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For our families
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Preface to the Eighth Edition

After observing that every new edition of a constitutional law casebook addresses numerous issues that the Supreme Court had not dealt with in detail before – and implicitly observing that issues that once concerned the Court fall off the docket for years – the Preface to the Seventh Edition of this casebook referred to an “American tendency to constitutionalize political controversy” and noted:

[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. [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.

Yet, we continued,

[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.

We continue to offer the perspectives we described then in this Eighth Edition. As before, we present recent developments in constitutional law with what we hope is an appropriate emphasis – taking some developments as perhaps portending substantial change in the universe of constitutional doctrine and others as having more modest effects on doctrine. Examples include the apparent stabilization of doctrine dealing with central features of gay rights (while leaving other issues open, particularly those dealing with transgendered people and with whether and if so how constitutional law does and should deal with accommodating religious and other objectors to antidiscrimination law), and the continuing recasting of freedom of expression in libertarian and corporate-favoring terms. In contrast, after a flurry of interest the Court has stepped back from
developing dormant commence clause doctrine, and we have accordingly somewhat reduced our treatment of that area.

The results of the 2016 election have already inserted new issues, or revived old ones, in discussions of constitutional law. For the second time in five presidential elections since 2000, for example, the Electoral College system produced a president who received fewer votes than his principal opponent (although campaign strategies shaped by the Electoral College system undoubtedly affect raw vote total). The first months of the Trump administration have led to reflections upon the relative role of law and norms in stabilizing the U.S. constitutional system, to a degree perhaps not matched since the political turmoil that accompanied Franklin D. Roosevelt’s Court-packing proposal in 1937. As of the time we write this Preface, the Supreme Court has barely begun to address these issues, in part because of the actions the Senate took with respect to the nominations of Merrick Garland and Neil Gorsuch to the Supreme Court – actions that, themselves, pushed questions about political norms to the fore.

We live in deeply unsettled times, and the future is even more unknowable than usual. It is at least possible that over the lifetime of this Edition, crucial issues of constitutional stability will take center stage. If that happens, our hope for this Edition is that it gives teachers of constitutional law the raw materials to foster intelligent discussion of a constitutional crisis. Whether it happens or not, teachers will have to decide for themselves how to incorporate discussions of our new and evolving situation
into their courses. We have tried to write a book that is provocative but not tendentious, that suggests avenues for discussion but does not insist on a particular resolution.

Near the conclusion of the prior Preface, we wrote, “Our aim for this book is to teach students about both the inside and the outside of constitutional law. [We] have tried to ask questions of our students that, for one reason or another, the Justices have failed to ask of themselves.” As before, and now more than ever, “We are guided by the firm conviction that thinking clearly about constitutional law – both what it is and what it might be – is vital for law students and, indeed, for citizens generally.”

G.R.S.

L.M.S.

C.R.S.

M.V.T.

P.S.K.

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Editorial Notice

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The Constitution of the United States

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the
general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

Section 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least One Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Wris of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and
shall have the sole Power of Impeachment.

Section 3.[1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.
Section 4.[1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5.[1] Each House shall be the judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6.[1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have
been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevents its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
[2] To borrow money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To establish Post Offices and post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining the Militia, and for governing
such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9.[1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on Articles exported from any State.

[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and
Expenditures of all public Money shall be published from time to time.

[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section 1. [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.
[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote, a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

[6] In case of the removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what
Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

Section 2.[1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, to the Courts of Law, or in the Heads of Departments.

[3] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of
the Union, and recommend to their Consideration such Measures as he shall judge
necessary and expedient; he may, on extraordinary occasions, convene both Houses, or
either of them, and in Case of Disagreement between them, with Respect to the time of
Adjournment, he may adjourn them to such Time as he shall think proper; he shall
receive Ambassadors and other public Ministers; he shall take Care that the Laws be
faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States,
shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery,
or other high Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme
Court, and in such inferior Courts as the Congress may from time to time ordain and
establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices
during good Behaviour, and shall, at stated Times, receive for their Services, a
Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The Judicial Power shall extend to all Cases, in Law and Equity, arising
under this Constitution, the Laws of the United States, and Treaties made, or which shall
be made, under their Authority;—to all Cases affecting Ambassadors, other public
Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to
Controversies to which the United States shall be a Party;—to Controversies between two
or more States;—between a State and Citizens of another State;—between Citizens of
different States;—between Citizens of the same State claiming Lands under Grants of
different States, and between a State, or the Citizens thereof, and foreign States, Citizens
or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those
in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all
the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction,
both as to Law and Fact, with such Exceptions, and under such Regulations as the
Congress shall make.
[3] The trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.[1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2.[1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3.[1] New States may be admitted by the Congress into this Union; but no new
State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of
the United States, shall be the supreme Law of the Land; and the Judges in every State
shall be bound thereby, any Thing in the Constitution or Laws of any State to the
Contrary notwithstanding.

