LIBERTY UNIVERSITY

Liberty University Law Review

Volume 11 | Issue 3 Article 3

July 2017

Justice David H. Souter and the First Amendment

Scott P. Johnson

Follow this and additional works at: http://digitalcommons.liberty.edu/lu_law_review

Recommended Citation

Johnson, Scott P. (2017) "Justice David H. Souter and the First Amendment," *Liberty University Law Review*: Vol. 11 : Iss. 3 , Article 3.
Available at: http://digitalcommons.liberty.edu/lu_law_review/vol11/iss3/3

This Article is brought to you for free and open access by the Liberty University School of Law at DigitalCommons@Liberty University. It has been accepted for inclusion in Liberty University Law Review by an authorized editor of DigitalCommons@Liberty University. For more information, please contact scholarlycommunication@liberty.edu.

ARTICLE

JUSTICE DAVID H. SOUTER AND THE FIRST AMENDMENT

Scott P. Johnson[†]

ABSTRACT

In 1990, Associate Justice David Souter was appointed by President George H. W. Bush to the United States Supreme Court and was expected to provide a critical vote in order to solidify a conservative majority. However, Justice Souter demonstrated a streak of independence during his nearly two decades on the Court and even established a liberal voting record in various areas of constitutional law. This article analyzes Justice Souter's opinions and voting record in First Amendment cases and concludes that Souter consistently supported the liberal wing of the Court in disputes involving separation of church and state, campaign finance reform, decency laws, and free expression related to public forums. Ultimately, Justice Souter was a critical factor in limiting a conservative revolution on the Court that began in the late 1960s.

I. INTRODUCTION

On June 29, 2009, Associate Justice David H. Souter retired from the U.S. Supreme Court after serving a relatively short but influential career on the federal bench.[1] Justice Souter was appointed to the Court by President George H.W. Bush and was expected to provide a critical vote for conservatives, particularly since he was replacing Justice William Brennan, one of the most liberal justices in the Court's history.[2] However, Justice Souter proved to be anything but an ideological appointment.[3] During his early years on the Court from 1991-1997, Justice Souter consistently voted with liberal justices by supporting the freedoms found in the Bill of Rights and became even more liberal during his latter years from 1998-2009,

---

† Professor of Political Science, Frostburg State University; Ph.D., Kent State University (1998); M.A., University of Akron (1990); B.A., Youngstown State University (1987).

1. Peter Baker & Jeff Zeleny, *Souter's Exit to Give Obama First Opening*, N.Y. TIMES (May 1, 2009), http://www.nytimes.com/2009/05/02/us/02souter.html?_r=1&ref=davidh souter.

2. *See* THOMAS R. HENSLEY ET AL., THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS & LIBERTIES 75 (1997).

3. *Id.* at 76-77.

aligning strongly with the liberal bloc of justices, namely Justices Ruth Bader Ginsburg, Stephen Breyer, and John Paul Stevens, particularly in disputes involving the freedoms found in the First Amendment.[4]

Justice Souter consistently maintained a liberal voting record in free expression cases where he was "committed to a board construction of the First Amendment."[5] Justice Souter's liberalism was clearly on display in his opinion writing in First Amendment cases, where six of his seven majority opinions were in the liberal direction.[6] Moreover, twenty-five of his twenty-eight dissenting opinions supported the liberal side.[7] Justice Souter seemingly embraced a more practical and flexible application of precedent and interpretation of the law and consistently rejected the views expressed by ideological conservatives in First Amendment cases.[8]

This Article documents the judicial behavior of Justice David H. Souter in the area of free expression from his time served as an attorney general and state judge in New Hampshire to his nineteen years on the United States Supreme Court.[9] Based upon his written opinions and individual votes, Justice Souter clearly evolved into a more liberal jurist than ideological conservatives would have preferred in cases involving the

---

4. Robert H. Smith, *Justice Souter Joins the Rehnquist Court: An Empirical Study of Supreme Court Voting Patterns*, 41 KAN. L. REV. 11 (1992). *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT & THE ATTITUDINAL MODEL REVISITED (2002) (arguing that attitudes and values are the most important factors in explaining judicial behavior). The attitudinal model simply divides the behavior of justices into either liberal or conservative votes. For the purposes of this Article, a liberal decision is a ruling that supports the rights of the individual. Conversely, a conservative decision is a ruling in favor of the government regulation or limitation of a freedom. However, it should be noted that the terms liberal and conservative are complex and multi-dimensional from an ideological perspective. Hence, the government regulation of money in elections, or the restriction of gun rights, has traditionally been interpreted as liberal by academic scholars.

5. *See* TINSLEY YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT 250 (2005).

6. *See* Analysis Overview, WASH. UNIV. LAW: SUPREME COURT DATABASE, http://supremecourtdatabase.org/analysisOverview.php (select "Analysis" tab; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Majority Opinion Writer" drop down box, and then select "analyze" to reveal the graph of Justice Souter's seven opinions).

7. *See id.* (select "Analysis" tab; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box; under "Justice/Voting" category, select the box for "Dissent", and then select "analyze" to reveal the graph of Justice Souter's twenty-eight dissenting opinions).

8. *See* HENSLEY ET AL., *supra* note 2, at 77.

9. *See generally* YARBROUGH, *supra* note 5.

liberties set forth in the First Amendment.[10] Justice Souter gained respect during his tenure on the Court as an intellectual scholar by attempting to understand both sides of a dispute completely and by applying precedent and legal rules in a just manner.[11] However, he may also be regarded as the justice who disappointed ideological conservatives by failing to complete a conservative counter-revolution that had begun in the late 1960s as a response to the liberal rulings of the Court led by Chief Justice Earl Warren from 1953-1969.[12]

II. ATTORNEY GENERAL SOUTER AND THE FIRST AMENDMENT

David Souter served as the Attorney General for the State of New Hampshire from 1976 until 1978.[13] In his capacity as Attorney General, Souter was authorized by the state to issue legal opinions related to disputes involving state and local agencies.[14] During his time as Attorney General,

10. LAWRENCE BAUM, THE SUPREME COURT 122-24 (9th ed. 2007).

11. *See* YARBROUGH, *supra* note 5, at 198.

12. *See generally* HENSLEY ET AL., *supra* note 2. From 1953-1969, Chief Justice Earl Warren led the U.S. Supreme Court in a liberal revolution by expanding the rights of criminal defendants and nationalizing nearly all of the Bill of Rights upon the states. *See generally* Richard C. Cortner, *The Nationalization of the Bill of Rights in Perspective*, *in* THE LANAHAN READINGS IN CIVIL RIGHTS & CIVIL LIBERTIES 31-47 (David M. O'Brien ed., 1999). As a response to the Warren's Court's liberal rulings, Richard Nixon's 1968 presidential campaign focused upon how he would appoint conservative justices to the U.S. Supreme Court. *See* KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM & ITS POLITICAL CONSEQUENCES 251-56 (2011). During Nixon's first term as president, he appointed Chief Justice Warren Burger in 1969 to replace Earl Warren and subsequently appointed Harry Blackmun in 1970, and in 1972, William Rehnquist and Lewis Powell. *Id.* Nixon's four appointments during his first term, nearly one half of the Supreme Court, began what scholars considered to be an attempt at a conservative counterrevolution. The conservative counterrevolution would seem to have been solidified by the fact that Nixon and his successors, Republican Presidents Ford, Reagan, and George H.W. Bush, were able to appoint eleven justices to the Court from 1969-1991, without an appointment being made by a Democratic president. However, because appointments to the Court are unpredictable, more than a few of the eleven appointments emerged as moderate or liberal justices. Hence, conservatives were still attempting to realize a counterrevolution with one of the last Republican appointments in 1990 when Justice William Brennan, one of the most liberal justices who had ever served on the Court, was replaced by Justice David Souter. *See* Scott P. Johnson & Christopher E. Smith, *David Souter's First Term on the Supreme Court: The Impact of a New Justice*, 75 JUDICATURE 239 (1992).

