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Constitutional Law

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Preface

Almost one hundred seventy five years ago, Alexis de Toqueville observed that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Supreme Court decisions rendered since we last published an edition of this book attest to the continuing astuteness of his insight. From the War on Terror, to the delivery of health care services, from arguments about gun control, to controversies surrounding class, race, gender, sexual orientation, and the appropriate size of government, virtually all the political issues that divide Americans eventually find their way into the Supreme Court's ornate courtroom.

Of course, the answers to some constitutional questions are completely uncontroversial. No one doubts that Congress consists of a House of Representatives and a Senate or that the President serves for four years. These constitutional propositions are never debated in decided cases or discussed in constitutional law casebooks. But cases and propositions that are contested often implicate the most fundamental and contentious political issues of our time.

This American tendency to constitutionalize political controversy poses a difficult challenge for casebook editors. Except in very occasional outraged, dissenting opinions, the Justices present themselves and the results they reach as above politics. Their interpretive techniques, doctrinal tests, and rhetorical tropes are designed to separate — or, at least to create the appearance of separation — between constitutional analysis and political disputation. A student cannot become proficient in constitutional law without mastering these tools and taking them seriously on their own terms. The doctrine surrounding, say, the dormant commerce clause, public forum analysis, or tiers of equal protection review is complex. Constitutional law is an insider's game, and the opinions of the Justices establish the rules by which it is played. It follows that teachers must explain these rules, and students must master them.

But no thoughtful student of constitutional law can remain solely an insider. It would be odd indeed if the Court's regular engagement with intensely controversial issues remained altogether uncontaminated by political passions. Even the most casual outside observer cannot help but notice that the Justices often divide according to familiar, if no doubt overly simple, political categories.

One problem for casebook editors, then, is posed by the need to mediate between the obligation to take judicial tools seriously and on their own terms on the one hand and the obligation to avoid ingenuous and uncritical acceptance of them on the other. A successful practitioner of constitutional law can be neither a cynic nor a naïf.

This problem is made more complex still by the fact that the familiar law/politics divide is itself too simple. The bifurcation obscures the different senses in which the terms "law" and "politics" are used. Constitutional law is not ordinary law, and constitutional politics is not ordinary politics. Constitutional law is inevitably embedded in the history and culture of the period in which it is made. Constitutional politics is not about — or at least not just about — partisan division, but also about the deepest questions of political theory.

Our aim for this book is to teach students about both the inside and the outside of constitutional law. To the greatest extent possible, we allow the Justices to speak for themselves by providing extensive excerpts from their opinions. Similarly, many of the notes following the cases are designed to make legal doctrine simpler and more understandable. But we have also made heavy use of secondary material, sometimes drawn from other disciplines or other constitutional traditions, designed to give students a critical perspective. And we have tried to ask questions of our students that, for one reason or another, the Justices have failed to ask of themselves.

Above all, we have tried to make the book concise, uncluttered, and teachable. We are guided by the firm conviction that thinking clearly about constitutional law — both about what it is and what it might be — is vital for law students and, indeed, for citizens generally. There is no hope of achieving this objective if materials from which students learn are not themselves clear.

One of the great joys of writing this book has been the opportunity to interact with countless students and teachers who have used these materials. We have learned a great deal from our readers — sometimes we fear, more than they have learned from us. Every page of this book is influenced by an ongoing dialogue with people who have used it. We are more grateful to these people than we can possibly acknowledge.

G.R.S.
L.M.S.
C.R.S.
M.V.T.
P.S.K.