[3] The Senators and Representatives before mentioned, and the Members of the
several State Legislatures, and all executive and judicial Officers, both of the United
States and of the several States, shall be bound by Oath or Affirmation, to support this
Constitution; but no religious Test shall ever be required as a Qualification to any Office
or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States shall be sufficient for the
Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth
Day of September in the Year of our Lord one thousand seven hundred and Eighty seven
and of the Independence of the United States of America the Twelfth.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED
STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF
THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the
free exercise thereof; or abridging the freedom of speech, or of the press; or the right of
the people peaceably to assemble, and to petition the Government for a redress of
grievances.

AMENDMENT II [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the
people to keep and bear Arms, shall not be infringed.

AMENDMENT III [1791]
No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

**AMENDMENT IV [1791]**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**AMENDMENT V [1791]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**AMENDMENT VI [1791]**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**AMENDMENT VII [1791]**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII [1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on
the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to
their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI [1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII [1913]

[1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[2] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[3] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII [1919]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an
amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

**AMENDMENT XIX [1920]**

[1] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

[2] Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XX [1933]**

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the
persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI [1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII [1951]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which the Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an
amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

**AMENDMENT XXIII [1961]**

*Section 1.* The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

*Section 2.* The Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XXIV [1964]**

*Section 1.* The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

*Section 2.* The Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XXV [1967]**

*Section 1.* In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

*Section 2.* Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.
*Section 3.* Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

*Section 4.* Whenever the Vice President and a Majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

**Amendment XXVI [1971]**

*Section 1.* The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII [1992]

No law varying the Compensation for the services of the Senators and Representatives shall take effect, unless an election of Representatives shall have intervened.
Biographical Notes on Selected U.S. Supreme Court
Justices

The brief sketches that follow are designed to offer at least some sense of the background, personality, and intellectual style of the justices who have had the greatest impact on modern constitutional law. Because they are no substitute for serious biography, we have frequently suggested additional sources for further investigation. On less significant justices, see Currie, The Most Insignificant Justice: A Preliminary Inquiry, 50 U. Chi. L. Rev. 466 (1983); Easterbrook, The Most Insignificant Justice: Further Evidence, 50 U. Chi. L. Rev. 481 (1983).

SAMUEL A. ALITO, JR. (1950–): The son of two school teachers (his father went on to become New Jersey’s first Director of the Office of Legislative Services), Justice Alito graduated from Princeton and then from Yale Law School where he served as an editor of the Yale Law Journal. He served as an assistant to the United States Solicitor General and Deputy Assistant to the Attorney General before becoming the United States Attorney for the District of New Jersey. He developed the reputation of a tough but fair prosecutor and was known especially for his efforts directed against drug trafficking and organized crime. Before his Supreme Court appointment in 2006, he served for sixteen years as a judge on the United States Court of Appeals for the Third Circuit.

HUGO L. BLACK (1886–1971): In 1937, President Roosevelt chose Hugo Black to fill the first available vacancy on the Court. A southern progressive who had defended the rights of labor organizers and investigated police brutality before coming to Washington, Black served in the U.S. Senate for ten years prior to his appointment. As a senator, he strongly defended New Deal programs, including Roosevelt’s “Court-packing” plan. Shortly after his confirmation he became the subject of controversy when it was revealed that he had belonged to the Ku Klux Klan for two years in the 1920s. The controversy subsided after Black, in a dramatic radio address, admitted his prior membership, but added that he had resigned many years before and would comment no further. As a justice, Black was known for his insistence on what he claimed to be literal enforcement of constitutional guarantees, especially the first amendment guarantee of free speech. Although frequently characterized as an “activist” because of his willingness to subject to
intensive review legislation that arguably violated express constitutional provisions, Black himself thought that literalism was necessary to confine judicial power. Thus, his insistence that the fourteenth amendment incorporated and made applicable to the states the guarantees of the first eight amendments was premised in part on his belief that any other approach would leave justices free to read their own values into the Constitution. See Adamson v. California, 332 U.S. 46 (1947). Consistent with this view, in cases such as Griswold v. Connecticut, 381 U.S. 479 (1965), Black rejected the notion that the Constitution contained general guarantees of “privacy” or “natural rights” beyond those expressly articulated in the text. See R. Newman, Hugo Black: A Biography (1994); G. Dunne, Hugo Black and the Judicial Revolution (1977).