13. *See* YARBROUGH, *supra* note 5, at 20; Linda Greenhouse, *An 'Intellectual Mind': David Hackett Souter*, N.Y. TIMES (July 24, 1990), http://www.nytimes.com/1990/07/24/us/man-in-the-news-an-intellectual-mind-david-hackett-souter.html?pagewanted=all.

14. *See* YARBROUGH, *supra* note 5, at 29.

most of the judgments by Souter relating to free expression usually involved technical issues of law, but his actions involving the First Amendment were not without controversy.[15]

In 1976, Souter supported Governor Meldrim Thomson's controversial decision to lower the U.S. and state flags to half-mast on Good Friday to honor the death of Jesus Christ.[16] The Governor's actions obviously resulted in lawsuits, arguing that the Establishment Clause, which required a separation of church and state, had been violated by the lowering of the flags.[17] The United States Court of Appeals for the First Circuit ruled in favor of the Governor, and then the United States Supreme Court issued a stay of the First Circuit's decision pending further consideration.[18] Souter signed off on a legal brief written by assistants in his office arguing against a violation of the Establishment Clause because the lowering of the flags did not advance, or inhibit, religion.[19] After the Supreme Court issued the stay, Governor Thomson and Souter strategized about how to connect a secular purpose to the lowering of the flags in order to maintain consistency with *Lemon v. Kurtzman*, the 1971 landmark decision that established a fundamental test used to judge Establishment Clause disputes.[20] Hence, the Governor issued a proclamation that the flags had been lowered out of respect for the inspiration of Jesus' life and teachings on Western civilization.[21] The Governor's proclamation resulted in a federal district judge's refusal to take further action against New Hampshire and the legal dispute was defused.[22] It has been presumed that Souter did not necessarily agree with the lowering of the flags on Good Friday but was simply

15. Neil A. Lewis, *Combing the Past for Clues on Souter*, N.Y. TIMES (Sept. 2, 1990), http://www.nytimes.com/1990/09/02/us/combing-the-past-for-clues-on-souter.html.

16. *See* YARBROUGH, *supra* note 5, at 48.

17. *Id.*

18. *Id.* at 48-49.

19. *Id.* at 49.

20. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). *Lemon* established a three prong test to judge the constitutionality of a law or policy that might violate the establishment clause. *Id.* First, the law must have a secular purpose. *Id.* Second, the law must neither advance or inhibit religion. *Id.* Finally, the law cannot foster excessive entanglement between church and state. *Id.; see* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION & THE FIRST AMENDMENT 130 (1986). Governor Thomson and Attorney General Souter attempted to satisfy the second prong with the initial brief in the dispute but, after the U. S. Supreme Court issued the stay, had to revise their strategy to include a secular purpose in order to meet the requirements of the *Lemon* test. *See* YARBROUGH, *supra* note 5, at 49. *See also* Brown v. Thomson, 435 U.S. 919 (1978).

21. *See* YARBROUGH, *supra* note 5, at 49.

22. *Id.*

performing his legal obligation to support the Governor's religious agenda as the State's Attorney General.[23]

In a separate dispute involving the Establishment Clause, Attorney General Souter refused to intervene in the Governor's attempt to support the recitation of prayer in the public school system of Rochester, New Hampshire.[24] A federal judge issued an injunction against the school system because prayer in the public schools was considered a blatant violation of the Establishment Clause based upon *Engel v. Vitale*, a landmark precedent created by the United States Supreme Court in 1962.[25]

In 1977, Souter rendered an opinion concerning political expression when he recommended to an assistant state treasurer that a state employee could legally place a political sticker on the bumper of his vehicle and park it on a transportation route near a state government agency.[26] However, Souter also advised in the opinion that state law prohibited a classified state employee from displaying a political sign on the roof of his automobile.[27] Souter viewed the political sticker placed on a vehicle by a state employee as personal expression protected by the First Amendment, but considered the political sign as a way of using an automobile "as an advertising tool . . . thereby donating 'a thing of value' to a candidate" which, in turn, violated state law.[28]

Finally, in May of 1977, Souter was involved in a dispute involving free expression in Seabrook, New Hampshire, when environmentalist protestors staged a sit-in at the construction site of a nuclear power plant.[29] As Attorney General, Souter aggressively prosecuted the protestors and denied First Amendment protections to the 1,414 demonstrators who had been arrested on private property.[30] After a state judge issued a fifteen-day suspended sentence to the first protestor processed through the court system, Souter personally complained to the judge that the sentence was too light given the fact that the demonstration was "one of the most well-planned acts of criminal conduct in the state" and also that the protestors planned to reoccupy the construction site after their release from prison.[31]

---

23. *Id.* at 50.
24. *Id.* at 46.
25. *Id.* at 46-47. *See* Engel v. Vitale, 370 U.S. 421, 430-31 (1962).
26. *See* YARBROUGH, *supra* note 5, at 29.
27. *Id.*
28. *Id.*
29. *Id.* at 42.
30. *Id.*
31. *Id.*

As a result of Souter's actions, the judge changed his ruling and sentenced the protestors to fifteen days in jail and a $100 fine.[32]

Souter's actions as Attorney General of New Hampshire provided minimal insight into his judicial philosophy concerning the First Amendment.[33] As noted above, his behavior was most likely guided by his support for the Governor's policies, as opposed to his own judicial philosophy.[34] However, Souter's refusal to participate in the Governor's support for prayer in the public schools forecast Souter's behavior as a United States Supreme Court Justice, where he would strongly support the separation of church and state.[35]

III. THE NEW HAMPSHIRE STATE SUPREME COURT

Souter served on the New Hampshire Supreme Court as an Associate Justice from 1983-1990.[36] During his eight years on the state supreme court, he had a reputation for respecting precedent and interpreting the language of the law and the original intention of the Framers in a technical fashion.[37] While Souter was known for defending the First Amendment in a broad fashion, albeit allowing for some government restrictions of speech on

---

32. *See* YARBROUGH, *supra* note 5, at 42. Interestingly, about a year before the arrest of the protestors, Souter had filed legal objections in July of 1976 to the construction of the nuclear facility in Seabrook along with the attorney general from Massachusetts. Souter's objections were not necessarily based upon the construction of the nuclear facility, but simply because he disagreed with the Nuclear Regulatory Commission (NRC) authorizing the approval of the cooling facility, which Souter claimed was a power given only to the Environmental Protection Agency. *See* Ruth Marcus & Joe Pichirallo, *Seeking Out the Essential David Souter*, WASH. POST (Sept. 9, 1990), https://www.washingtonpost.com/archive/politics/1990/09/09/seeking-out-the-essential-david-souter/230d0090-f228-4418-8d81-a86cd859d28a/?utm_term=.52ac6cdbcf48. Souter also expressed concern that the Seabrook area lacked an evacuation plan in the event of a nuclear meltdown or other crisis at the plant. Souter's legal action angered then Governor Meldrim Thomson who wholeheartedly supported the construction of the nuclear facility at Seabrook and viewed Souter's behavior as offering support for the environmental groups and individuals who opposed the construction of the plant. *See generally* DONALD W. STEVER JR., SEABROOK & THE NUCLEAR REGULATORY COMMISSION: THE LICENSING OF A NUCLEAR POWER PLANT (1980).

33. *See* YARBROUGH, *supra* note 5, at 29.

34. *Id.* at 50.

35. *See* David L. Hudson, Jr., *Justice Souter and the First Amendment*, FIRST AMENDMENT CTR. (May 1, 2009), http://www.firstamendmentcenter.org/justice-souter-and-the-first-amendment.

36. *See* Greenhouse, *supra* note 13.

