “special favor and protection.” 287 Justice Scalia concluded by accusing the majority of engaging in judicial activism and stressed that the democratic process should prevail at the state level because the U.S. Constitution does not address the legal issue presented in Romer. 288

B. Lawrence v. Texas

Seven years after Romer, the Court finally established a right to privacy for gay people in Lawrence v. Texas and, in the process, overturned the seventeen-year reign of Bowers. 289 Lawrence involved an anti-sodomy law from the State of Texas that criminalized homosexual conduct. 290 By a 6–3 vote, the Court held that the Texas law was an unconstitutional violation of the right to privacy implicit in the Due Process Clause of the Fourteenth Amendment. 291

Justice Kennedy wrote the majority opinion in Lawrence, joined by the same five justices from the Romer ruling. 292 The majority asserted that the law “further[ed] no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual.” 293 The Court stated that Bowers was wrongly decided because the Court’s precedent in Griswold v. Connecticut 294 and Roe clearly recognized a right to privacy in the Due Process Clause. 295 In addition, Justice Kennedy’s research suggested that the historical basis for anti-sodomy laws in the United States was not directed at homosexual conduct but, instead, was aimed at sexual behavior in general. 296 Justice Kennedy found that because the laws were not enforced, for the most part, there existed a traditional recognition of privacy regarding the

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133 U.S. 333, 346–47 (1890)). Justice Scalia noted that states were permitted to classify polygamy as a “social harm,” but a state could not make the same judgment about other moral offenses. Id. at 651 (Scalia, J., dissenting).
287 Id. at 642.
288 See id. at 652–53.
290 Id. at 562.
291 Id. at 561, 578.
292 See id. at 561.
293 Id. at 578. The State of Texas claimed that the anti-sodomy law served a legitimate state interest by promoting morality. Id. at 582 (O’Connor, J., concurring).
294 381 U.S. 479 (1965).
295 See Lawrence, 539 U.S. at 564–67 (majority opinion).
296 Id. at 568.
sexual activity of consenting adults. Finally, the majority asserted that *Bowers* had been weakened considerably by the recent *Casey* and *Romer* decisions, which protected liberty related to issues of sexuality or reproduction. The majority noted that legal scholars in the United States had been highly critical of the *Bowers* ruling, finding it inconsistent with contemporary rulings by other developed countries in the West. For example, the European Court of Human Rights in 1981 struck down an anti-sodomy law in Northern Ireland and the British Parliament in 1957 sought to repeal laws that criminalized homosexual behavior. Various international bodies cite a historical record different than the one provided in *Bowers*.

Justice O’Connor agreed with the majority but argued in her concurring opinion that the anti-sodomy law enacted by Texas violated the Equal Protection Clause because it criminalized only homosexual sodomy and failed to treat heterosexual sodomy in the same manner. She stated that the Court would not decide the issue of whether an anti-sodomy law that criminalized both heterosexual and homosexual behavior would be constitutional. However, she expressed that, as the democratic process plays out within state governments, it is likely such laws would not survive long. While Justice O’Connor supported striking down the Texas law based on equal protection grounds, she stated she would not have overturned *Bowers* and, therefore, refused to acknowledge a right to privacy for gay persons within the Due Process Clause.

Justice Scalia penned a dissenting opinion, joined by Chief Justice Rehnquist and Justice Thomas, in which he criticized the majority for disregarding the precedent in

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297 Id. at 569.
298 Id. at 573–76.
299 Id. at 576–77.
300 Id. at 572–73.
301 See id.
302 Id. at 579–81 (O’Connor, J., concurring).
303 Id. at 584–85.
304 Id. Justice Byron White authored the majority opinion in *Bowers* and noted that, before 1961, all fifty States had prohibited sodomy and, by 1986, at the time of the *Bowers* decision, twenty-four States and the District of Columbia had laws against sodomy. *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). By the time of the *Lawrence* decision in 2003, the number of states with sodomy bans had dropped to thirteen. 539 U.S. at 573. Of the thirteen states, nine prohibited both homosexual and heterosexual sodomy, while four states criminalized only homosexual sodomy. *Id.*
305 See *Lawrence*, 539 U.S. at 579, 582 (O’Connor, J., concurring).
Bowers. His dissent called out three of the justices in the Lawrence majority, Justices Stevens, Souter, and Kennedy, who voted to overturn Bowers but refused to strike down the Roe precedent in the Casey ruling. Justice Scalia also expressed concern that the Lawrence ruling would create difficulties for lower courts that had relied upon Bowers in past decisions. He remarked that over the course of seventeen years, Bowers provided a guide for the lower courts to hold that moral offenses “constitute[] a rational basis for regulation.”

Justice Scalia also argued that based on the Court’s ruling denying Texas the power to outlaw sodomy, other immoral offenses might now be protected under Lawrence. For instance, Justice Scalia questioned whether laws prohibiting prostitution, incest, bestiality, or obscenity were vulnerable. He warned that by taking sides in a culture war and favoring the “homosexual agenda,” the majority abandoned the role of the Court as a neutral arbiter of the law. According to Justice Scalia, the majority created a new constitutional right that does not exist and, in the process, subverted democracy at the state level. Justice Scalia believed that voters and their state representatives, rather than the Court, should resolve moral issues unaddressed in the Constitution.

C. Souter’s Voting Behavior in Gay Rights Cases

In both Romer and Lawrence, Souter sided with the liberal justices in striking down state laws that discriminated against gay persons. Cases involving the right to privacy and gay rights prompted Souter to vote against states’ rights. His vote in Lawrence also contributed to
overturning existing precedent—the *Bowers* decision.\footnote{317}{See Lawrence, 539 U.S. at 578.} Hence, it was discrimination against a marginalized group in society that likely pushed Souter to vote ideologically, which stands in contrast with his behavior in other privacy cases.\footnote{318}{See Garrow, supra note 57.}