March 2013

before his nomination to the Court. Although he became wealthy from his practice, Brandeis preferred to live simply and set a ceiling on personal expenditures of one-fifth of his income. Even after his appointment to the Court, he provided financial support for the work of his proteges, one of whom was Felix Frankfurter. He devoted himself to a host of public causes. He defended municipal control of Boston's subway system, opposed monopolistic practices of the New Haven Railroad, arbitrated labor disputes in New York's garment industry, and argued in support of the constitutionality of state maximum hour and minimum wage statutes. His nomination to the Court by President Wilson in 1916 sparked heated opposition, including protests from seven ex-presidents of the American Bar Association. During his long tenure on the Court, Brandeis insisted on respect for jurisdictional and procedural limitations on the Court's power. His distrust of large and powerful institutions, and of dogmatic adherence to the received wisdom, led him to support the constitutional authority of the states to experiment with unconventional social and economic theories. He also frequently dissented from the Court's conservative majority when it blocked efforts of the federal government to intervene in the economy. Some of his most eloquent opinions, however, were written in defense of limits on governmental power when civil liberties were at issue. His famous concurring opinion in Whitney v. California, 274 U.S. 357 (1927), argued for freedom of expression on the ground that "it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." And in Olmstead v. United States, 277 U.S. 438 (1928), Brandeis dissented from the Court's refusal to condemn wiretapping, noting that "[o]ur Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." See L. Paper, Brandeis (1983); M. Urofsky, Louis B. Brandeis and the Progressive Tradition (1981).

WILLIAM J. BRENNAN, JR. (1906–1997): After graduating from Harvard Law School, William Brennan returned to his native Newark, where he joined a prominent law firm and specialized in labor law. As his practice grew, Brennan, a devoted family man, resented the demands it made on his time and accepted an appointment on the New Jersey Superior Court in order to lessen his workload. Brennan attracted attention as an efficient and fair-minded judge and was elevated to the New Jersey Supreme Court in 1952. President Eisenhower appointed him to the Supreme Court in 1956. The appointment was criticized at the time as "political" on the ground that the nomination of a Catholic Democrat on the eve of the 1956 presidential election was intended to win votes. Once on the Court, Justice Brennan firmly established himself as a leader of the "liberal" wing. He authored important opinions in the areas of free expression, criminal procedure, and reapportionment. Often credited with providing critical behind-the-scenes leadership during the Warren Court years, Brennan continued to play a significant role — although more often as a dissenter lamenting what he believed to be the evisceration of Warren Court precedents — as the ideological complexion of the Court shifted in the 1970s and 1980s. Brennan's own spirit is perhaps best captured in his celebration in New York Times v. Sullivan, 376 U.S. 255 (1964), of "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

STEPHEN G. BREYER (1938–): Prior to his appointment to the Supreme Court, Stephen Breyer had compiled a distinguished record as a legal academic and in all three branches of the federal government. Educated at Oxford and Harvard Law School, he served as law clerk to Justice Arthur Goldberg and in the Justice Department before returning to Harvard to teach. During leaves of absence, he worked for Watergate Special Counsel Archibald Cox and served as chief counsel to the Senate Judiciary Committee. In 1980, President Carter named him to the U.S. Court of Appeals. As chief judge of the First Circuit, Breyer gained a reputation for his ability to forge consensus and to write opinions that were clear, concise, and trenchant. An expert on administrative law and an author of important works about risk assessment, Breyer has most often voted with the Court's "liberal" bloc, although his interest in government regulation of the new technologies has sometimes led him to reject first amendment challenges to such regulation. He is known for his pragmatism, his erudition, and his willingness to rethink old ideas.

WARREN E. BURGER (1907–1995): The son of financially hard-pressed parents, Warren Burger attended college and law school at night while selling life insurance during the day. After graduation, he entered private practice and assisted Harold Stassen in his unsuccessful bid for the Republican presidential nomination in 1948. In 1953, he came to Washington to serve as assistant attorney general for the Civil Division of the Justice Department. While in that post, he attracted public attention by defending the government's dismissal of John F. Peters for disloyalty after Solicitor General Sobeloff refused to argue the case on grounds of conscience. Shortly thereafter President Eisenhower appointed him to the U.S. Court of Appeals for the District of Columbia Circuit. His tenure on that court was marked by sharp clashes with the court's liberal majority, especially over criminal justice issues. In 1969, President Nixon named Burger chief justice to replace Earl Warren. A strong advocate of "strict construction" and a "plain meaning" approach to statutory and constitutional interpretation, Burger firmly identified himself with the Court's conservative wing and often voted to limit Warren Court decisions. But he also authored important opinions upholding the right of trial judges to order busing as a remedy for school segregation, interpreting federal civil rights statutes as imposing an "effects" test for employment discrimination, and upholding the right of the press to remain free of prior restraints in covering criminal trials. Burger wrote for a unanimous Court in United States v. Nixon, 418 U.S. 683 (1974), upholding the subpoena for the Watergate tapes, which a few days later resulted in President Nixon's resignation. The Court's legacy under his leadership is much disputed, with some seeing continuity with the Warren Court years and others claiming that he began a period of substantial retrenchment. See E. Maltz, The Chief Justiceship of Warren Burger, 1969–1989 (2000).