37. *See* William S. Jordan III, *Justice David Souter & Statutory Interpretation*, 23 U. TOL. L. REV. 491, 495-509 (1992).

public property,[38] his legal opinions regarding free expression also incorporated "a balancing of interests approach" in specific cases.[39]

In *State v. Hodgkiss*, Souter wrote for a unanimous court in overturning the conviction of Michael Hodgkiss, who had set up a table and was distributing pamphlets near the Manchester City Hall in an attempt to encourage voters to support Lyndon LaRouche, the Libertarian candidate for president in 1988.[40] Hodgkiss was arrested based upon an ordinance which required a permit to distribute literature.[41] However, Souter argued that the ordinance was designed for merchants, not for persons, such as Hodgkiss, who were promoting political ideas.[42] While Hodgkiss's conviction for obstructing the sidewalk was overturned, a separate conviction for hanging signs and additional literature using a rope connected to a lamppost and tree owned by the city was upheld as constitutional based upon the precedent established in *United States v. O'Brien*.[43] Using the *O'Brien* test, Souter concluded that the ordinance prohibiting the posting of signs on public property served a substantial government interest by preventing visual pollution.[44] Hence, the government could restrict Hodgkiss's expression because the regulation was content-neutral and unrelated to the suppression of his expression.[45]

In a 1986 free speech case, Souter wrote a concurring opinion wherein he agreed that the use of state bar association dues to oppose tort reform legislation was a violation of the free speech rights of attorneys practicing within the state.[46] Souter argued that the bar association's right to override the free speech concerns of its members "extend[ed] only so far as the need to serve the counterbalancing public interests."[47] A bar association could use its dues to lobby for legislation that improved the competence and integrity of its lawyers and judges, or to increase the public's access to it members, but it could not engage in lobbying activities that influenced the substance of legal rights and responsibilities.[48] In sum, a bar association did

38. *See* YARBROUGH, *supra* note 5, at 83.
39. *Id.* at 84.
40. *See* State v. Hodgkiss, 565 A.2d 1059, 1060 (1989).
41. *See* YARBROUGH, *supra* note 5, at 83.
42. *Id.*
43. *Id. See also* United States v. O'Brien, 391 U.S. 367, 376-77 (1968).
44. *See* YARBROUGH, *supra* note 5, at 83-84.
45. *Id.*
46. *Id.* at 84; *see also* Petition of Chapman, 509 A.2d 753, 759-60 (N.H. 1986).
47. *See* YARBROUGH, *supra* note 5, at 84.
48. *Id.*

not have unlimited power to support any proposal that a majority of its members deemed appropriate.[49]

In a separate case involving the bar association, Souter authored a unanimous opinion for the court in favor of an expansive reading of the free speech rights of legal services lawyers.[50] The New Hampshire Disabilities Rights Center (DRC) had petitioned the New Hampshire Supreme Court and requested that it be allowed to represent disabled persons, not only indigent persons.[51] Souter concluded that any state restriction on the DRC to provide legal representation for disabled persons was a violation of the First Amendment.[52]

During his tenure on the New Hampshire Supreme Court, Souter clearly emerged as a protector of free expression.[53] Souter's opinions and votes on First Amendment issues would continue to demonstrate a strong liberal perspective, particularly during his later years on the United States Supreme Court.[54]

IV. ASSOCIATE JUSTICE DAVID SOUTER AND THE FIRST AMENDMENT

A. *The Policy Impact of a Freshman Justice*

During his first year on the United States Supreme Court, Justice David Souter seemingly had a limited influence over First Amendment case law, with mixed results in terms of his ideological voting behavior. Souter participated in five decisions involving First Amendment freedoms and cast three conservative and two liberal votes.[55] However, while Souter was not assigned a majority opinion in a First Amendment case during his first term and appeared to have an unremarkable year, he significantly influenced a landmark decision by casting a tie-breaking vote as well as authoring a

49. *Id.*

50. *In re* N.H. Disabilities Rights Ctr., Inc., 541 A.2d 208, 209-10 (N.H. 1988).

51. *See* YARBROUGH, *supra* note 5, at 85.

52. *Id.*

53. *Id.* at 83-85.

54. *See* Hudson, *supra* note 35.

55. During the 1990-1991 term in First Amendment cases, Justice Souter voted in the conservative direction in the following three cases: Leathers v. Medlock, 499 U.S. 439, 453 (1991), Barnes v. Glen Theatre Inc., 501 U.S. 560, 581 (1991), and Gentile v. State Bar of Nev., 501 U.S. 1030, 1062 (1991). Conversely, Souter voted liberal in the following two cases: Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 498 (1991) and Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991).

special concurrence in the case of *Barnes v. Glen Theatre Inc.*[56] In *Barnes*, Souter voted with Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy to uphold a public decency law in Indiana that prohibited totally nude dancing.[57] Although the Court voted five to four in favor of the Indiana law, the legal basis for the ruling was very divisive.[58] Hence, Chief Justice Rehnquist was forced to write a plurality opinion for the Court joined only by Justices O'Connor and Kennedy.[59] Rehnquist argued that the Indiana law furthered the substantial government interests of protecting societal order and morality.[60] Souter's special concurrence distinguished himself from Rehnquist's plurality opinion by arguing that the law furthered a substantial government interest by preventing the harmful secondary effects of adult entertainment, such as prostitution and sex-related crimes.[61] It is likely that, if *Barnes* had been argued the previous term, Justice Brennan would have voted in the liberal direction and the public decency law would have been struck down as unconstitutional.[62]

B. *Justice Souter's Written Opinions and Votes in First Amendment Cases*

During his nineteen years on the Court, Justice David Souter participated in seventy-three cases involving First Amendment issues where the vote was non-unanimous.[63] During Souter's early tenure on the Court from 1991-1997, he voted in favor of the liberal ideological position in nearly seven of every ten cases.[64] Interestingly, Souter's votes demonstrated an even stronger liberal pattern from 1998-2009.[65] Hence, Souter's overall voting record in First Amendment cases displayed a solid record of liberalism.[66]

---

56. *See* Barnes v. Glen Theatre, 501 U.S. 560 (1991).

57. *Id.* at 562-63.

58. *Id.* at 562.

59. *Id.*

60. *Id.* at 567-68.

61. *Id.* at 581-87.

62. *See* Johnson & Smith, *supra* note 12, at 239-40.

63. *See* WASH. UNIV. LAW: SUPREME COURT DATABASE, *supra* note 6 (select "Analysis" tab; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box, and then select "analyze" to reveal the graph of opinions).

64. *Id.* (select "Analysis" tab; under "Time/Era" category, insert 1991-1997 in the boxes for "Range of Terms"; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box, and then select "analyze" to reveal the graph of opinions).

65. *Id.* (select "Analysis" tab; under "Time/Era" category, insert 1998-2009 in the boxes for "Range of Terms"; under "Case Components" category, select the box for "First

In regard to majority opinion assignments, a liberal trend is clearly evident in Souter's seven majority opinions pertaining to First Amendment disputes.[67] Of the seven majority opinions written by Souter during his tenure on the Court, six of these majority opinions resulted in a liberal outcome.[68] Souter's impact in the area of the First Amendment was most apparent in cases pertaining to the Establishment Clause, campaign finance regulations, free association, and decency laws.[69] As noted below, Souter also demonstrated a liberal pattern in his concurring and dissenting opinions in First Amendment cases.[70]

1. Establishment Clause

Justice Souter's opinions and votes on the United States Supreme Court demonstrated a strong commitment to separation of church and state.[71] Justice Souter's first significant opinion for the United States Supreme Court in the area of the First Amendment occurred in an Establishment Clause case entitled *Board of Education of Grumet Village School District v. Grumet*.[72] The *Grumet* case involved the Establishment Clause and an attempt by the New York state legislature to create a separate school district for a village populated completely with practitioners of an orthodox form of Judaism.[73] The main purpose of the unique school district was to allow the Hasidic Jewish followers to create a special education program for handicapped children in the village.[74] Justice Souter authored the Court's opinion with a six-person majority and began a pattern of arguing forcefully for separation of church and state during his career on the Court.[75] He maintained that the New York law was unconstitutional because it united religion and government in an impermissible fashion.[76]

Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box, and then select "analyze" to reveal the graph of opinions).