VI. PRIVACY AND ANTI-ABORTION PROTESTERS

A. *The Scheidler Cases*

From 1994 to 2006, Souter voted in three cases involving the National Organization for Women (NOW) and Joseph Scheidler.\footnote{319}{NOW, Inc. v. Scheidler, 510 U.S. 249 (1994); Scheidler v. NOW, Inc., 537 U.S. 393 (2003); Scheidler v. NOW, Inc., 547 U.S. 9 (2006).} In 1980, Scheidler founded the Pro-Life Action League—an anti-abortion organization.\footnote{320}{About Joe Scheidler, PRO-LIFE ACTION LEAGUE, https://prolifeaction.org/joe [https://perma.cc/5US2-2H2F].} Various abortion providers and their clients, represented by NOW, filed suit against Scheidler, who was part of a larger coalition of anti-abortion protesters known as the Pro-Life Action Network (PLAN).\footnote{321}{NOW, Inc. v. Scheidler, 510 U.S. at 252–53.} The abortion providers maintained that PLAN had violated their rights under the Racketeering Influenced and Corrupt Organizations Act (RICO) as well as the Hobbs Act, a federal law prohibiting the use of robbery, extortion, or threats of violence to interfere with interstate commerce.\footnote{322}{Id. RICO was created by Title IX of the Organized Crime Control Act of 1970. Id. at 252. RICO sought to bolster the tools of federal law enforcement in the gathering of evidence. See Scheidler v. NOW, Inc., 537 U.S. at 411–12 (Ginsburg, J., concurring). By establishing new rules, penalties, and solutions, RICO provided important tools for dealing with the illegal activities of organized crime syndicates. See id.; see also Andrea Hutton, RICO Resurgence: How State Statutes Are Bringing RICO Back., U. BALTIMORE L. REV. (Oct. 30, 2023), https://ubaltlawreview.com/2023/10/30/rico-resurgence-how-state-statutes-are-bringing-rico-back [https://perma.cc/AK8E-6XFH]. The Hobbs Act was enacted by Congress in 1946 and made it illegal to commit, or attempt to commit, robbery or extortion that was connected in any way to interstate commerce. Scheidler v. NOW, Inc., 547 U.S. at 18–19. A violation of the Hobbs Act is sufficient to show a pattern of racketeering which is a required element of RICO prosecutions. Id. at 14. However, a violation of the Hobbs Act need not necessarily involve racketeering. See id.} The lower federal courts ruled that RICO did not apply to NOW’s claim that PLAN had conspired to prevent women from obtaining abortions.\footnote{323}{NOW, Inc. v. Scheidler, 510 U.S. at 254.} In sum, NOW failed to show the protesters’ ideological behavior was economically motivated or related to interstate commerce.\footnote{324}{Id.}
In the 1994 case *NOW, Inc. v. Scheidler*, the U.S. Supreme Court unanimously overruled the decisions by the District Court of Northern Illinois and the Seventh Circuit Court of Appeals.\(^{325}\) Chief Justice Rehnquist authored the opinion for the Court, holding that RICO was applicable to NOW's claim because RICO does not require an economic motive.\(^{326}\) Chief Justice Rehnquist noted that RICO makes it illegal for any “enterprise” affecting interstate commerce to engage in “a pattern of racketeering activity or collection of unlawful debt.”\(^{327}\) Contrary to the reasoning of the lower courts, he concluded that the term “enterprise” did not imply that an economic motive was necessary in a RICO lawsuit.\(^{328}\) While NOW pursued an action under RICO against PLAN, the Court did not address whether the protesters were protected by the First Amendment to express their political opposition to abortion.\(^{329}\)

Souter wrote a concurring opinion where he discussed how the application of RICO might implicate free speech.\(^{330}\) He wrote separately to emphasize that an economic motive requirement attached to RICO would create constitutional issues related to legitimate free speech.\(^{331}\) He clarified that, while the majority opinion allowed the claim to proceed, it did not prevent PLAN, or any other defendant, from challenging a RICO lawsuit under the First Amendment in the future.\(^{332}\)

In 1997, a federal court granted class action status to NOW to bring a lawsuit on behalf of all women and their abortion rights.\(^{333}\) In 1998, a jury found PLAN guilty of violating RICO as well as the Hobbs Act.\(^{334}\) The defendants were also found guilty of numerous violations of the Travel Act,\(^{335}\) a federal law prohibiting persons from engaging in
interstate commercial activity in support of a racketeering scheme.\textsuperscript{336}

Scheidler and the other anti-abortion protesters were initially ordered to pay $85,926 in damages to the abortion clinics, and that amount was ultimately tripled to more than $250,000 under the RICO provisions.\textsuperscript{337} The district court also issued a national injunction prohibiting PLAN from trespassing on or damaging clinic property.\textsuperscript{338} The injunction also prohibited PLAN from using or threatening to use violence against the abortion clinics, their employees, or their patients.\textsuperscript{339} The Seventh Circuit Court of Appeals affirmed the verdict.\textsuperscript{340}

In 2003, Scheidler and PLAN appealed to the U.S. Supreme Court, arguing that PLAN was not guilty of extortion under the Hobbs Act because it had not obtained any property from the abortion clinics.\textsuperscript{341} In \textit{Scheidler v. National Organization for Women, Inc.}, the Court voted 8–1 in favor of Scheidler and PLAN.\textsuperscript{342} Chief Justice Rehnquist authored the majority opinion and determined that extortion had not occurred because NOW failed to show that any property was “obtained,” which is the basis for a violation under the Hobbs Act.\textsuperscript{343} He opined that while PLAN had engaged in coercive behavior against the clinics, such action did not constitute extortion because nothing of value was taken from the abortion providers that could be sold or transferred.\textsuperscript{344} Chief Justice Rehnquist concluded that because PLAN did not violate the Hobbs Act, PLAN also did not violate RICO.\textsuperscript{345} Without extortion, Rehnquist reasoned, there was no racketeering.\textsuperscript{346} The majority endorsed the practice of judicial restraint, noting that Congress would have to decide whether

\begin{itemize}
\item \textsuperscript{336} 18 U.S.C. § 1952.
\item \textsuperscript{337} Scheidler v. NOW, Inc., 537 U.S. at 399.
\item \textsuperscript{338} Id.
\item \textsuperscript{339} Id.
\item \textsuperscript{340} Id.; NOW, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001), rev’d, 537 U.S. 393 (2003).
\item \textsuperscript{341} See Scheidler v. NOW, Inc., 537 U.S. at 400–01.
\item \textsuperscript{342} Id. at 395.
\item \textsuperscript{343} Id. at 397. Rehnquist stated that the Court has recognized that the “obtaining” requirement pertained to both deprivation and attainment of property under the Hobbs Act. \textit{Id.} at 404–05 (citing United States v. Enmons, 410 U.S. 396, 406 n.16 (1973)).
\item \textsuperscript{344} See \textit{id.} at 405.
\item \textsuperscript{345} Id. at 397.
\item \textsuperscript{346} Id.
\end{itemize}
to expand the Hobbs Act to include coercion within the definition of extortion.347