**HARRY A. BLACKMUN (1908–1999):** Harry Blackmun was President Nixon’s third choice to fill the seat vacated when Abe Fortas resigned in 1970. After failing to secure confirmation of Clement Haynsworth of South Carolina and G. Harrold Carswell of Florida, Nixon announced that the Senate “as it is presently constituted” would not confirm a southerner and turned to Blackmun, a judge on the Eighth Circuit Court of Appeals. A boyhood friend of Chief Justice Burger, Blackmun was quickly dubbed “the Minnesota Twin” by the press. During his early years on the Court, he regularly voted with the chief justice. Later he distanced himself from the Court’s conservative bloc and increasingly joined Justices Marshall and Brennan in dissent. Blackmun is best known for his majority opinion in Roe v. Wade, 410 U.S. 113 (1973), upholding the constitutional right of women to decide for themselves whether to have an abortion. It has been suggested that the opinion was influenced by Blackmun’s experience before joining the Court as house counsel for the Mayo Clinic, where he frequently advised doctors and defended their right to make medical judgments.

**JOSEPH P. BRADLEY (1813–1892):** The oldest of eleven children, Joseph Bradley was raised in poverty on a small farm. As a lawyer, he specialized in corporate and commercial law and represented several railroads. A Whig before the Civil War, Bradley was an avid supporter of the Union cause and became identified with the radical wing of the Republican Party in the postwar period. His appointment to the Court by President Grant in 1870 was later the subject of controversy because it made possible the reversal
of the Court’s earlier decision involving the validity of the Civil War legal tender acts. Compare Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870) with The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871). As a justice, Bradley supported the power of Congress to regulate the interstate movement of goods, even if the regulation limited state authority. His dissent in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), also showed a willingness to read the newly enacted fourteenth amendment as an important expansion of federal authority. In 1877, Bradley was a last-minute substitute on the electoral commission established to resolve the disputed presidential election of 1876. With the commission deadlocked seven to seven, Bradley cast the deciding vote to make Rutherford B. Hayes the President. See G. White, The American Judicial Tradition ch. 4 (1976); Fairman, Mr. Justice Bradley, in A. Dunham and P. Kurland, Mr. Justice 65–93 (1956).

**LOUIS D. BRANDEIS (1856–1941):** The son of Jewish immigrants from Bohemia, Louis Brandeis successfully practiced law in Boston for forty years 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
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 protestors 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 life-long 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

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 justice, declined reappointment to the position. Marshall served for thirty-four years, participated in more than one thousand decisions, and wrote over five hundred opinions. He is best remembered for establishing the Court’s power to declare congressional statutes unconstitutional in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), although his contemporaries found the portion of Marbury asserting judicial control over presidential appointees much more controversial. But in some ways his refusal to invalidate a statute enacted pursuant to Congress’s powers in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and his willingness to strike down state statutes interfering with federal powers or individual rights in such cases as McCulloch, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), and Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), were even more influential on modern constitutional theory. In 1807, Marshall presided over the treason trial of former Vice President Aaron Burr. In the course of that trial, he signed the famous subpoena directing President Jefferson to produce various documents relevant to the trial—a precedent much cited over a century and a half later when Richard Nixon asserted “executive privilege” to resist a judicial subpoena. See L. Baker, John Marshall: A Life in the Law (1974); A. Beveridge, The Life of John Marshall (1916).