66. *Id.* (select "Analysis" tab; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box, and then select "analyze" to reveal the graph of 101 opinions).

67. *See* Hudson, *supra* note 35.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 688 (1994).

73. *Id.* at 690.

74. *Id.* at 692.

75. *Id.* at 688-90; *see also* Hudson, *supra* note 35.

76. *See Grumet*, 512 U.S. at 688.

In issuing his ruling, Justice Souter relied heavily upon precedent from a 1982 case, *Larkin v. Grendel's Den, Inc.*[77] In *Larkin*, the Burger Court struck down a Massachusetts law that was used by religious groups to deny applications for liquor licenses within five hundred feet of a religious building.[78] The legal rationale in Larkin was based upon the argument that the Massachusetts law had the primary effect of advancing religion and fostered an excessive entanglement between church and state.[79] In *Grumet*, Justice Souter's opinion did not reference the same legal rationale used in Larkin, but he stated that the constitutional problems were comparable and expressed a desire for the government to remain neutral toward religion.[80]

Justice Souter's final opinion for the Court in an Establishment Clause case also represented a liberal majority in a dispute over the public display of the Ten Commandments.[81] In *McCreary County v. American Civil Liberties Union*, the Court voted five to four that a local ordinance requiring the posting of the Ten Commandments in two Kentucky courthouses violated the First Amendment's Establishment Clause.[82] In his majority opinion, Justice Souter maintained that the display was clearly for a religious purpose, and he relied upon a 1980 precedent established in *Stone v. Graham*[83] where the Court held that the display of the Ten Commandments in public classrooms violated the Establishment Clause because the Commandments are obviously "a sacred text in the Jewish and Christian faiths . . . ."[84] Justice Souter also referenced *Lemon v. Kurtzman* in order to emphasize that government must maintain its neutrality between religion and nonreligion, and the local ordinance that required the posting of the Ten Commandments in a public setting advanced religion in violation of the Lemon test.[85] The *Lemon* test involves three prongs wherein a government policy must serve a secular purpose, cannot advance or inhibit religion, and must avoid fostering an excessive entanglement between church and state.[86] The local ordinance at issue in *McCreary* was held to violate the second prong by advancing religion and, therefore,

---

77. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 118 (1982).
78. *Id.* at 117.
79. *Id.* at 123, 127.
80. *See Grumet*, 512 U.S. at 698.
81. *See* McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 850 (2005).
82. *Id.* at 848, 881.
83. *See* Stone v. Graham, 449 U.S. 39 (1980).
84. *Id.* at 41-43.
85. *See* Lemon v. Kurtzman, 403 U.S. 602, 643 (1971).
86. *Id.* at 643, 657-58.

abandoning the principle that government must remain neutral in matters of church and state.[87]

Justice Souter also authored two significant dissents in support of separation of church and state in 1995 and 2002, respectively.[88] In *Rosenberger v. Rector and Visitors of the University of Virginia*,[89] he wrote a dissenting opinion against a five-person majority which supported a public university and its funding of a Christian publication.[90] Justice Souter asserted that the university's subsidizing of a Christian student group's magazine entitled Wide Awake Productions was a violation of the Establishment Clause.[91] In his dissent joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter detailed the contents of the articles in the magazine and noted that while the publication covered secular topics such as racism and eating disorders, it always returned to the religious theme of calling upon readers to awake to their salvation based upon St. Paul's exhortation.[92] Hence, the magazine failed to serve a secular purpose because of its emphasis upon encouraging students to enter into a relationship with Jesus Christ.[93] Justice Souter concluded that "[t]he Court today, for the first time, approves direct funding of core religious activities by an arm of the State."[94] He maintained that such funding is "categorically forbidden" under the Establishment Clause of the First Amendment, which specifically prohibits the use of public money to support religion.[95]

Seven years after the *Rosenberger* ruling, Justice Souter again authored a dissenting opinion in *Zelman v. Simmons-Harris*, where he emphasized neutrality concerning state government and religious instruction.[96] In *Zelman*, the Court was deeply divided over voucher programs in such states as Ohio and Wisconsin where the states provided funding to parents to send their children to private schools if the public school systems were failing.[97] Nearly all of the parents participating in the programs chose to send their children to parochial schools which raised the issue of the state

---

87. *See McCreary Cty.,* 545 U.S. at 881.

88. *See* Hudson, *supra* note 35.

89. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

90. *Id.* at 863-64.

91. *Id.* at 864.

92. *Id.* at 865-68.

93. *Id.*

94. *Id.* at 863.

95. *Rosenberger*, 515 U.S. at 868.

96. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 686, 688 (2002).

97. *Id.* at 644-45, 714.

supporting religious instruction with the school vouchers.[98] A five-person majority composed mainly of conservative justices held that the school voucher programs did not violate the Establishment Clause.[99] The legal reasoning of the majority opinion written by Chief Justice William Rehnquist was based upon the argument that a state can provide such educational opportunities to students, and the decision to use the public funding to attend religious institutions was based solely on the free choice of the parents, not the government.[100] Hence, the programs were deemed neutral with respect to religion.[101]

Justice Souter's dissent in *Zelman* cited Justice Hugo Black's majority opinion in *Everson v. Board of Education of Ewing Tp.*, which was a landmark case from 1947 that nationalized the Establishment Clause upon state governments.[102] Souter quoted from Black's opinion in arguing that "[n]o tax in any amount . . . can be levied to support any religious activities or institutions . . . ."[103] He accused the majority of ignoring the *Everson* ruling by allowing a state to violate the neutrality inherent in the meaning of the Establishment Clause.[104]

2. Campaign Finance

Justice Souter authored three majority opinions for the Court in the area of campaign finance.[105] Each of the three majority opinions supported a liberal outcome by upholding limits on campaign contributions.[106]

---

98. *Id.* at 647.

99. *Id.* at 641, 643-44.

100. *Id.* at 649-53.

101. *Id.* at 652-53.

102. *Zelman*, 536 U.S. at 686-88; *see also* Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1, 3-5 (1947).

103. *Zelman*, 536 U.S. at 687; *see also Everson*, 330 U.S. at 16.

104. *Zelman*, 536 U.S. at 688.

105. *See* Fed. Election Comm'n v. Christine Beaumont, 539 U.S. 146, 149 (2003); Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 437 (2001); Nixon v. Shrink Mo. Gov. PAC, 528 U.S. 377, 381 (2000).

106. *See* WASH. UNIV. LAW: SUPREME COURT DATABASE, *supra* note 6 (select "Analysis" tab; under "Case Components" category, select the box for "Campaign Spending" from the "First Amendment" drop down box; under "Justice/Voting" category, select Justice Souter from the "Majority Opinion Writer" drop down box, and then select "analyze" to reveal the graph of Justice Souter's three opinions). For ideological purposes, a justice upholding a campaign contribution limit is counted as a liberal vote while a justice voting to strike down a contribution limit in violation of the First Amendment is categorized as a conservative vote. *See* Decision Direction, WASH. UNIV. LAW: SUPREME COURT DATABASE, http://supreme courtdatabase.org/document ation.php?var=decisionDirection. While this reasoning may be

In 2000, Souter authored his first majority opinion involving a campaign finance law in the case of *Nixon v. Shrink Missouri Government PAC*.[107] In *Shrink*, Justice Souter, as part of a six-person majority, held that the federal campaign contribution limits established in the 1976 landmark case of *Buckley v. Valeo*[108] also applied to state campaign limits.[109] However, the state of Missouri could increase the limit adjusting for inflation beyond the limit of $1,000 set in *Buckley v. Valeo*.[110] Justice Souter defined the test concerning whether a contribution limit violated the First Amendment to be based upon whether the limit was so extreme "as to render political association ineffective," therefore silencing a candidate and making contributions meaningless.[111] Ultimately, he concluded that the Missouri statute did not violate the First Amendment because the law addressed a legitimate interest whereby large donations could adversely affect an election and corrupt the democratic process.[112]