A concurrence by Justice Ginsburg focused on the Freedom of Access to Clinic Entrances Act (FACE), which was passed by Congress immediately after the first case involving NOW and Scheidler in 1994.348 FACE was a federal law designed to assist abortion patients in gaining access to health clinics.349 Justice Ginsburg suggested that FACE preempted RICO because Congress had enacted FACE in direct response to criminal activity at abortion clinics.350 Justice Ginsburg also expressed concern that RICO had evolved past its original intent, and the lower courts had an excessively expansive view of its application.351

In his lone dissent, Justice Stevens took exception to the majority’s conclusion that PLAN had not taken property from the abortion clinics.352 Justice Stevens stated that historically the federal courts have relied upon an expansive interpretation of property.353 Hence, he reasoned that the clinics’ right to serve their patients and generate new clients is a property right protected under the Constitution.354 Justice Stevens asserted that the use of threats and violence in an attempt to shut down clinics constituted the “obtaining” of property by PLAN.355 Lastly, he claimed that preventing the application of RICO in such cases would benefit those engaged in the activities Congress meant to deter with its enactment of FACE.356

On remand, NOW argued that since the jury in the federal district court also based its verdict on physical threats made against the clinics that were unrelated to extortion, the district court was required to hear the case a second time.357

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347 Id. at 409.
348 Id. at 411 (Ginsburg, J., concurring).
350 See Scheidler v. NOW, Inc., 537 U.S. at 411. Because FACE was passed in 1994, it was not available for consideration in the first legal dispute involving NOW and Scheidler. See NOW, Inc. v. Scheidler, 510 U.S. 249 (1994).
351 Scheidler v. NOW, Inc., 537 U.S. at 411.
352 Id. at 412 (Stevens, J., dissenting).
353 Id.
354 See id. at 412–13 (citing United States v. Tropiano, 418 F.2d 1069, 1075–76 (1969)).
355 Id.
356 Id. at 417.
357 See NOW, Inc. v. Scheidler, 91 F. App’x 510, 512 (7th Cir. 2004); see also Anthony Stark & Ya-Wei Li, Scheidler v. National Organization for Women (04-
NOW argued that the district court holding was still valid because, while the U.S. Supreme Court ruled that 117 of the 121 violations related to extortion were not covered by the Hobbs Act and failed to support a RICO claim in NOW, Inc. v. Scheidler in 2003, the district court had not addressed whether the Hobbs Act was violated by the four physical, non-extortionary threats. Under that reasoning, PLAN might still be liable under RICO if it were determined that there was a Hobbs violation, which would render the nationwide injunction against PLAN valid. In 2006, in Scheidler v. NOW, Inc. (NOW II), the Justices voted that physical threats of violence not connected to a plan involving robbery or extortion were beyond the reach of the Hobbs Act. In its opinion by Justice Breyer, the Court held that Congress did not intend for the Hobbs Act to cover such physical threats of violence within this context. Justice Breyer asserted that the statutory language of the Hobbs Act must be read in a restrictive way by directly tying an extortion plan to the prohibited violence.

The lengthy dispute between NOW and Scheidler lasted twelve years, and during this time, the Justices were also considering issues involving anti-abortion protesters in other cases.

B. Madsen v. Women’s Health Center

In 1994, the Justices heard Madsen v. Women’s Health Center, which involved the constitutionality of an injunction with various restrictions against anti-abortion protesters issued by a Florida state court. The injunction prohibited demonstrators from penetrating a thirty-six-foot...
buffer zone around a clinic providing abortions, engaging in excessively loud noises during mornings when procedures were conducted, displaying images observable to patients, approaching patients within a 300-foot radius, and protesting within 300 feet of clinic employees’ homes. The case presented multiple issues involving the free speech rights of the protesters versus the liberty, privacy, and security of patients and clinic workers.

By a 6–3 vote, the Court handed down a mixed result, upholding some restrictions while striking down others. In an opinion written by Chief Justice Rehnquist, the majority declined to apply a heightened level of scrutiny to the restrictions because the injunction did not target the content or viewpoint of the protesters’ message. Instead, the majority categorized the injunction as content-neutral, which required an assessment of whether the restrictions burdened “no more speech than necessary to serve a significant government interest.”

Chief Justice Rehnquist was joined by Justices Blackmun, O’Connor, Souter, Ginsburg, and Stevens in the determination that the thirty-six-foot buffer zone and the

365 Id. at 759–60.
366 See id. at 757–59.
367 Id. at 757.
368 Id. at 767. Strict scrutiny, sometimes referred to as a form of heightened scrutiny, offers the greatest level of protection for speech. See id. at 764, 766. When strict scrutiny applies, restrictions must be narrowly tailored to serve a compelling state interest. Id. at 766. If the Court would have applied strict scrutiny in Madsen, it is plausible that the restrictions would have been struck down as an unconstitutional violation of the First Amendment.
369 Id. at 791 (Scalia, J., dissenting). This standard lies somewhere between strict and intermediate scrutiny. See id. As noted by Justice Scalia in his Madsen dissent, intermediate scrutiny evaluates a restriction based upon whether it is narrowly tailored to further a significant government interest. Id. Intermediate-intermediate scrutiny requires determining if the restriction burdens no more speech than required to serve a significant government interest. Id. Chief Justice Rehnquist concluded that intermediate scrutiny was not appropriate in the context of reviewing an injunction that had been violated and then broadened to punish protesters. Id. at 764–65 (majority opinion). He reasoned that in such a case involving illegal conduct that had been previously sanctioned, the regulation must be more precise. Id.; see also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982) (holding that nonviolent picketing, as part of NAACP protests against white merchants in Mississippi, was entitled to protection under the First Amendment).
noise restrictions did not violate the First Amendment free speech rights of the demonstrators. He reasoned that the thirty-six-foot buffer zone around the front of the clinic served the state interest of providing patients necessary access to the clinic, and the noise restrictions served the state interest of safeguarding the health and well-being of patients. However, the Court struck down the thirty-six-foot buffer zone around the back and side of the clinic as a violation of free speech because this area was comprised of private property and did not interfere with the business of the clinic. In addition, the restriction on observable images was also struck down because the clinic could draw the curtains to prevent patients from viewing the images. Hence, the ban on images was too broad because other means existed to achieve the state interest of reducing the anxiety of patients. Finally, the 300-foot no-approach zone around the clinic and the ban on demonstrations within 300 feet of the homes of clinic staff were deemed unconstitutional, as they unduly burdened the First Amendment rights of the protesters. The 300-foot no-approach zone failed to serve the purpose of providing access to the clinic and reducing intimidation, while the 300-foot ban around the homes of clinic staff was deemed too broad, and the state interest of protecting the privacy of staff in their homes could have easily been achieved with a smaller zone.