THURGOOD MARSHALL (1908–1993): The son of a primary school teacher and a club steward, Thurgood Marshall became the first African American to serve on the Court when he was appointed by President Johnson in 1967. But Marshall had already made an enduring mark on American legal history decades before his judicial career began. After graduating first in his class from Howard Law School, Marshall began his long involvement with the National Association for the Advancement of Colored People. For two decades, he traveled across the country coordinating the NAACP’s attack on segregation in housing, employment, voting, public accommodations, and, especially,

**JAMES C. McREYNOLDS (1862–1946):** Although remembered today primarily as one of the “four horsemen of reaction” who helped block Franklin Roosevelt’s New Deal, James McReynolds first came to public attention as a vigorous “trust buster” in the Theodore Roosevelt and Wilson administrations. In the year that he served as Wilson’s attorney general, he angered many members of Congress and of the administration with his arrogance and ill-temper. President Wilson named him to the Court in 1914 largely to quiet the controversy. His judicial career was marked by an unyielding commitment to strict constructionism and conservative principles. His personal manner continued to alienate many of his colleagues. After The Gold Clause Cases were decided in 1935, he proclaimed, “Shame and humiliation are on us now. Moral and financial chaos may confidently be expected.” Chief Justice Taft remarked that McReynolds “has a continual grouch” and “seems to delight in making others uncomfortable.” Widely accused of anti-Semitism, McReynolds conspicuously failed to sign the letter of affection and regret drafted by his brethren on Justice Brandeis’s retirement from the Court.

**SANDRA DAY O’CONNOR (1930–):** The first woman ever to serve on the Court, Sandra Day O’Connor was appointed by President Reagan in 1981. O’Connor was a classmate of Justice Rehnquist at the Stanford Law School, where she was an editor of
the Stanford Law Review. Despite her outstanding academic achievements, O’Connor found it difficult to locate a job on graduation. When she applied to the firm in which future Attorney General William French Smith was a partner, she was offered the position of secretary. After briefly serving as deputy county attorney for San Mateo County in California, she worked as a civilian attorney for the army while her husband served his tour of duty. She then spent eight years as a mother, homemaker, and volunteer while her three children grew up. When she resumed her legal career, she became an assistant attorney general in Arizona. In 1970, she was elected to the Arizona senate and eventually became majority leader. She then served on the Superior Court for Maricopa County and the Arizona Court of Appeals. Perhaps more often than any other justice in the Court’s history, Justice O’Connor cast the deciding vote in important cases. She showed a preference for a balancing approach to constitutional law and case-by-case particularism—a stance that created conflict with Justice Scalia, who claims to favor a rule-based approach. She initially urged her colleagues to reconsider the Court’s analysis of the abortion question in Roe v. Wade, but later surprised many by coauthoring an important opinion preserving Roe’s central holding at a time when many thought it would be overruled. She wrote for a five-to-four majority to permit universities to utilize affirmative action programs to help achieve racial diversity and authored the majority opinion holding that the executive could not indefinitely hold “enemy combatants” without providing a procedure under which they could challenge their detention. Widely respected for her incisive and informed questioning at oral argument, O’Connor was known for her deference to the political branches of government, for her defense of federalism, and for her original approach to the problem of church-state relations. See S. O’Connor, Lazy B: Growing up on a Cattle Ranch in the American Southwest (2002); Comment, The Emerging Jurisprudence of Justice O’Connor, 52 U. Chi. L. Rev. 389 (1985).

LEWIS F. POWELL, JR. (1907–1998): Following his graduation from Harvard Law School, Lewis Powell returned to his native Virginia, where he joined one of Richmond’s most prestigious law firms. As president of the Richmond school board during a period of intense controversy concerning school desegregation, Powell gained a reputation as a racial moderate. Despite intense pressure from those advocating “massive resistance,” he
insisted on keeping the schools open. Powell was elected president of the American Bar Association in 1964. In that capacity, he worked to establish a legal services program within the Office of Economic Opportunity and spoke out against civil disobedience and “parental permissiveness.” In 1971, President Nixon fulfilled his promise to name a southerner to the Court by selecting Powell to fill the vacancy created by the resignation of Justice Black. A few years after his appointment, Powell seemed to speak for the South in his concurring opinion in Keyes v. School District, 413 U.S. 189 (1973), in which he argued that there was no significant legal distinction between northern and southern school segregation. Over time, Powell gained the reputation as an ad hoc “balancer,” often casting the critical “swing vote” in important decisions. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Trimble v. Gordon, 430 U.S. 762 (1977), and Branzburg v. Hayes, 408 U.S. 665 (1972), for example, he controlled the disposition even though he was the only justice adopting his particular view of affirmative action, the rights of nonmarital children, and press rights, respectively. See J. Jeffries, Justice Lewis F. Powell, Jr. (1994).