One year after the *Shrink* ruling, Justice Souter authored his second majority opinion in the campaign finance case of *Federal Election Commission v. Colorado Republican Federal Campaign Committee*.[113] In a five to four vote split along liberal and conservative lines, Justice Souter upheld the campaign contribution limits placed upon a political party if its spending was coordinated with a candidate's campaign.[114] As noted above, the 1971 *Buckley* precedent placed contribution limits on individuals and political parties if the expenditures were made directly to a candidate's campaign.[115] However, if the expenditures spent by a political party were independent of a campaign, then the campaign contributions were protected by the First Amendment and could not be limited by the *Buckley* ruling.[116] Justice Souter emphasized in his majority opinion the importance

---

viewed as counter-intuitive, the United States Supreme Court Database has categorized the ideological divide on campaign finance in this manner. *Id.*

107. *See Nixon*, 528 U.S. at 381-82.

108. *See* Buckley v. Valeo, 424 U.S. 1, 13 (1976).

109. *See Nixon*, 528 U.S. at 382.

110. *Id.* at 396.

111. *Id.* at 397.

112. *Id.* at 387-88, 395, 397-98.

113. *See* Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001).

114. *Id.* at 437.

115. *See* Buckley v. Valeo, 424 U.S. 1, 13 (1976). The *Buckley* ruling limited the amount that a political party could contribute to a candidate's campaign to $5000 per election cycle. *Id.* at 35.

116. *Id.* at 45.

of limiting contributions made in conjunction with a political campaign by quoting from the *Buckley* precedent that the contribution limits "alleviate[] the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[117] Interestingly, Justice Souter's majority opinion was a continuation of sorts based upon a decision five years earlier in 1996 where the Court ruled in favor of the Colorado Republican Federal Campaign and a political party's independent expenditures.[118] In *Colorado Republican Federal Campaign v. Federal Election Commission*, the Court voted seven to two that the federal limits on party contributions made independent of a candidate's campaign violated the First Amendment.[119] Justice Souter's opinion five years later was a denial of the Colorado Republican Federal Campaign's attempt to expand First Amendment protection to party contributions directly connected to a political campaign.[120]

In 2003, Justice Souter authored his final majority opinion involving a campaign finance law in *Federal Election Commission v. Christine Beaumont*.[121] The case involved a legal challenge to the prohibition on corporations donating directly to a federal campaign.[122] The federal ban, established when Congress passed the Federal Election Campaign Act (FECA) of 1971, was contested by North Carolina Right to Life, Inc. (NCRL), a nonprofit advocacy corporation, which offered counseling to pregnant women by emphasizing alternatives to abortion.[123]

By a vote of seven to two, the majority, led by Justice Souter, held that the federal ban on corporations donating directly to federal campaigns was not a violation of the free speech clause.[124] In his opinion, Justice Souter emphasized the goal of eliminating corruption as well as the appearance of corruption from federal campaigns.[125] In addition, he argued that the judiciary should provide deference to the legislature concerning how to limit contributions by corporations.[126] Finally, Justice Souter noted that the

117. *See Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 441.

118. *See* Colo. Republican Fed. Campaign v. Fed. Election Comm'n, 518 U.S. 604, 608 (1996).

119. *Id.* at 607-08.

120. *See Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 437.

121. *See* Fed. Election Comm'n v. Christine Beaumont, 539 U.S. 146, 149 (2003).

122. *Id.* at 149.

123. *Id.* at 149-50.

124. *Id.* at 148-49.

125. *Id.* at 154.

126. *Id.* at 155.

political expression through campaign donations by such corporations as NCRL was not entitled to the highest level of protection known as strict scrutiny.[127] Under the strict scrutiny standard, the government is required to justify the restriction of expression with a law that is narrowly tailored to serve a compelling state interest.[128] However, Justice Souter rejected NCRL's request for a strict scrutiny analysis and, instead, maintained that the political expression of a corporation can be limited under the lesser standard of simply determining whether an important governmental interest exists, such as preventing the influence of money in federal elections.[129] In a brief dissent, Justice Clarence Thomas, joined by Justice Antonin Scalia, maintained that the strict scrutiny standard should have been applied to the federal ban which, in turn, would have been struck down as a violation of the First Amendment because the federal ban was not narrowly tailored to serve a compelling state interest.[130]

Justice Souter's dissenting opinion in *Randall v. Sorrell* also exhibited a liberal position on campaign finance regulation.[131] In *Randall*, a divided Court struck down a Vermont law with fairly low contribution limits to campaigns.[132] The law also contained expenditure limits placed upon the amount that a candidate could spend during a campaign.[133] Justice Breyer's plurality opinion cited the *Buckley v. Valeo* precedent that Vermont's contribution and expenditure limits violated freedom of speech.[134] In his dissent, Justice Souter argued that the contribution limits portion of the Vermont law should have been upheld as constitutional because it addressed the serious issue of money and corruption in campaigns that had spiraled out of control in the last three decades since Buckley.[135] The Vermont legislation also sought to level the playing field for candidates who were at a severe disadvantage against opponents who raised large amounts of money.[136] In regard to the expenditure limits section of the law, Justice Souter would have remanded this issue for further consideration by the

---

127. *Fed. Election Comm'n*, 539 U.S. at 161.
128. *Id.* at 162.
129. *Id.*
130. *Id.* at 164-65.
131. *See* Randall v. Sorrell, 548 U.S. 230, 281 (2006).
132. *Id.* at 230.
133. *Id.* at 230-31.
134. *Id.*
135. *Id.* at 282 (Souter, J., dissenting).
136. *Id.* at 283.

lower courts in order to determine if Vermont's law was the least restrictive way to promote fair elections.[137]

3. Free Association and Gay Rights

In 1995, the United States Supreme Court decided a speech-plus conduct case involving the Irish-American Gay, Lesbian, and Bisexual Group of Boston, also referred to as GLIB, which sought to be included in a St. Patrick's Day parade organized by various veterans groups in South Boston.[138] GLIB successfully argued in state court that the exclusion of their group from the parade violated a public accommodation law designed to prevent "[discrimination] against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds."[139] However, in the case of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, the Court ruled that GLIB did not have to be included in the St. Patrick's Day parade in Boston, Massachusetts.[140] In a unanimous opinion for the Court, Justice Souter maintained that the First Amendment rights of the parade organizers were violated by the state court decision to include the gay group in the parade.[141] He defined the issue of the dispute in First Amendment terms by stating that "[p]arades are . . . a form of expression" and "the Constitution looks beyond written or spoken words as mediums of expression."[142] Once the parade was established as a form of expression protected by the First Amendment, it was clear that the message of the parade was altered by the inclusion of a homosexual group.[143] Justice Souter wrote in his unanimous opinion:

> [T]he disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring [the parade organizers] to alter the expressive content of their parade.[144]

---

137. *Randall*, 548 U.S. at 284.

138. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Mass., 515 U.S. 557 (1995).

139. *Id.* at 572.

140. *Id.* at 559.

141. *Id.*

142. *Id.* at 568-69.

143. *Id.* at 572.

144. *Hurley*, 515 U.S. at 572-73.