Souter authored a concurring opinion to clarify two important points. Firstly, he noted that the injunction filed against the demonstrators also included any persons acting “in concert” with the parties to the case. Souter underscored that whether someone was acting “in concert” with the anti-abortion groups should be determined on a case-by-case basis, without regard to the protesters’ viewpoints. Secondly, Souter maintained that even the anti-abortion groups recognized that the Florida law supported the

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370 Madsen, 512 U.S. at 757.
371 Id. at 770–72.
372 Id. at 771.
373 Id. at 773.
374 Id.
375 Id. at 773–75.
376 Id. The anti-abortion protesters asserted that the injunction was invalid because the order applied to persons acting “in concert” with them. Id. at 756. This, too, was rejected by the majority. Id.
377 See id. at 776 (Souter, J., concurring).
378 Id. at 776–77.
379 Id.
governmental interests of public safety, order, and the property rights of the health clinics.\textsuperscript{380}

Justice Stevens concurred in part, supporting the majority’s conclusion that the injunction did not restrict the content of the demonstrators’ speech.\textsuperscript{381} However, Justice Stevens also dissented in part, arguing that a more lenient standard of review should apply when analyzing the constitutionality of an injunction as opposed to a statute.\textsuperscript{382} Injunctions prohibit conduct by persons who have already engaged in illegal acts, whereas a statute applies generally to everyone in the community.\textsuperscript{383} Under his proposed standards of review, Justice Stevens reasoned that a statute imposing a thirty-six-foot buffer zone around the clinic would likely violate the protesters’ free speech, whereas a similar buffer zone aimed at individuals who have behaved unlawfully would likely be upheld.\textsuperscript{384} According to Justice Stevens, injunctions should be evaluated with less scrutiny than statutes because a trial judge must be given deference based upon the circumstances surrounding a case.\textsuperscript{385} Justice Stevens argued that under the appropriate standard, courts should consider whether the injunction is “no more burdensome than necessary to provide complete relief.”\textsuperscript{386}

While Justice Stevens agreed with the majority in upholding the noise restrictions and striking down both the ban on images and the 300-foot zone around clinic staff residences,\textsuperscript{387} he disagreed with the majority’s declaration that the 300-foot radius around the clinic violated free speech.\textsuperscript{388} Justice Stevens relied on the trial judge’s description of the protesters’ previous illegal actions—including unwanted contact, stalking, and harassment—all of which caused anxiety for patients.\textsuperscript{389} Favoring the more lenient standard of review for injunctive relief, Justice Stevens would have upheld the ban on approaching patients within a

\begin{itemize}
    \item[380] Id. The lower courts did not err on these two important points, but Souter’s concurrence highlighted these aspects of the case. Id.
    \item[381] Id. at 777 (Stevens, J., concurring in part and dissenting in part).
    \item[382] Id. at 778.
    \item[383] Id.
    \item[384] See id. at 779.
    \item[385] Id. at 778 (citing Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).
    \item[386] Id. at 783–84.
    \item[387] Id. at 782.
    \item[388] Id. at 781.
\end{itemize}
300-foot radius of the clinic as a reasonable time, place, and manner restriction.390

Justice Scalia, joined by Justices Kennedy and Thomas, concurred in part and dissented in part.391 Justice Scalia criticized the majority, alleging that they used a free speech case to uphold abortion-friendly state regulations.392 Justice Scalia would have struck down the entire injunction as a violation of the First Amendment.393 He argued that because the injunction was issued by an individual judge as opposed to a statute passed by representatives of the people, there existed a greater likelihood that freedoms would be violated.394 Justice Scalia noted that the injunction targeted a single-issue group protesting abortion, while competing views were also being expressed outside the clinic.395 Hence, Justice Scalia argued that these were content-based regulations and thus strict scrutiny should have applied.396 Ultimately, Justice Scalia disagreed with the majority’s government interests argument, noting that injunctions must be justified by a violation of law.397

C. Schenck v. Pro-Choice Network of Western New York

In Schenck v. Pro-Choice Network of Western New York, the Court dealt with an issue similar to Madsen.398 In Schenck, a district court judge in western New York issued an injunction that created fixed buffer zones that prohibited protesters from demonstrating within fifteen feet of doorway

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390 Id. at 782.
391 Id. at 784 (Scalia, J., concurring in part and dissenting in part).
392 Id. at 785. Justice Scalia argued that the majority viewed the case through the lens of abortion when, in fact, the case would be regarded in legal history as a free speech case related to injunctions. Id. at 815.
393 See id. at 785. Justice Scalia concurred with the majority in striking down, as a violation of free speech, the ban on images, the thirty-six-foot buffer zone around the sides and back of the clinic, the 300-foot no approach buffer zone around the clinic, and the 300-foot buffer zone around the homes of clinic employees. See id. at 815. However, Justice Scalia dissented from the majority’s finding that the thirty-six-foot buffer zone around the front of the clinic and the noise restrictions were constitutional. Id. at 785.
394 Id. at 793–94.
395 Id. at 810. Based upon video evidence, Justice Scalia contended that pro-abortion demonstrators were often louder and more disruptive than the anti-abortion protesters. Id.
396 Id. at 794.
397 Id. at 804. Justice Scalia questioned whether any Florida law had been broken that would implicate state interests. See id. He argued that the state judge who issued the injunction and the majority simply assumed that laws had been broken related to the interests. See id. at 804–05.
entrances, parking lots, or driveways of abortion facilities.\textsuperscript{399} The injunction also created floating buffer zones where protesters were prohibited from being within fifteen feet of individuals or vehicles attempting to access or depart from an abortion clinic.\textsuperscript{400}