BENJAMIN N. CARDOZO (1870–1938): The son of a Tammany Hall judge who was implicated in the Boss Tweed scandal and resigned, rather than face impeachment, Benjamin Cardozo began his judicial career by narrowly defeating a Tammany candidate for a position on the New York Supreme Court. Shortly thereafter he was appointed to the New York Court of Appeals, where he served for eighteen years, during the last six of which he was chief judge. Cardozo is probably best remembered for his skill as a state common law judge. He was responsible for making the New York Court of Appeals the most respected

state court in the country, and his judicial writings and lectures were immensely influential. Upon Justice Holmes's retirement, President Hoover was inundated with requests that Cardozo be elevated to the Supreme Court. But there were already two New Yorkers and one Jew serving on the Court, and Hoover resisted. Only when Justice Stone offered to resign to make way for Cardozo did the President relent. Cardozo was a bachelor who had very few friends and lived for most of his life with his unmarried sister. Called "the hermit philosopher" by some, Cardozo was remembered by others for "the strangely compelling power of [his] reticent, sensitive almost mystical personality." See R. Posner, Cardozo, A Study in Reputation (1990); G. Hellman, Benjamin N. Cardozo (1940).

WILLIAM O. DOUGLAS (1898–1980): Widely regarded as one of the most brilliant, eccentric, and independent persons to serve on the Court, William Douglas sat as an associate justice for thirty-six years, seven months — longer than any other justice. Born in poverty in Minnesota, he spent his early years in Yakima, Washington. Although financially hard pressed, he managed to go east to study law at Columbia Law School, where he taught before joining the Yale faculty in 1929. President Roosevelt named him to the newly created Securities and Exchange Commission in 1934, and Douglas became its chairman in 1937. Roosevelt nominated him to be an associate justice in 1939. Douglas's early opinions gave little hint of the controversy that would surround him in later years. Indeed, Roosevelt came close to choosing him as his running mate in 1944 — a decision that would have made him President on Roosevelt's death a year later. In subsequent years, however, Douglas's controversial statements both on and off the bench, his strong support for unpopular political causes, and his unconventional lifestyle (he was married four times) stirred up a whirlwind of political opposition. Congress twice began impeachment proceedings against him, although neither effort came close to success. A prodigiously rapid worker, Douglas often ridiculed his colleagues for complaining about the Court's workload. By his own account, he once assisted a colleague who had fallen behind in his work by ghostwriting a majority opinion that responded to his own dissent. He often finished his work for the term early and retreated to his nearly inaccessible summer home in Yakima, to which lawyers were forced to trek when emergency matters arose. Critics claimed that his opinions showed the signs of haste; admirers emphasized the forceful, direct manner in which he cut through legal doctrine to reach the core issue in a case. His opinions were marked by a fierce commitment to individual rights and distrust of government power. See B. Murphy, Wild Bill: The Legend and Life of William O. Douglas (2003); W. Douglas, The Court Years 1939–1975 (1980); W. Douglas, Go East Young Man (1974); V. Countryman, Douglas of the Supreme Court (1959).