Justice Souter concluded by arguing that the state had used its power in violation of First Amendment protections, which enable a private speaker to choose the content of his, or her, own message.[145] As a private speaker, the parade organizers had "clearly decided to exclude a message it did not like from the communication it chose to make."[146]

In *Boy Scouts of America v. Dale*, a five-person majority ruled that Boy Scouts of America (BSA) could exclude homosexuals from membership in their group based upon their right of expressive association.[147] Hence, the Court held that it was the First Amendment right of the BSA to control their message that members must lead a clean and moral life.[148] Justice Souter authored a dissenting opinion based largely upon the fact that BSA was unclear in whether the message of the organization specifically targeted sexual orientation.[149] While Justice Souter's dissent must be classified as conservative because it opposed the free expression of BSA, his opinion was tempered by the fact that he simply wanted BSA to provide clarity regarding the exclusion of gays from its organization.[150]

4. Retaliatory Prosecution and First Amendment Rights

Justice Souter's only majority opinion involving a conservative outcome was based upon a lawsuit filed by a corporate figure who claimed that he was targeted for criminal prosecution simply for exercising his First Amendment rights when he criticized government officials.[151] The case of *Hartman v. Moore* resulted from a dispute between the United States Postal Service (USPS) and CEO William Moore, who owned a manufacturing company named Recognition Equipment Inc. (REI).[152] In the early 1980s, REI initially received $50 million from the USPS to develop technology to read and sort mail.[153] However, the United States Postmaster General encouraged the use of the nine digit zip code as a substitute for the development of the new technology by REI.[154] As a result of the Postmaster General's decision, Moore engaged in a successful lobbying campaign and

---

145. *Id.* at 581.

146. *Id.* at 574.

147. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

148. *Id.* at 650.

149. *Id.* at 701-02 (Souter, J., dissenting).

150. *Id.*

151. *See* Hartman v. Moore, 547 U.S. 250 (2006).

152. *Id.* at 252.

153. *Id.*

154. *Id.*

convinced members of Congress to fund the development of the technology.[155] The USPS eventually agreed with Congress but the funding for the new technology was not given to REI.[156] Instead, an order of between $250-400 million in equipment was provided to a competing firm.[157] Postal inspectors then began a criminal investigation of Moore and REI, focusing upon kickbacks to a public relations firm promoting their agenda as well as the possibility that REI acted improperly in the search for a new Postmaster General.[158] A federal prosecutor brought charges against Moore and he was indicted by a federal grand jury despite minimal evidence.[159] A federal district court acquitted both Moore and REI on all charges citing a "complete lack of direct evidence."[160]

Moore eventually filed a lawsuit against the federal prosecutor and five postal inspectors based upon the precedent established in *Bivens v. Six Unknown Named Agents*.[161] The *Bivens* precedent from 1971 was a landmark case where the United States Supreme Court held that a lawsuit could be brought against federal agents if an implied cause of action existed for a citizen whose rights had been violated, even if a federal law authorizing such a lawsuit did not exist.[162] Moore's complaint rested largely upon the argument that he had faced retaliatory prosecution for his criticism of the USPS, and therefore his First Amendment freedom had been violated.[163] Moore concomitantly sought monetary damages from the federal government under the Federal Tort Claims Act of 1946, which authorized a private citizen to sue the United States in federal court for any actions committed by persons acting on behalf of the United States government.[164]

In 2006, Justice Souter authored the majority opinion in *Hartman* siding with the federal prosecutor and postal inspectors.[165] In a five to two decision, the Court ruled that in order for Moore to employ the *Bivens*

155. *Id.* at 253.

156. *Id.*

157. *Hartman*, 547 U.S. at 253.

158. *Id.* at 253-54.

159. *Id.*

160. *See* United States v. Recognition Equip. Inc., 725 F. Supp. 587, 596 (D.D.C. 1989).

161. *Hartman*, 547 U.S. at 254. *See generally* Bivens v. Six Unknown Named Agents of FBI, 403 U.S. 388 (1971).

162. *Bivens*, 403 U.S. at 392.

163. *Hartman*, 547 U.S. at 254.

164. *Id.*

165. *Id.* at 252-66.

precedent claiming retaliatory prosecution, he was required to allege and prove that the prosecution lacked probable cause in bringing the criminal charges.[166] Justice Souter maintained that establishing probable cause was essential in evaluating whether retaliatory prosecution had occurred.[167] In addition, a plaintiff bringing a lawsuit claiming retaliatory prosecution must show a causal connection between the motives of the government officials and the actions of another person.[168] In sum, the government officials could not be held liable for violating the free speech rights of Moore because he failed to prove the absence of probable cause as well as any causal connection between the motives of the postal inspectors and the actions of the federal prosecutor.[169]

5. Secondary-Effects Doctrine and Decency

Souter's evolution from a conservative justice to a moderately liberal justice in First Amendment cases was evident in two cases decided nearly a decade apart involving the secondary-effects doctrine.[170] As noted above, in the *Barnes v. Glen Theatre* case, Justice Souter supported a ban on nude dancing to prevent the secondary effects on society caused by such expression contributing to crime and a decrease in property values.[171] The *Barnes* ruling was handed down during Justice Souter's first term on the Court in 1991.[172] However, in 2000, Justice Souter authored a dissenting opinion in *City of Erie v. Pap's A.M.*, where he retracted his earlier stance on nude dancing based upon the fact that he had become enlightened about the importance of protecting free expression.[173] Souter wrote that "[the] government must toe the mark more carefully than I first insisted [in *Barnes*]."[174]

Perhaps Souter's strongest commitment to free expression occurred when he authored a lone dissent in *National Endowment for the Arts v.*

---

166. *Id.* at 258.

167. *Id.* at 258-59.

168. *Id.* at 259.

169. *Hartman*, 547 U.S. at 265.

170. *See* City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, 501 U.S. 560, 560 (1991).

171. *Barnes*, 501 U.S. at 581-87 (Souter, J., concurring).

172. *Id.* at 560.

173. *City of Erie*, 529 U.S. at 310-317 (Souter, J., concurring in part and dissenting in part).

174. *Id.* at 317.

Finley.[175] An eight-person majority in *Finley* maintained that the National Endowment for the Arts (NEA) did not violate the First Amendment when it established that grant applications must meet general standards of decency and respect for the American public.[176] Justice Souter asserted in his dissenting opinion that the NEA engaged in viewpoint discrimination by establishing standards of decency that are vague, overbroad, and subject to various interpretations.[177] Hence, he concluded that the NEA standards violated the First Amendment and would ultimately cause a chilling effect upon artistic expression and display.[178]

6. Public Forums and Free Expression

During the 1991-1992 term, Justice Souter's first year on the Court, he demonstrated a strong break from the conservative justices in two cases involving free expression and the concept of a public forum.[179] In *International Society for Krishna Consciousness v. Lee*, the Court voted five to four to uphold a ban on the solicitation of funds in airport terminals within New York City.[180] Chief Justice Rehnquist wrote for the majority and argued that the airport terminal was not a public forum and therefore undeserving of the highest level of First Amendment protection where the courts apply strict scrutiny to a government law or policy.[181] As a result, the ban on groups soliciting funds in the airport terminals was judged by the majority based upon the lowest level of protection known as minimal scrutiny, which simply required that the policy was reasonable in its protection of citizens from fraudulent and coercive encounters.[182]

In *Krishna*, Justice Souter authored a dissenting opinion wherein he argued that the concept of a public forum was not static and disagreed with the idea that such a forum was limited to traditional areas such as streets, parks, and sidewalks.[183] He concluded that any public property could be considered a public forum and certain airports, based upon their

---

175. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

176. *Id.* at 572-90 (plurality opinion).

177. *Id.* at 600-01 (Souter, J., dissenting).

178. *Id.* at 621-22.

179. *See* YARBROUGH, *supra* note 5, at 170-71.

180. *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

181. *Id.* at 679-80. Strict scrutiny involves extensive review of a law or policy by the courts and requires that such a law is narrowly tailored to serve a compelling state interest. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800-01 (2006).

182. *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 683-85.