Relying on \textit{Madsen}, the Court deemed the injunction content neutral and upheld the fixed buffer zones by a vote of 6–3 but struck down the floating buffer zones as a violation of the First Amendment in an 8–1 vote.\textsuperscript{401} Chief Justice Rehnquist’s majority opinion, in which he was joined by Justices O’Connor, Stevens, Souter, Ginsburg, and Breyer, declared that the fixed buffer zones were no more burdensome than necessary to serve the governmental interest of providing access to the clinic in a safe and orderly manner.\textsuperscript{402} As noted just a few years earlier in \textit{Madsen}, the government has a significant interest in the protection of women obtaining abortion-related services.\textsuperscript{403} Considering the history of illegal blockades and other unlawful behavior by protesters, Chief Justice Rehnquist suggested that a smaller buffer zone would not have guaranteed access to the clinic.\textsuperscript{404}

The majority applied the \textit{Madsen} test and concluded that the floating buffer zones burdened more speech than was needed to achieve the governmental interests, and so they were unconstitutional.\textsuperscript{405} The floating buffer zones were too broad because they restricted classic forms of speech in a traditional public forum, like conversing or handing out leaflets on a sidewalk.\textsuperscript{406} Additionally, the floating buffer zones required protesters to move when a person or vehicle approached the clinic. The unfixed nature of the floating buffer zone brought with it a level of uncertainty in determining when a protester had violated the injunction; this uncertainty created a substantial risk that more speech would be restricted than what was technically proscribed by the injunction.\textsuperscript{407}

\textsuperscript{399} Id. at 364.
\textsuperscript{400} Id. at 367. The injunction attempted to accommodate the free speech concerns by allowing two sidewalk counselors inside of the buffer zones. Id. However, the counselors were required to “cease and desist” if a targeted person asked to be left alone. Id.
\textsuperscript{401} Id. at 375–78.
\textsuperscript{402} Id. at 380.
\textsuperscript{403} Id. at 380–81.
\textsuperscript{404} Id. at 381–82.
\textsuperscript{405} Id. at 377.
\textsuperscript{406} Id.
\textsuperscript{407} Id. at 378.
Concurring in part and dissenting in part as he did in Madsen, Justice Scalia, again joined by Justices Kennedy and Thomas, contended that both the fixed and floating buffer zones constituted free speech violations. 408 Justice Scalia stated that under the First Amendment, there is no right to be free from outrageous or insulting speech in public. 409 He opined that the injunction was not justified because the only violation of the law was for trespassing, which did not serve the government interest of providing access to the clinic. 410 Finally, Justice Scalia expressed concern that the majority gave judges too much authority, at the expense of the First Amendment, in allowing them to craft injunctions dealing specifically with abortion regulations. 411

While Justice Breyer agreed with the majority in upholding the fixed buffer zones, he authored a separate opinion, concurring in part and dissenting in part, to point out that the injunction did not contain floating buffer zones. 412 Based on the records from the district court hearing, Justice Breyer argued that the floating buffer zones were intended to be fixed buffer zones. 413 Instead, he believed that the provision was mistakenly interpreted by the court of appeals en banc and the conflation was never corrected. 414

D. Hill v. Colorado

The final decision that Souter participated in involving privacy and abortion protesters was Hill v. Colorado. 415 The case involved a 1993 Colorado law that provided that when a person was within 100 feet of the entrance of a healthcare clinic, a sidewalk counselor could not “knowingly approach” within eight feet of the person for the purpose of providing

408 Id. at 386 (Scalia, J., concurring in part and dissenting in part). In quoting the majority opinion in Madsen, Justice Scalia made no comment on whether the injunction was content-based or whether strict scrutiny should be applied to the restrictions. See id. at 385–95. However, it is reasonable to conclude that he implied as such based upon his opinion in Madsen. See Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 784–815 (1994) (Scalia, J., concurring in part and dissenting in part).
409 See Schenck, 519 U.S. at 386 (Scalia, J., concurring in part and dissenting in part) (citing majority opinion).
410 Id. at 391.
411 Id. at 392–93.
412 Id. at 395–96 (Breyer, J., concurring in part and dissenting in part).
413 Id. at 397–98.
414 Id. at 398–99.
“education” without the person’s consent. The Court upheld the law in a 6–3 vote; the vote was identical to the breakdown in Madsen and Schenck.

Writing for the majority, Justice Stevens held that the law was a content-neutral time, place, and manner restriction, and that it was narrowly tailored to serve a compelling government interest. Justice Stevens defined the governmental interest as protecting the health and safety, and privacy of citizens attempting to gain access to a healthcare service.

Justice Stevens relied on the dissent in Olmstead v. United States, in which Justice Louis Brandeis recognized the “right to be let alone.” Justice Stevens noted that this right is particularly important as it relates to a person’s privacy in their home as well as outside a healthcare facility where an “unwilling listener” might find it difficult to avoid a message. Justice Stevens also relied upon Ward v. Rock Against Racism in his finding that the law was content-neutral and not overbroad or vague because it clearly restricted the place where speech occurs and not the content of the speech. Using the “time, place, and manner” test from Ward, Justice Stevens determined that there was no correlation between the state interests, such as privacy and safe access, and the message of the abortion protesters.

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416 Id. at 707.
417 See id.
418 Id. at 719–20, 725–26. While the floating buffer zones struck down by the Court in Schenck seem comparable to the restriction at issue in Hill, Justice Stevens differentiated the two cases by stating that Hill involved an ordinance whereas Schenck involved an injunction that posed a greater risk of censorship. Id. at 713. Moreover, while the floating buffer zone in Schenck required a demonstrator to stop talking whenever a patient came within fifteen feet, the Colorado law in Hill contained the “knowingly approaches” requirement, which permitted a protester to stand still while an individual was entering or leaving a healthcare facility. Id.
419 See id. at 715–16.
420 Id. at 716–17 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). In Olmstead, the Court ruled that the wiretapping of conversations by federal agents did not constitute a violation of the Fourth or Fifth Amendment to the U.S. Constitution. 277 U.S. 438.
421 Hill, 530 U.S. at 716.
422 Id. at 719 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). In Ward, a New York City ordinance required concerts in Central Park to use a city-employed technician and mixing board to limit noise. 491 U.S. at 784. The Court ruled in favor of the city based upon the government’s interest in maintaining order. Id. at 803.
423 See Hill, 530 U.S. at 731–32. A time, place, and manner regulation must (1) be content-neutral on its face, (2) be narrowly tailored to serve a significant
concluded that the law was narrowly tailored to serve state interests because the protesters possessed alternative means of communicating their message via signs, leaflets, or by way of a normal conversational tone that was not directed at an unwilling listener. 424 Finally, Justice Stevens rejected the argument that the law was a prior restraint because, unlike the facts of _Madsen_ and _Schenck_, protesters were not banned from certain areas and requiring a person’s consent to approach fell outside the definition of censorship. 425 According to the majority, the Colorado law at issue in _Hill_ was less restrictive than components of the injunctions that had been upheld in the previous cases.426