STEPHEN J. FIELD (1816–1899): In 1863, Congress authorized an additional seat on the Court in part to assure a majority sympathetic to the Union cause in the Civil War. President Lincoln named Stephen Field, a Democrat who had nonetheless staunchly opposed secession, to fill the seat. Field was part of an illustrious family: His brothers included a well-known politician and lawyer, a widely read author, and a famous entrepreneur; he served for the last seven years of his tenure on the Court with his nephew, Justice Brewer; Anita Whitney, the left-wing activist who gained notoriety in Whitney v. California, 274 U.S. 357 (1927), was his niece. Justice Field himself was personally involved in a landmark Supreme Court case. When his personal bodyguard killed former Chief Justice

Terry of the California Supreme Court, allegedly while defending Justice Field's life, the ensuing litigation ended in In re Neagle, 135 U.S. 1 (1890). In light of the circumstances surrounding his appointment, it was ironic that, once on the Court, Field tended to defend the South in particular and state sovereignty in general against extension of federal power during the Reconstruction period. In the period before substantive due process secured majority support on the Court, Field sought to provide constitutional protection for business enterprises. His dissenting opinion in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), for example, read the fourteenth amendment as providing significant protection to property rights and was an important precursor of Lochner v. New York, 198 U.S. 45 (1905). By the time of his retirement in 1897, Field had surpassed John Marshall's record for length of service. See P. Kens, Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age (1997); C. Swisher, Stephen J. Field: Craftsman of the Law (1930).

ABE FORTAS (1910–1984): Founder of the Washington law firm Arnold, Fortas, and Porter, Abe Fortas provided behind-the-scenes advice to Democratic politicians for years before his appointment to the Court in 1965. As a young man, Fortas held a series of jobs in the Roosevelt administration, including undersecretary of the interior under Harold Ickes. After entering private practice, Fortas found time to defend victims of McCarthyism and to litigate several important civil rights cases, including Gideon v. Wainwright, 372 U.S. 335 (1963). In 1948, Fortas successfully represented Congressman Lyndon Johnson when his forty-eight-vote victory in the Democratic senatorial primary was challenged. (The election earned Johnson the nickname "Landslide Lyndon.") Fortas became one of Johnson's close friends, and when Justice Goldberg resigned to become United Nations ambassador, Johnson appointed him to the Court. In 1968, when Chief Justice Warren indicated that he intended to retire, Johnson chose Fortas as Warren's successor. The nomination had long-term consequences that neither man could have foreseen. Republicans and conservative Democrats charged Johnson with "cronyism" and ultimately forced him to withdraw the nomination, but not before it was revealed that Fortas had received $15,000 to teach a course at a local university while on the bench. The next year Life magazine revealed that Fortas had accepted and then returned $20,000 from a charitable foundation controlled by the family of an indicted stock manipulator. Although denying any wrongdoing, Fortas resigned from the Court. As a consequence, President Nixon was able to fill two vacancies early in his term, thereby helping to fulfill his campaign promise to "roll back" the Warren Court revolution. See L. Kalman, Abe Fortas: A Biography (1990); B. Murphy, Fortas: The Rise and Ruin of a Supreme Court Justice (1988).

FELIX FRANKFURTER (1882–1965): An immigrant from Austria, Felix Frankfurter grew up in poverty on New York's lower east side. Before his appointment to the Court by President Roosevelt in 1939, he taught at the Harvard Law School, helped found The New Republic, served in a variety of public positions, and provided important, informal advice to Roosevelt in formulating the New Deal. Frankfurter's scholarly writings contributed significantly to understanding of administrative law, labor law, and the relationship between federal and state courts. As a justice, Frankfurter's career was marked by a preoccupation with problems of judicial legitimacy and self-restraint. He frequently clashed with Justices Douglas and Black, also Roosevelt appointees, over the "preferred

position" of the first amendment and the incorporation doctrine. His concern over the countermajoritarian aspect of judicial review led him to argue for deference to legislative judgment in such landmark cases as Dennis v. United States, 341 U.S. 494 (1951), and Baker v. Carr, 369 U.S. 186 (1962). See Hirsch, The Enigma of Felix Frankfurter (1981); J. Lash, From the Diaries of Felix Frankfurter (1974); P. Kurland, Felix Frankfurter on the Supreme Court (1970); L. Baker, Felix Frankfurter (1969).