WILLIAM H. REHNQUIST (1924–2005): After graduating from Stanford Law School, William Rehnquist came to Washington in 1952 to clerk for Associate Justice Robert Jackson. During his clerkship, he wrote a controversial memorandum for Justice Jackson supporting the constitutionality of “separate but equal” education for blacks. When the memorandum surfaced years later during Rehnquist’s confirmation hearings, he explained that it represented Jackson’s views and not his own. Following his clerkship, Rehnquist moved to Phoenix, Arizona, where he became involved in Republican politics. A strong supporter of Barry Goldwater, Rehnquist headed the Justice Department’s Office of Legal Counsel in the Nixon administration. President Nixon named him to the Court in 1971, and President Reagan named him chief justice in 1986. Chief Justice Rehnquist was known for his commitment to judicial restraint and majoritarianism. His opinions in the areas of equal protection, due process, and free speech consistently reflected a narrow construction of constitutional rights. For example, he would have limited strict scrutiny under the equal protection clause to cases involving racial discrimination. Unlike conservative justices of an earlier era, however, Rehnquist maintained the same deferential stance when reviewing state legislation arguably
interfering with private markets and the free flow of commerce. See, e.g., his opinion for the Court in Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986), and his dissenting opinion in Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981). Nonetheless, Rehnquist supported judicial intervention to protect the prerogatives of the states from federal interference and to place constitutional limits on affirmative action programs arguably discriminating in favor of racial minorities. See Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293 (1976).

JOHN G. ROBERTS, JR. (1955–): Originally nominated by President George W. Bush to replace Justice O’Connor, John Roberts was renominated for the position of Chief Justice of the United States following the death of Chief Justice Rehnquist. Upon his confirmation in 2005, he became the third youngest chief justice in American history and the first justice to replace the justice for whom he had clerked. After graduating magna cum laude from Harvard Law School, Roberts served as a special assistant to the Attorney General, Associate Counsel to the President, and the Principal Deputy Solicitor General. He is one of the most experienced and successful Supreme Court advocates ever to have been appointed to the Court. While in government service, he argued thirty-nine cases before the Supreme Court, winning twenty-five of them. Upon leaving government, he became head of the appellate practice of a major Washington law firm, in which capacity he argued fourteen additional cases before the Court. In 2003, he became a judge on the United States Court of Appeals for the District of Columbia Circuit. Since becoming chief justice, he has spoken repeatedly in favor of having the Court decide cases narrowly and uniting behind a single majority opinion. Although he had suggested in his confirmation hearings that the Court should increase the number of merits cases it hears, the Court’s docket has remained low by historical standards.

ANTONIN SCALIA (1936–): The son of an Italian immigrant, Antonin Scalia was the first Italian American to be appointed to the Supreme Court. A former law professor and assistant attorney general, he earned a reputation as an intelligent, hardworking, and dedicated conservative while serving as a judge on the U.S. Court of Appeals for the District of Columbia Circuit. Since his elevation to the Supreme Court, Justice Scalia has become known for his forceful opposition to constitutional balancing tests and to reliance
on nontextual sources of interpretation. This posture has most often led him to “conservative” outcomes. He is a strong defender of executive prerogatives and is perhaps the Court’s most vigorous opponent of affirmative action and abortion rights. The same posture has occasionally led him to vote with the Court’s “liberals,” however, especially on free speech and search and seizure questions. In a concurring opinion concerning the status of “enemy combatants,” he went further than the majority by insisting that the Constitution did not grant the President authority to hold American citizens without trial. Some commentators consider him the Court’s most accomplished stylist, while others decry the effect of his sharply worded opinions on civility in constitutional discourse.

**Sonia Sotomayor (1954–):** Justice Sotomayor is the daughter of a factory worker with a third grade education who died when she was nine and a nurse who raised her as a single mother. She grew up in a public housing project in the South Bronx. After graduating valedictorian of her high school class, she enrolled at Princeton, where she graduated summa cum laude and Yale Law School, where she was an editor of the Yale Law Journal. She served as a prosecutor and in private practice until she was appointed to the United States District Court by George H.W. Bush. In 1995, she issued a ruling that effectively ended the Major League Baseball strike, a decision that, according to a reporter for the Philadelphia Inquirer, caused her to join “the ranks of Joe DiMaggio, Willie Mays, Jackie Robinson, and Ted Williams.” In 1998, President Bill Clinton appointed her to the United States Court of Appeals for the Second Circuit, where she served as the first Latina on that court. Nominated by Barack Obama, she joined the Supreme Court in 2009. Since her elevation, Justice Sotomayor has generally voted with the Court’s liberal wing. She has become known for her probing questions at oral argument and her mastery of the record in complex cases. See Sonia Sotomayor, *My Beloved World* (2013).