Souter wrote a concurring opinion, joined by Justices O'Connor, Ginsburg, and Breyer, where he discussed whether the regulation was content-based and, therefore, subject to strict scrutiny analysis.427 Souter emphasized the difference between regulating the circumstances of how someone behaves in presenting a speech as opposed to the content of the speech itself.428 He highlighted that the Colorado law did not focus on limiting a specific message, but rather it restricted a type of conduct in the exercise of free speech—the act of approaching a person.429 Hence, Souter concluded that the law was content neutral and a necessary restriction given the past conduct of abortion protesters.430

Souter added that the law was not overbroad simply because it might be used against persons whose speech could be deemed a violation despite the violation being unintentional. 431 He emphasized that a person must act “knowingly” and the chances that the law might be applied to someone unnecessarily were unlikely.432 Souter concluded his concurrence by addressing whether the law was vague based upon employing the word “education” in a way that clearly and sufficiently conveyed the statutory limitations.433 Souter

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424 _Id._ at 726.
425 _Id._ at 733–34.
426 _Id._
427 _Id._ at 735–36 (Souter, J., concurring).
428 _Id._
429 _Id._ at 737–38.
430 See _id._ at 736.
431 _Id._ at 739.
432 _Id._ For example, a person may not understand that they were within 100 feet of a facility’s entrance. _Id._
433 _Id._ at 739–40.
rejected the vagueness argument reasoning that laws restricting expressive activity have never been required to specify which conversations were relevant. While this would require police to exercise discretion in applying the law, Souter argued that the discretion was no greater than the manner in which prosecutors have discretion in applying other criminal laws.

As with his opinions in Madsen and Schenck, Justice Scalia’s dissent attacked the majority for treating abortion protesters differently than protesters in other cases. He argued that, in regulating the speech of abortion opponents, the majority chose to ignore the First Amendment. As in the previous cases, Justice Scalia would have analyzed the Colorado law as a content-based restriction and applied strict scrutiny, and so declared it an unconstitutional violation of free speech.

In his dissent, Justice Kennedy echoed Justice Scalia’s assertion that the Colorado law was a content-based regulation that violated the First Amendment because it jeopardized open communication in public. He explained that for a law to be classified as content neutral, the law would have to be applied equally to all buildings in the state, not only to healthcare facilities. Justice Kennedy also stressed that the Colorado law was vague and overly broad because the terms “education” and “counseling” were not defined, which could result in confusion and a chilling effect on speech.

E. Souter’s Voting Behavior in Right to Abortion Cases

In all the cases that Souter considered involving anti-abortion protesters, it is clear that he took a measured approach in weighing free speech concerns as well as the safety of patients and clinic workers. In the Scheidler cases,

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\[\text{434 See Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989).}\
\[\text{435 Hill, 530 U.S. at 740.}\
\[\text{436 See id. at 741 (Scalia, J., dissenting). Justice Scalia speculated that the majority would have struck down the Colorado law if the case involved anti-war protesters or union members. Id. at 742.}\
\[\text{437 See id. at 741–42.}\
\[\text{438 See id. at 747–49.}\
\[\text{439 Id. at 765 (Kennedy, J., dissenting).}\
\[\text{440 Id. at 767–68. Justice Kennedy also interpreted the Colorado law as a viewpoint-based rule that acted as a discriminatory restriction on free speech. Id. at 768.}\
\[\text{441 Id. at 772–73.}\
Souter expressed concern for the First Amendment rights of protesters and refused to support interpreting the laws in a way that would impinge on protest activities. Souter, along with the majority of the justices, exercised judicial restraint by limiting the use of the RICO statute and the Hobbs Act, which clearly were not designed to deal with the issue at hand in Scheidler.

In Madsen, Schenck, and Hill, Souter sided with the majority of justices who he thought best evaluated the statutes given the circumstances. Souter did not vote ideologically with the dissenting bloc of conservative justices, who defended the actions of pro-life demonstrators seemingly without reservations regarding their abusive conduct toward patients and clinic workers. Many have argued that the dissenting justices, particularly Justices Scalia and Thomas, may have decided these cases in accordance with their pro-life ideology. Souter and the majority, including Chief Justice Rehnquist, who maintained a consistent record as an ideological conservative, appeared to set aside political factors and resolve constitutional issues based on the legislative intent of the law in these cases.

VII. DISCUSSION

As noted below in Tables 1 and 2, Souter voted consistently with the conservative wing of the Court during his early years but shifted toward the liberal side in the late 1990s, and this trend continued until he retired in 2009. As a freshman justice appointed by a Republican president, Souter was most likely influenced by the conservative majority of...
justices serving on the Court in the early 1990s. However, his liberal votes documented in his later years might be better understood once contextualized: Souter served alongside three of the most conservative justices in the history of the Court, each of whom promoted an extreme agenda. Moreover, the political environment of the 1990s, the 2000 presidential election, the 9/11 terrorist attacks, and the controversial decisions of President George W. Bush in the post-9/11 world may have created some distance between Souter’s views and the conservative agenda.

A. Ideological Voting of Justice Souter

Souter was not assigned a majority opinion in any of the privacy cases decided during his time on the Court, and he authored only a limited number of concurrences in these cases. While Souter was not active in writing majority opinions on the subject of privacy, Tables 1 and 2 demonstrate that his voting behavior aligned more often with the liberal
bloc of the Court, particularly in the latter part of his tenure.\textsuperscript{454} By examining only the non-unanimous rulings, the ideological split on the Court can be highlighted in the various areas of privacy.\textsuperscript{455} Table 1 illustrates the voting record of Souter in the area of privacy and shows an overall voting record of 69\% in the liberal direction.\textsuperscript{456} Souter voted liberal in 50\% of privacy cases involving abortion procedures and 75\% in privacy cases involving anti-abortion protesters. \textsuperscript{457} While Souter only participated in three non-unanimous privacy cases pertaining to gay rights or euthanasia, he voted with the liberal justices in 100\% of these cases.\textsuperscript{458}

Table 2 demonstrates that Souter was more inclined to vote with the conservative justices in privacy cases during his early years on the Court.\textsuperscript{459} From 1991 to 1997, Souter voted in the conservative direction 50\% of the time.\textsuperscript{460} However, things shifted dramatically in the final chapter of his career, as Souter only voted for a conservative outcome in one out of seven privacy cases from 1998 until 2009.\textsuperscript{461} In fact, Souter’s only conservative vote during this time frame was in \textit{Scheidler v. National Organization for Women, Inc.}, which produced a

\textsuperscript{454} A liberal vote is defined as one supporting the privacy rights of the individual, while a conservative vote is defined as one favoring government power over individual privacy. See The Supreme Court Database, supra note 12.