RUTH BADER GINSBURG (1933–): When Ruth Bader Ginsburg graduated from law school, one of her mentors suggested to Justice Felix Frankfurter that he take her on as a law clerk. Despite Ginsburg's brilliant law school record (earned while caring for an infant daughter), Justice Frankfurter told her sponsor that he just was not ready to hire a woman. Thirty-three years after this rebuff, Ginsburg assumed her seat on the Supreme Court. In the intervening years, Ginsburg gained fame as the first tenured woman professor at Columbia Law School; as the director of the Women's Rights Project of the American Civil Liberties Union, where she won many pioneering victories in the legal battle against gender discrimination; and as a judge on the U.S. Court of Appeals for the District of Columbia Circuit. She has been called "the Thurgood Marshall of gender equality law" and is said to be "as responsible as any one person for legal advances that women made under the Equal Protection Clause." A strong defender of abortion rights, she has nonetheless criticized Roe v. Wade for rejecting a narrower approach to the abortion question that might have "served to reduce rather than to fuel controversy." On the bench, she has often sided with her "liberal" colleagues. She authored a strong dissent in Bush v. Gore and wrote for a divided Court that invalidated the Virginia Military Institute's policy excluding women students.

JOHN MARSHALL HARLAN (1833–1911): Although a slaveholder and a member of the southern aristocracy, John Harlan remained loyal to the Union during the Civil War and commanded a regiment of Kentucky volunteers in the Union forces. At a critical moment in the deadlocked Republican convention of 1876, Harlan threw the support of the Kentucky delegation behind Rutherford B. Hayes, who rewarded him a year later with an appointment to the Court. Before his appointment, Harlan opposed the postwar amendments ending slavery and guaranteeing equal rights for blacks. (He opposed Lincoln and supported Democrat John McClellan in the 1864 presidential election.) Once on the Court, however, he advocated a broad reading of these amendments. His famous dissenting opinions in The Civil Rights Cases, 109 U.S. 3 (1883), and Plessy v. Ferguson, 163 U.S. 537 (1896), argued for Congress's power to defend the newly freed slaves from "private" discrimination and against the constitutionality of state-mandated separation of the races. It was in Plessy that Harlan declared that "[o]ur Constitution is color blind" and rightly predicted that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision . . . in the Dred Scott case." Well known for his distinctive personal style, Harlan often delivered his opinions extemporaneously in the fashion of an old-time Kentucky stump speech. Justice Holmes described him as "the last of the tobacco-spitting judges." See F. Latham, The Great Dissenter: John Marshall Harlan (1970).

JOHN MARSHALL HARLAN (1899–1971): The grandson of the first Justice Harlan, John Harlan was appointed to the Court by President Eisenhower in

1955. Before his appointment, Harlan spent a quarter of a century in practice with a prominent Wall Street law firm, served as chief counsel to the New York State Crime Commission, and sat briefly on the U.S. Court of Appeals for the Second Circuit. On the Court, Justice Harlan became the intellectual leader of the "conservative" wing, often dissenting from "activist" decisions during the stewardship of Chief Justice Warren. He defended the values of federalism and never accepted the incorporation of the bill of rights against the states. Nor was he ever reconciled to the Court's broad reading of the equal protection clause, especially when strict scrutiny was utilized to defend "fundamental" values. There was also a strong libertarian strain in Justice Harlan's opinions, however. His belief in federalism and rejection of "judicial activism" did not prevent him from finding, for example, that the due process clause precluded the states from restricting the use of contraceptives by married couples. He also wrote for the Court in a series of important first amendment decisions, narrowly construing federal statutes prohibiting subversive advocacy and defending the right of a Vietnam War protestor to wear a jacket inscribed with the message "Fuck the Draft." It was in the latter case that Harlan proclaimed that "one man's vulgarity is another's lyric." During his tenure, Harlan was widely respected, even by opponents of his philosophy, for his thoroughness, candor, and civility. Although he often disagreed publicly with Justice Black, they were close friends in private. They were hospitalized together during their final illnesses and died within a short period of each other. See T. Yarbrough, John Marshall Harlan: Great Dissenter of the Warren Court (1992); D. Shapiro, The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan (1969).