**David Hackett Souter (1939–):** Prior to his nomination to the Supreme Court by the first President Bush, David Souter was a virtual unknown. In his long career as a justice on the New Hampshire Supreme Court, a judge on the New Hampshire trial court, and New Hampshire’s attorney general, he seldom had occasion to express his
views on contentious constitutional issues such as abortion and affirmative action.

Indeed, some critics suggested that President Bush, mindful of the searing controversy surrounding the nomination of Judge Bork, selected Souter principally because he lacked a “paper trail.” But although Souter had little experience in constitutional adjudication, he came to the Court with solid intellectual credentials. A Rhodes scholar and graduate of the Harvard Law School, he was praised by liberals and conservatives alike for his intelligence and fair-mindedness. The counsel for the New Hampshire State Democratic Party and president of the New Hampshire Bar Association characterized him as “an enormous intellectual” and “about 135 pounds—and about 120 pounds of brain.” Before his appointment, Justice Souter lived by himself in a ramshackle New Hampshire farmhouse laden with stacks of books. Friends said that he liked to work seven days a week, taking time out to hike and listen to classical music. As a justice, Souter is known for careful, lawyerlike opinions and his moderate, nonideological stance toward controversial constitutional issues.

JOHN PAUL STEVENS (1920–): A graduate of Northwestern Law School, John Paul Stevens clerked for Justice Wiley B. Rutledge before joining a Chicago law firm specializing in antitrust work. He taught part-time at the University of Chicago and Northwestern Law Schools until his appointment to the Seventh Circuit Court of Appeals in 1970. Although a registered Republican, Justice Stevens was never active in partisan politics. President Ford elevated him to the Supreme Court in 1975. Stevens is known for his independence and an unwillingness to be bound by rigid formulas. He rejected the position that equal protection analysis can be reduced to various “tiers” of review, for example, arguing that various factors must be weighed under the same standard in every case to ensure that the state has met its obligation to govern impartially. And in free speech cases Stevens staked out his own theory that fits comfortably within neither the traditional “liberal” nor the traditional “conservative” ideology. See, e.g., Smith v. United States, 431 U.S. 291 (1977); Young v. American Mini Theatres, 427 U.S. 50 (1976).

POTTER STEWART (1915–1985): Son of the Republican mayor of Cincinnati, Potter Stewart became active in Ohio Republican politics at an early age. He was twice elected to the city council and served one term as vice mayor before President
Eisenhower appointed him to the Sixth Circuit Court of Appeals in 1954. In 1958, Eisenhower elevated him to the Supreme Court, where he served until his retirement in 1981. Although his political background was conservative, Stewart occupied a centrist position on the Court. He frequently voted with the liberal justices on first amendment issues (an orientation perhaps influenced by his experience as editor of a student newspaper while at Yale), but with conservative justices on equal protection issues. On many questions, his position simply could not be predicted in advance, and he had little difficulty in changing his mind about views he had expressed in earlier opinions. Perhaps his most famous opinion was a concurrence in Jacobellis v. Ohio, 378 U.S. 184 (1964), in which he said of “hard core” pornography, “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.” Although sometimes ridiculed, this statement in some ways summarized Stewart’s judicial philosophy, which tended to be particularistic, intuitive, and pragmatic.