\textsuperscript{455} See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 86–92 (2002). The attitudinal model is an approach to explain a justice’s voting based upon personal preferences and values. Id. at 86. It has been argued that it is the strongest explanation of judicial behavior. See id. at 88. Non-unanimous decisions obviously reveal ideological differences as opposed to unanimous rulings where liberal and conservative justices agree about the meaning of the law. See id. at 90–91.

\textsuperscript{456} See infra tbl.1. Souter voted liberal in nine cases with non-unanimous votes.


\textsuperscript{458} See cases cited supra note 456.

\textsuperscript{459} Gonzales, 550 U.S. at 169 (Ginsburg, J., dissenting) (liberal vote on euthanasia); \textit{Romer}, 517 U.S. at 623 (liberal vote on gay rights); \textit{Lawrence}, 539 U.S. at 562 (liberal vote on gay rights).

\textsuperscript{460} See cases cited supra note 456 (for breakdown by term).

\textsuperscript{461} See cases cited supra note 456.
vote of 8–1. However, his conservative vote in this case does not indicate a significant ideological deviation, as liberal justices such as Justices Ginsburg and Breyer also joined Souter and the “conservative” majority.

Table 1: Ideological Votes by Justice David H. Souter in Non-Unanimous Privacy Cases by Sub-Category, 1990-2009

<table>
<thead>
<tr>
<th>Sub-Category</th>
<th>Liberal</th>
<th>Conservative</th>
</tr>
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<tbody>
<tr>
<td>Privacy and Abortion Rights</td>
<td>3 (50%)</td>
<td>3 (50%)</td>
</tr>
<tr>
<td>Privacy, Euthanasia, and Gay Rights</td>
<td>3 (100%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Privacy and Anti-Abortion Protesters</td>
<td>3 (75%)</td>
<td>1 (25%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>9 (69%)</td>
<td>4 (31%)</td>
</tr>
</tbody>
</table>

Table 2: Ideological Votes by Justice David H. Souter in Non-Unanimous Privacy Cases by Era

<table>
<thead>
<tr>
<th>Era</th>
<th>Liberal</th>
<th>Conservative</th>
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<tbody>
<tr>
<td>1991-1997</td>
<td>3 (50%)</td>
<td>3 (50%)</td>
</tr>
<tr>
<td>1998-2009</td>
<td>6 (85%)</td>
<td>1 (15%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>9 (69%)</td>
<td>4 (31%)</td>
</tr>
</tbody>
</table>

In privacy cases, Souter disappointed conservatives by voting with the liberal justices more than twice as often as with the conservative justices during his tenure. Moreover, he appeared to vote more consistently for the liberal position during his last decade on the Court. Similarly, Souter’s voting pattern evolved in the liberal direction in other areas of constitutional law toward the end of his tenure. Hence, it is worth considering the factors that may have contributed to Souter’s more frequent alignment with the liberal justices beginning in 1998.

463 See id.
464 See Garrow, supra note 57, at 64. See generally YARBROUGH, supra note 8. Souter was expected to be a homerun for conservatives, but he ended up voting more consistently with the liberal members of the Court.
465 See supra note 449 and accompanying text.
466 See supra note 449 and accompanying text.
467 See supra note 449 and accompanying text.
B. The Ideological Influence of Justices and Case Issues During Souter’s Tenure

During his first three years on the Court, Souter served with a solid majority of justices who were appointed by Republican presidents.468 Hence, it would be expected that the conservative justices may have influenced Souter during his first years on the Court.469 In 1993 and 1994, President Bill Clinton appointed Justices Ginsburg and Breyer to the Court. 470 They were the first justices appointed by a Democratic president since 1967.471 After Justices Ginsburg and Breyer joined the Court, no other appointment occurred until 2005, when President George W. Bush appointed Chief Justice John Roberts. 472 Perhaps the two liberal justices appointed by President Clinton influenced Souter’s voting behavior during this eleven-year gap.473 It is well known that Souter held Justice Ginsburg in high esteem and that the two developed a close friendship during their years together on the

468 See About the Court: Justices 1789 to Present, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/Z5DT-KQEP]. During the 1990 to 1991 term, Souter served with six justices appointed by Republican presidents: Chief Justice Rehnquist and Justices Stevens, O’Connor, Blackmun, Scalia, and Kennedy. Id. Justice Byron White, appointed by President John F. Kennedy in 1962, and Justice Thurgood Marshall, appointed by Lyndon B. Johnson in 1967, were the only two justices appointed by Democratic presidents on the Court at that time. Id. During the 1991 to 1992 term, Justice Marshall was replaced by Justice Clarence Thomas, and Souter then served with seven justices appointed by Republican presidents. See Epstein et al., supra note 4, at 723–29.

469 See Smith & Johnson, supra note 2.


Court.474 After Justice Ginsburg passed away in 2020, Souter stated that “[she] was one of the members of the Court who achieved greatness before she became a great justice. I loved her to pieces.”475

Ideology may have also played a part in influencing Souter considering the changing nature of the Court’s docket. It is possible that case facts and relevant issues brought to the Court presented more opportunities for conservative rulings in the late 1990s which caused Souter to vote more often with the liberal justices.476 While a Supreme Court justice can obviously be placed on an ideological spectrum in terms of liberal or conservative behavior, the issues examined by justices also can be positioned on an ideological spectrum.477 For example, a privacy case might require a justice to prescribe to a certain level of liberalism to vote in favor of abortion rights in general. 478 However, a privacy case involving a ban on late-term abortions might require a justice to possess an extreme liberal voting record to strike down such a controversial regulation in favor of abortion rights.479

Since the Rule of Four allows a minority of the justices to set the Court’s docket, a few like-minded justices can control case selection.480 Chief Justice Rehnquist and Justices Scalia and Thomas frequently voted together, and they are arguably the three most conservative jurists to have ever served on the Court.481 If those three justices could garner one more vote from a Court comprised mostly of Republican appointees, the cases accepted for review may have pushed the docket into a