183. *Id.* at 710 (Souter, J., dissenting).

characteristics, definitely could be classified as a public forum.[184] Justice Souter thus concluded that the New York City airports most certainly should be included as public areas deserving of the highest level of First Amendment protection.[185]

Once defined as a public forum, any regulation of expression within such an area must be narrowly tailored to serve a significant state interest.[186] The solicitation ban was supposedly justified as serving the government's interest by preventing fraud and coercion.[187] In his dissent, Justice Souter defined the government's interest as weak because few complaints had been filed against any groups soliciting funds in a fraudulent or coercive manner.[188] He also expressed concern that such regulations could harm "unpopular [or] poorly funded groups from receiving [much needed financing through] solicitation."[189]

In a companion case, *Lee v. International Society for Krishna Consciousness*, Justice Souter joined a per curiam opinion of five justices where the Court struck down a ban on the distribution of literature in the New York City airport terminals.[190] Chief Justice Rehnquist, joined by four conservative justices, authored a dissenting opinion repeating the arguments from his majority opinion in the solicitation dispute.[191] Chief Justice Rehnquist viewed no distinction between the burdens placed upon travelers who encounter groups soliciting funds or distributing literature.[192] Hence, he maintained that the airport regulations should have been deemed reasonable in both instances.[193]

In 2003, Justice Souter also cast a liberal vote and authored a dissenting opinion against a conservative majority in *United States v. American Library Association*, which involved the concept of a public forum and obscene material.[194] The case involved the Children's Internet Protection Act of 2000 (CIPA) which required public libraries receiving federal funding to use software filters to block pornographic or obscene images in

---

184. *Id.* at 710-11.
185. *Id.* at 711.
186. *Id.* at 712.
187. *Id.*
188. *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 713-14.
189. *Id.* at 715.
190. *See id.*
191. *Id.* at 831-32 (Rehnquist, C.J., dissenting).
192. *Id.*
193. *Id.* at 832.
194. *See* United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

order to protect children from viewing such harmful material.[195] Under CIPA, adults, however, could request that Internet access be unblocked by the library to view non-obscene material harmful to children in order to conduct research or other lawful activities.[196] Chief Justice William Rehnquist's opinion for the Court argued that the CIPA was not a violation of the First Amendment because the federal funding requirement was within the spending powers of Congress.[197] Chief Justice Rehnquist noted that whenever the government provides funds for a program "it is entitled to broadly define that program's limits."[198] A public library could still exercise its First Amendment freedom by not installing the filters, but such action would result in a loss of federal funding.[199]

Because public libraries have broad discretion to decide what material to provide to the public, Rehnquist concluded that the public forum concept was not relevant to the use of the Internet in public libraries.[200] According to Rehnquist, since the use of the Internet in public libraries is not a traditional or designated public forum, the CIPA must be judged based upon a lower level of First Amendment protection.[201] Hence, the CIPA regulations were deemed a reasonably effective way to prevent library resources from being used to expose minors to pornographic or obscene images.[202]

---

195. *Id.* at 199.

196. *Id.* at 201.

197. *Id.* at 203.

198. *Id.* at 196 (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991)). In *Rust*, the U.S. Supreme Court held that federal funding allocated for family planning could be denied to organizations that offered abortion counseling. *See Rust*, 500 U.S. at 173, 194. *See also* 3 FEDERAL ABORTION POLITICS: JUDICIAL NOMINATIONS 323 (Neal Devins & Wendy L. Watson eds., 1995); Sheldon Nahmod, *Justice Souter on Government Speech*, 6 BYU L. REV. 2097 (2010).

199. *See Am. Library Ass'n*, 539 U.S. at 201.

200. *Id.* at 205-07.

201. *Id.* The U.S. Supreme Court judges expression in traditional and designated forums according to strict scrutiny where a law or policy is required to serve a compelling state interest. Strict scrutiny of a government action provides the highest level of protection under the First Amendment. However, Rehnquist held that public libraries were nonpublic forums which are judged under minimal scrutiny. Hence, CIPA simply needed to serve a rational or legitimate objective. Such analysis of a law is viewed as the lowest level of protection for free expression. For additional information, see HENSLEY ET AL., *supra* note 2, at 261; Darin Siefkes, Explaining United States v. American Library Association: Strictly Speaking, a Flawed Decision, 57 BAYLOR L. REV. 327 (2005).

202. *Am. Library Ass'n*, 539 U.S. at 214.

Justice Souter's dissent focused upon the argument that the CIPA imposed an unconstitutional condition on the receipt of federal subsidies and exceeded Congress' spending powers under Article I of the Constitution.[203] Justice Souter also maintained that although libraries could provide unblocked computer terminals for adults, CIPA gave too much discretion in determining whether to unblock terminals for adults engaged in research or other lawful activities.[204] Justice Souter agreed that the government had the power to protect children at the library from harmful materials on the Internet but CIPA was written in such a manner that, in theory, adults could be denied access to non-obscene material judged as harmful to children.[205] Hence, the government rule required action that would violate freedom of speech if the libraries acted alone in deciding when it may or may not unblock a terminal for an adult patron.[206] Justice Souter viewed the filtering scheme as censorship and would have applied the highest level of judicial scrutiny.[207] In sum, he judged CIPA to be an unduly broad restriction and therefore a violation of the First Amendment.[208]

C. The Ideological Voting Behavior and Written Opinions of Justice David Souter (1991–2009)

As with Justice Souter's written opinions discussed above, an empirical analysis of individual votes cast by Justice Souter from 1991–2009 also reveals a strong shift toward liberalism on issues related to freedoms contained in the First Amendment cases.[209]

---

203. *Id.* at 231 (Souter, J., dissenting).

204. *Id.* at 233.

205. *Id.* at 233-34.

206. *Id.* at 234-35.

207. *Id.* at 242.

208. *Am. Library Ass'n*, 539 U.S. at 242-43.

209. The individual votes of Justice David Souter were compiled from the WASH. UNIV. LAW: SUPREME COURT DATABASE, *supra* note 6 (select "Analysis" tab; under "Time/Era" category, insert 1991-2009 in the boxes for "Range of Terms"; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box, and then select "analyze" to reveal the graph of opinions).

TABLE 1: IDEOLOGICAL VOTING RECORD OF JUSTICE DAVID SOUTER IN FIRST AMENDMENT CASES, 1991-2009 (Non-Unanimous Decisions)

Time Period/	(1991-1997)		(1998-2009)		(TOTALS)	
Constitutional Issue	Liberal	Conservative	Liberal	Conservative	Liberal	Conservative
1st Amendment	22 (69%)	10 (31%)	35 (85%)	6 (15%)	57 (78%)	16 (22%)

The first column of Table 1 displays Justice Souter's ideological voting behavior during his early years on the Court (1991–1997), while the second column of Table 1 documents Justice Souter's shift toward liberal voting over the last decade of his career (1998–2009).[210] Finally, the third column in Table 1 provides a comprehensive summary of Justice Souter's ideological voting covering his entire career from 1991–2009.[211]

From 1991-2009, Justice Souter participated in seventy-three cases involving First Amendment issues where the vote was non-unanimous.[212] During his early tenure on the Court from 1991-1997, he voted 69 percent of the time in favor of the liberal ideological position and 31 percent in the conservative direction in First Amendment cases.[213] Justice Souter's liberal