HARLAN FISKE STONE (1872–1946): For twenty-five years, Harlan Fiske Stone practiced law with a Wall Street law firm and served as a professor and the dean of Columbia Law School. In 1924, President Coolidge appointed Stone, his old friend and classmate, to head a Department of Justice demoralized by the Teapot Dome scandal. A year later Coolidge appointed Stone to the Court. Although a Republican and moderate conservative, Stone sided with the wing of the Court willing to uphold New Deal programs during the great controversy that engulfed the Court in the early 1930s. In 1941, President Roosevelt elevated Stone to chief justice, an appointment that Archibald MacLeish called “the perfect word spoken at the perfect moment.” Justice Stone’s footnote 4 in United States v. Carolene Products, 304 U.S. 144 (1938), is doubtless the most famous footnote in constitutional law and has formed the basis of much of modern constitutional theory. During his twenty-one years on the bench, Stone occupied every seat from junior associate justice to senior associate justice to chief justice—a feat accomplished by no one else. He died “with his boots on”—stricken while reading a dissenting opinion from the bench in 1946. See A. Mason, Harlan Fiske Stone: A Pillar of the Law (1956); G. White, The American Judicial Tradition ch. 10 (1976); Dunham, Mr.
JOSEPH STORY (1779–1845): Joseph Story was only thirty-two years old and had had no judicial experience when James Madison appointed him to the Court in 1811. Although a Republican, Story had strong nationalist sympathies and sided with John Marshall throughout much of his judicial career. His opinion in Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816), established the finality of the Court’s constitutional authority against the states. His nationalist inclinations were also reflected in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), which upheld the power of federal courts to create a national commercial law. As a circuit justice, Story was said to absorb “jurisdiction as a sponge took up water,” and some claimed that, “if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it.” A serious scholar, Story was elected to the Harvard Board of Overseers and played a key role in the founding of Harvard Law School. His Commentaries on the Constitution, published in 1833, was a classic of its time. On Marshall’s death in 1835, Story hoped to be nominated chief justice, but Andrew Jackson, who had called him “the most dangerous man in America,” named Roger Taney instead. Story was frequently in dissent during the nine years he sat on the Taney Court. See, e.g., Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837). Frustrated by the direction of the Court, which he saw as undermining the Marshall Court’s conception of the Constitution, he planned to resign in 1845, but fell ill and died before he could complete his unfinished business. See G. Dunne, Justice Joseph Story and the Rise of the Supreme Court (1970); K. Neumyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (1984).

GEORGE SUTHERLAND (1862–1942): A friend and close advisor to President Harding, George Sutherland was appointed to the Court in 1922. Before his appointment, he served in the U.S. Senate for twelve years, where he developed a reputation as an authority on constitutional questions and a conservative who nonetheless occasionally supported progressive causes. While on the Court, he was the intellectual leader of the conservative wing. He strongly objected to what he considered the evisceration of the contract clause and vigorously opposed the constitutionality of minimum wage laws. See
Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934); Adkins v. Children’s Hospital, 261 U.S. 525 (1923). But his concern for the rights of individuals and broad reading of the due process clause also led him to write for the majority in Powell v. Alabama, 287 U.S. 45 (1932), which reversed the conviction of the “Scottsboro Boys” and began the process of applying constitutionally based rules of criminal procedure to the states. See H. Arkes, The Return of George Sutherland: Restoring Jurisprudence of Natural Rights (1994); J. Paschal, Mr. Justice Sutherland: A Man against the State (1951).

WILLIAM HOWARD TAFT (1857–1930): The only person to serve as both President and chief justice, William Howard Taft’s career was marked by genial conservatism and a commitment to the institutional independence of each branch of the federal government. Taft served as secretary of war in Theodore Roosevelt’s administration and became one of Roosevelt’s closest advisors. With support from Roosevelt, he was elected President in 1908. Soon after his inauguration, however, he and Roosevelt split, and he lost his bid for reelection in 1912, when Roosevelt splintered the Republican vote by running as a third-party candidate. After leaving the presidency, Taft taught constitutional law at Yale University and served for a year as president of the American Bar Association. Along with several other former ABA presidents, Taft fought to block Louis Brandeis’s nomination to the Court in 1916. President Harding named Taft chief justice in 1921. Taft was responsible for passage of the Judiciary Act of 1925, which gave the Supreme Court effective control over its own appellate jurisdiction and for the appropriation of funds for construction of the present Supreme Court building. See A. Mason, William Howard Taft: Chief Justice (1964).