OLIVER WENDELL HOLMES, JR. (1841–1935): Oliver Wendell Holmes, the son of a famous poet and essayist, survived three wounds in the Civil War. He had already enjoyed a distinguished career as a practitioner, author, professor, and justice on the Supreme Judicial Court of Massachusetts before his appointment to the Supreme Court by President Roosevelt in 1902. Holmes, then sixty-two years old, seemed to be at the close of his career. A lifelong Republican, he was expected to be a loyal supporter of the President on the bench. Few could have anticipated that he would serve on the Court for twenty-nine years, that his tenure would be marked by a fierce independence, and that he would exercise virtually unparalleled influence over modern constitutional theory. Holmes is perhaps best remembered for his formulation of the "clear and present danger test" for subversive advocacy and his rejection of substantive due process as a limitation on state social and economic legislation. His judicial philosophy was marked by skepticism, particularism, and pragmatism. He doubted that general propositions decided particular cases or that broad value judgments could be objectively defended. He thought that the law was necessarily unconcerned with the thought processes of those it regulated, and that it had no independent existence apart from what people did in response to what judges said. For twenty-five years, he walked daily the two and one-half miles from his home to the Court, never missing a session. He finally retired at ninety years of age and died two days before his ninety-fourth birthday. See A. Alschuler, Law without Values: The Life, Work and Legacy of Justice Holmes (2000); G. White, Justice Oliver Wendell Holmes: Law and the Inner Self (1993); M. Howe, Justice Oliver Wendell Holmes: The Proving Years (1963); M. Howe, Justice Oliver Wendell Holmes: The Shaping Years (1957).

CHARLES EVANS HUGHES (1862–1948): After defeating William Randolph Hearst for the governorship of New York, Charles Evans Hughes served as governor for one term and part of another until 1910, when President Taft appointed him to the Court. In 1916, Hughes resigned to run for the presidency on the Republican and Progressive tickets against Woodrow Wilson. On election eve, he went to bed thinking that he was President, but when the final returns were counted, he had lost by a scant twenty-three electoral votes. Hughes returned to New York law practice until President Harding appointed him secretary of state. In 1930, President Hoover returned Hughes to the Court, this time as chief justice. Hughes served as chief justice during the tumultuous eleven-year period when the Court blocked much of President Roosevelt's New Deal, then survived a direct attack on its independence, and finally reconciled itself to the fundamental changes wrought by Roosevelt's program. Throughout this period, Hughes occupied a centrist position. Although closely identified with the conservative New York bar, he often joined the liberals on the Court who dissented from invalidation of social and economic legislation. But he also defended the institutional independence of the Court when it was attacked by President Roosevelt. At a crucial point in the "Court-packing" controversy, Hughes sent a letter to Senator Wheeler arguing that the Court was current in its work, and that the addition of new justices would create serious inefficiencies. Upon his retirement in 1941, Justice Frankfurter likened his leadership ability to that of "Toscanini lead[ing] an orchestra." See M. Pusey, Charles Evans Hughes (1951).