210. *Id.*

211. *Id.*

212. *Id.*

213. Justice Souter cast thirty-two votes in First Amendment cases from 1991-1997 where the Court decision was non-unanimous. *Id.* (select "Analysis" tab; under "Time/Era" category, insert 1991-1997 in the boxes for "Range of Terms"; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box, and then select "analyze" to reveal the graph of opinions). For more information on Justice Souter's rulings on the First Amendment during his first five terms on the Court, see YARBROUGH, *supra* note 5, at 182-83. *See generally* Frederick Shauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853 (1992). In the following ten cases, Justice Souter voted conservative by supporting the government's restriction upon free speech: Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997); Denver Area Educ. Telecomms. Consortium v. FCC, 518 U. S. 727 (1996); Colo. Republican Fed. Campaign Comm. V. FEC, 518 U.S. 604 (1996); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994); Waters v. Churchill, 511 U.S. 661 (1994); United States v. Edge Broad. Co., 509 U.S. 418 (1992); Leathers v. Medlock, 499 U.S. 439 (1991); Barnes v. Glen Theatre, 501 U.S. 560 (1991); Gentile v. State Bar of Nev., 501 U.S. 1030 (1991). In the following twenty-two cases, Souter supported the liberal ideological position: City of Boerne v. Flores, 521 U.S. 507 (1997); Glickman v. Wileman Bros. & Elloitt, 521 U.S. 457 (1997); Agostini v. Felton, 521 U.S. 203 (1997); O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712 (1996); Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 688 (1996); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995); United States v. Nat'l

votes increased to 85 percent from 1998-2009 and his conservative votes declined to 15 percent.[214] Hence, his overall voting record in First Amendment cases displayed a liberal voting record with 78 percent support for the liberal side and 22 percent for the conservative position.[215]

Treasury Emps. Union, 513 U.S. 454 (1995); McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995); Bd of Educ. of Kiryas Joel Village Sch. Dist. V. Grumet, 512 U.S. 687 (1994); United States v. X-Citement Video, 513 U.S. 64 (1994); City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993); Edinfield v. Fain, 507 U.S. 761 (1993); Zobrest v. Catalina Foothills, 509 U.S. 1 (1993); Alexander v. United States, 509 U.S. 544 (1993); Burson v. Freeman, 504 U.S. 191 (1992); Forsyth Cty. v. Nationalist Movement, 505 U.S. 123 (1992); Lee v. Weisman, 505 U.S. 577 (1992); Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992); Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991); Cohen v. Cowles Media, 501 U.S. 663 (1991); Dawson v. Delaware, 503 U.S. 159 (1991).

214. *See* WASH. UNIV. LAW: SUPREME COURT DATABASE, *supra* note 6 (select "Analysis" tab; under "Time/Era" category, insert 1998-2009 in the boxes for "Range of Terms"; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box, and then select "analyze" to reveal the graph of opinions); *see also* Hudson, *supra* note 35. Justice Souter cast forty-one votes in First Amendment cases from 1998-2009 where the Court decision was non-unanimous. In the following six cases, Justice Souter voted conservative by supporting the government's restriction upon free speech: FCC v. Wis. Right to Life, 551 U.S. 449 (2007); Hartman v. Moore, 547 U.S. 250 (2006); Beard v. Banks, 548 U.S. 521 (2006); Ashcroft v. ACLU, 535 U.S. 564 (2002); Republican Party of Minn. v. White, 536 U.S. 765 (2002); L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999). In the following thirty-five cases, Souter voted in favor of the liberal ideological position: Ysura v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009); United States v. Williams, 553 U.S. 285 (2008); Davis v. FEC, 554 U.S. 724 (2008); Morse v. Frederick, 551 U.S. 393 (2007); Garcetti v. Ceballos, 547 U.S. 410 (2006); Randall v. Sorrell, 548 U.S. 230 (2006); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005); Clingman v. Beaver, 544 U.S. 581 (2005); Tory v. Cochran, 544 U.S. 734 (2005); Van Orden v. Perry, 545 U.S. 677 (2005); McCreary Cty. v. ACLU, 545 U.S. 844 (2005); Locke v. Davey, 540 U.S. 712 (2004); Virginia v. Black, 538 U.S. 343 (2003); FCC v. Beaumont, 539 U.S. 146 (2003); United States v. Am. Library Ass'n, 539 U.S. 194 (2003); McConnell v. FCC, 540 U.S. 93 (2003); Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002); Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002); Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Bartnicki v. Vopper, 532 U.S. 514 (2001); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); United States v. United Foods, Inc., 533 U.S. 405 (2001); FCC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000); City of Erie v. PAP's A.M., 529 U.S. 277 (2000); United States v. Playboy Entm't Grp., 529 U.S. 803 (2000); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Mitchell v. Helms, 530 U.S. 793 (2000); Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

215. *Supra* notes 213 and 214.

Justice Souter's voting behavior in cases related to the First Amendment highlight a strong liberal trend.[216] He displayed a liberal voting record in First Amendment cases during his early years, and he became even more liberal in his last decade of service.[217] Moreover, Justice Souter's written opinions revealed a liberal justice that favored the preferred freedoms approach in free expression disputes.[218] In particular, Justice Souter made his mark with liberal opinions in controversies involving the Establishment Clause, campaign finance, decency laws, and expression in public forums.[219]

Justice Souter argued forcefully in his majority and dissenting opinions for strict separation regarding church and state in Establishment Clause cases involving preferential treatment for Hasidic Jews, the public display of the Ten Commandments, school voucher programs, and a public university's funding of a Christian publication.[220] Justice Souter also was supportive of upholding campaign finance laws in order to limit the corruption caused by financial contributions in political elections.[221] In cases involving decency laws, Justice Souter reversed his position over the course of his career in favor of free expression pertaining to nude dancing and also challenged the National Endowment for the Arts when it established vague standards of decency for artistic expression.[222] Finally, Justice Souter challenged his conservative colleagues by arguing for a

---

216. See the Supreme Court Database for evidence of Souter's shift to the liberal end of the spectrum. WASH. UNIV. LAW: SUPREME COURT DATABASE, *supra* note 6 (select "Analysis" tab; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box, and then select "analyze" to reveal the graph of opinions). For a discussion of the Court's historical trend of providing for protection for defendants at the latter stages of the criminal justice process, see HENSLEY ET AL., *supra* note 2, at 417.

217. *See* WASH. UNIV. LAW: SUPREME COURT DATABASE, *supra* note 6 (select "Analysis" tab; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box, and then select "analyze" to reveal the graph of opinions).

218. *Id.* (select "Analysis" tab; under "Case Components" category, select the box for "First Amendment"; under "Justice/Voting" category, select Justice Souter from the "Justices Involved" drop down box and select "Justice Wrote an Opinion" box, and then select "analyze" to reveal the graph of opinions).

219. *See* Hudson, *supra* note 35.

220. *See, e.g.*, McCreary Cty. v. ACLU, 545 U.S. 844 (2005); Rosenberger v. Univ. of Va., 515 U.S. 819 (1995); Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994).

221. *See, e.g.*, FEC v. Beaumont, 539 U.S. 146 (2003); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

222. *See, e.g.*, City of Erie v. PAP's A.M., 529 U.S. 277 (2000); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Barnes v. Glen Theatre, 501 U.S. 560 (1991).

broader definition of a public forum to provide First Amendment protections to unpopular groups soliciting funds and distributing literature in airport terminals.[223]

V. CONCLUSION

In the end, Justice Souter did not behave as an ideological conservative in the area of free expression.[224] Instead, he demonstrated the streak of independence that began during his years as a state attorney general and state supreme court justice which garnered him praise from liberals and conservatives in his home state.[225] Justice Souter's behavior of distributing justice based upon a more practical and flexible interpretation of the law earned him the respect of legal scholars, but disappointed Republicans hoping for another conservative vote in the tradition of the Nixon and Reagan appointees to the Court.[226] Justice Souter's impact in the area of the First Amendment cannot be understated and can be summed up best by Linda Greenhouse, a Pulitzer Prize winning reporter for The New York Times. Greenhouse maintained that Souter's evolution toward the liberal end of the ideological spectrum was critical to preventing a conservative revolution on the Court.[227]

---

223. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 830 (1992).

224. *See* David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES MAG. (Sept. 15, 1994), http://www.nytimes.com/1994/09/25/magazine/justice-souter-emerges.html?pagewanted=all.

225. *See* HENSLEY ET AL., *supra* note 2, at 75-76.

226. *See* Garrow, *supra* note 224.

227. *Id.*