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474 See ‘I Loved Her to Pieces,’ Retired Justice Souter Says of RBG, supra note 473.
475 Id.
476 See generally James L. Gibson, From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior, 5 POL. BEHAV. 7 (1983) (providing an overarching theory of judicial behavior using a variety of factors, including the political environment). Because the 1990s and 2000s were a divisive period in American politics, the controversies surrounding the Clinton impeachment, the 2000 presidential election, the 9/11 terrorist attacks, and the Iraq War likely affected Souter’s voting behavior. See supra note 452 and accompanying text.
477 Gibson, supra note 476. Gibson refers to justices on the psychometric spectrum as j-points and case facts or issues as i-points. See id. at 16–20.
478 Id.
479 Id.
480 See Supreme Court Procedures, U.S. Cts., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/6QWF-XZPN]. The Rule of Four is a rule created by the Court where, in order for a case to be accepted for review, at least four of the nine justices must vote to grant a writ of certiorari. See id.
481 See Epstein & Martin, supra note 451.
realm of issues on which Souter was not comfortable voting in the conservative direction.482

C. Politics and Judicial Behavior

The political environment has also been known to affect the behavior of justices. 483 The presidency of Bill Clinton from 1993–2001 was a period of relative stability, and President Clinton enjoyed high approval ratings, particularly during his second term. 484 The impeachment of President Clinton in December of 1998 and the subsequent trial was viewed as unfair by most of the public, and his approval rating actually improved during and after the impeachment.485

At the end of the Clinton presidency, the 2000 presidential election contest resulted in a highly controversial Supreme Court decision, Bush v. Gore.486 Souter expressed concern that the legitimacy of the Court may have been harmed by its decision to intervene in that case on behalf of the Republican presidential candidate, George W. Bush.487 Souter, in fact, sided with the liberal bloc comprised of Justices Stevens, Ginsburg, and Breyer, dissenting from the majority’s decision to stop the recounting of votes in Florida.488

Shortly thereafter, following the September 11, 2001, terrorist attacks, President George W. Bush and a Republican Congress enacted controversial legislation, including the

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483 See Gibson, supra note 476, at 31–32. Gibson notes that the political environment can have a strong influence on judicial behavior. Id.
484 See Robert J. Spitzer, Clinton’s Impeachment Will Have Few Consequences for the Presidency, 32 PS: POL. SCI. & POL. 541, 541–45 (Sept. 1999). Spitzer states that Clinton’s approval rating was at 68% during the impeachment trial and that Congress approved his major policy proposals during that period. See id. at 543–44.
485 Id. at 544.
Patriot Act, which narrowed the freedoms of U.S. citizens. In addition, legal issues related to President Bush’s use of military commissions and the treatment of enemy combatants caused a majority of the justices on the Supreme Court, including Souter, to strike down President Bush’s use of the military tribunals to try suspected terrorists without due process as unconstitutional. Finally, President Bush’s decision to invade Iraq in 2003 further divided the country during a time of crisis. In sum, President Clinton’s popularity and his impeachment at the hands of the Republicans, the outcome in \textit{Bush v. Gore}, and the controversial responses of President Bush to the 9/11 terrorist attacks reflected poorly on conservatives, who appeared to be using the law in increasingly political manners. These historic events may have affected Souter during a time when he was finding his own voice on the Supreme Court.

Further evidence that Souter had grown dissatisfied with Republicans and the conservative movement can perhaps be found in his decision to retire from the Court in 2009 after a relatively short tenure. At the end of the 2008–2009 term, Souter announced his decision to retire from the Court, a decision that allowed Democratic President Barack Obama the opportunity to fill his seat. President Obama appointed Justice Sonia Sotomayor in the hope that she would follow in Souter’s footsteps by providing a liberal vote on the Court.

491 See Jacobson, supra note 452.
492 Id.  
495 Id.  
apprehension that Justice Sotomayor might vote more conservatively than Souter, she quickly eliminated any doubts and developed a liberal reputation on the Court.497 Not only has she voted more liberally than Souter, but Justice Sotomayor has established a voting record that is more liberal than Justices Ginsburg, Breyer, and Kagan, all of whom were appointed by Democratic presidents.498

VIII. CONCLUSION

Ultimately, the transformation of Justice Souter from a conservative to a liberal justice would best be explained by the Justice himself. However, because the U.S. Supreme Court is an extremely secretive institution based upon tradition, it is difficult to obtain information about the Court and its members.499 Justices rarely give interviews or explain their reasons for drafting an opinion or casting a particular vote in political or personal terms.500 While the attitudinal model can be relied upon as the most significant and powerful explanation of behavior by judicial scholars, the Justices are adamant in describing themselves as neutral and objective interpreters of the law.501 The legal model of judicial decision-making is important because it reinforces the perception that stability exists in the law and, in turn, provides legitimacy for the Court as a non-political body.502 Based upon Souter’s great respect for the Court as an institution, it is unlikely that he would ever reveal much about his judicial behavior beyond

500 Id.
501 See SEGAL & SPAETH, supra note 455; see also ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 147–51 (1990). Bork argued against “good results” where a judge uses the law to reach a certain outcome. Id. at 147. He favored the “legitimate process” method where a judge simply interprets the law based upon its original intent and objectively hands down a ruling. Id.
502 See BORK, supra note 501, at 143–60. The legal model argues that precedent, original intent, the plain meaning rule, and the balancing of interests determine judicial behavior. Id. at 147.
the framework of the law. However, the motives behind Souter’s voting behavior might ultimately be exposed in papers that he donated to the New Hampshire Historical Society upon his retirement. Unfortunately, Souter ordered that the documents not be released until fifty years after his death. Hence, judicial scholars will likely have to wait until the end of the twenty-first century to gain further insight into Justice Souter’s shift toward the liberal end of the ideological spectrum.

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503 See generally TOOBIN, supra note 487 (examining Souter’s career and judicial philosophy over a variety of issues including abortion and privacy, anti-trust law, states’ rights, and copyright infringement).
504 See Gresko, supra note 499.
505 Id. Souter was quoted as saying to the director of the New Hampshire Historical Society, “I’ve got an incinerator outside my house, and either you agree to 50 years after my death, or they go into the incinerator.” Id.
506 Id.