ROBERT H. JACKSON (1892–1954): A skillful advocate and brilliant legal stylist, Robert Jackson rose quickly in the early Roosevelt administration, eventually becoming one of President Roosevelt's closest advisors. After serving as counsel to the Internal Revenue Bureau, where he won a $750,000 judgment against former Treasury Secretary Andrew W. Mellon, Jackson served successively as assistant attorney general, solicitor general, and attorney general. President Roosevelt named him to the Supreme Court in 1941 to fill the seat vacated by Justice Stone when Stone was appointed chief justice. Jackson is perhaps best remembered for his graceful prose and his subtle and original efforts to articulate a coherent theory of separation of powers in his opinions in such cases as Youngstown Sheet & Tube Co. v. Sawyer, 342 U.S. 579 (1952), and Korematsu v. United States, 323 U.S. 214 (1944). In 1945, while still on the Court, Jackson served as the chief U.S. prosecutor at the Nuremberg war crimes trial. This exposure to German fascism may have influenced Jackson's subsequent approach to constitutional interpretation. Many of his later first amendment opinions, for example, were preoccupied with the attempt to draw a bright line between protected freedom of conscience and unprotected speech that threatened the public peace and order. Jackson's willingness to permit government regulation of subversive or abusive advocacy in cases such as Dennis v. United States, 341 U.S. 494 (1951), and Terminiello v. Chicago, 337 U.S. 1 (1949), brought him into sharp conflict with Justices Black and Douglas — conflict that was exacerbated by deteriorating personal relationships. When Chief Justice Stone died, it was reported that several justices threatened to resign if Jackson was elevated to the chief justiceship. Jackson never became chief justice, but remained on the Court until his death in 1954. See E. Gerhart, America's Advocate: Robert H. Jackson (1958); G. White, The American Judicial Tradition ch. 11 (1976).

ELENA KAGAN (1960–): Named to the Supreme Court by Barack Obama in 2010, Elena Kagan is the first person nominated to the Court without judicial experience in almost forty years. After graduating magna cum laude from Harvard Law School, she clerked for Justice Thurgood Marshall, who nicknamed her "shorty" because of her 5'3" height. She then embarked on a distinguished academic career, first at the University of Chicago Law School and then at Harvard Law School, where she eventually became the first woman dean. For four years she served President Clinton as Associate White House Counsel, Deputy Assistant to the President for Domestic Policy, and Deputy Director of the Domestic Policy Council. In 2009, President Obama named her Solicitor General of the United States. Kagan is known for her powerful intellect, effective writing style, and puckish sense of humor.

ANTHONY M. KENNEDY (1936–): President Reagan's effort to fill the seat vacated by the retirement of Justice Powell, who was widely viewed as a "swing vote" on a number of important issues, sparked an extraordinary controversy about the future direction of the Supreme Court. His first nominee, Robert Bork, was defeated on the Senate floor after a long and bitter debate that pitted "originalists" against those who would treat the Constitution as incorporating values not directly derived from the text. His second nominee, Douglas Ginsburg, was forced to withdraw from consideration after it was revealed that he had used marijuana. In the wake of these events, the Senate greeted with relief the nomination of Anthony Kennedy, a relatively colorless and nonideological conservative. After graduating from Harvard Law School in 1961, Kennedy worked as a lawyer and lobbyist in California until his appointment to the Ninth Circuit by President Ford in 1975. Since joining the Supreme Court, he has most often voted with the "conservative" bloc. He criticized his colleagues for "trivializing constitutional adjudication" by engaging in a "jurisprudence of minutiae" in its enforcement of the establishment clause and for moving "from 'separate but equal' to 'unequal but benign'" in upholding an affirmative action plan. However, he joined some of his liberal colleagues when he twice cast the deciding vote to uphold the first amendment right of protestors to burn the American flag and disappointed some of his conservative supporters when he coauthored a joint opinion with Justices Souter and O'Connor declining to overrule Roe v. Wade, authored two opinions for the Court upholding the rights of homosexuals, and wrote for the Court to invalidate state-sponsored prayers at public school events.

JOHN MARSHALL (1755–1835): A century and a half after his death, John Marshall remains perhaps the most important single figure in American constitutional history. Born in a log cabin on the Virginia frontier, he served in the Continental Army during the Revolutionary War. After only the briefest formal instruction, he began the practice of law, specializing in the defense of Virginians against British creditors. Before entering public life, Marshall himself was constantly hounded by creditors. He wrote his five-volume biography of George Washington in an unsuccessful effort to raise money to pay off his debts. In 1799, Marshall entered the House of Representatives, and the following year he became secretary of state in the Adams administration. During his brief tenure, he signed and sealed, but failed to deliver, the famous commission naming William Marbury justice of the peace for the District of Columbia. In 1800, Adams appointed Marshall chief justice after John Jay, the Court's first chief