ROGER B. TANEY (1777–1864): Prior to his appointment as chief justice by President Jackson in 1835, Roger Taney served as Jackson’s attorney general and secretary of the treasury. While serving in Jackson’s cabinet, he became enmeshed in the controversy surrounding the second Bank of the United States. As attorney general, Taney drafted Jackson’s message vetoing the bank’s recharter, and when the secretary of the treasury refused to withdraw federal funds from the Bank, Jackson named Taney to the post so that he could do so. But when Jackson submitted Taney’s name to the Senate
for confirmation, he was defeated and forced to withdraw. Senate Whigs, who feared that Taney was too radical, again blocked his nomination as associate justice in 1835. Shortly thereafter, however, he was successfully nominated to replace John Marshall as chief justice. Taney’s career on the Court is overshadowed by his opinion in Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), widely viewed as one of the great legal and moral blunders in the Court’s history. The rest of his tenure, however, was marked by the cautious and careful use of judicial power. Contrary to the expectations of his contemporaries, he did not support the wholesale abandonment of the Marshall legacy. Instead, he steered a middle course between the extreme nationalism and extreme localism of his colleagues. But as the nation approached civil war, the ground in the middle became increasingly unstable, and Taney’s one spasmodic effort to end the nation’s agony over slavery by imposing a constitutional solution in Dred Scott ended in a tragedy that permanently marred his reputation. See C. Swisher, Roger B. Taney (1935); G. White, The American Judicial Tradition ch. 3 (1976).

**CLARENCE THOMAS (1948–)**: Born into grinding poverty in segregated coastal Georgia, Clarence Thomas became the second African American and one of the youngest justices to join the Court when he was appointed by President Bush in 1991. He was confirmed by the Senate to fill the seat vacated by the retirement of Thurgood Marshall after extraordinary confirmation hearings that opened with a moving account of his personal saga and closed with charges of sexual harassment leveled against him by Anita Hill, who had worked with him at the Department of Education and the Equal Employment Opportunity Commission. A graduate of Yale Law School, he served as assistant secretary for civil rights at the Department of Education and chair of the Equal Employment Opportunity Commission in the Reagan administration. During his controversial seven-year stewardship of the EEOC, Thomas’s fierce opposition to affirmative action antagonized liberals and members of the civil rights community. In 1989, President Bush appointed Thomas to the U.S. Court of Appeals for the District of Columbia Circuit, where he served for fifteen months before his elevation to the Supreme Court. Known as a staunch conservative, Thomas’s extrajudicial writings suggest an interest in natural law as a basis for constitutional adjudication. Since joining the Court, he has written a series of distinctive dissents and concurrences, often demonstrating a
willingness to reject settled precedent in favor of his understanding of the constitutional text. On racial issues, he strongly opposes what he considers liberal condescension in the form of affirmative action and the assumption that majority black institutions are necessarily inferior. See K. Foskett, Judging Thomas: The Life and Times of Clarence Thomas (2004); A. Thomas, Clarence Thomas: A Biography (2001).

WILLIS VAN DEVANTER (1859–1941): A lawyer’s lawyer, William Van Devanter invariably sided with the conservative wing of the Court, but, unlike some of his colleagues, never resorted to divisive ideological rhetoric. Instead, he relied on his mastery of technical doctrine to become a “master of formulas that decided cases without creating precedents.” Van Devanter, who was active in Republican politics in Wyoming, came to Washington during the McKinley administration and was named to the Eighth Circuit Court of Appeals by Theodore Roosevelt. When President Taft nominated him to serve as an associate justice, William Jennings Bryan complained that he was “the judge that held that two railroads running parallel to each other for two thousand miles were not competing lines, one of the roads being that of Union Pacific,” one of Van Devanter’s former clients. It has been said that Van Devanter came to the Court “fully equipped with a lawyer’s understanding of federal jurisdiction, a frontiersman’s knowledge of Indian affairs, and a native hostility to governmental regulation.” His years on the Court were marked by a concern for technical jurisdictional questions and opposition to government intervention in all forms. His retirement in June 1937 gave Franklin Roosevelt his first appointment and helped defuse the crisis created by the Court’s opposition to the New Deal.

EARL WARREN (1891–1974): Both vilified and canonized during and since his tenure, Earl Warren presided as chief justice over one of the most tumultuous and portentous periods in the Court’s history. The emotions that he aroused are hard to reconcile with his political stance, which was, essentially, centrist and pragmatic. As Republican governor of California, he denounced “communistic radicals” and supported the wartime order to forcibly evacuate Japanese Americans. (The Court subsequently upheld the constitutionality of the evacuation in Korematsu v. United States, 323 U.S. 214 (1944).) In his later years as governor, however, he developed a reputation as a
progressive and proposed state programs for prepaid medical insurance and liberal welfare benefits. In 1948, he ran for Vice President on the ticket headed by Thomas Dewey. In 1952, he mounted his own presidential effort. At the Republican convention, however, he threw his support behind Dwight Eisenhower. President Eisenhower repaid Warren by nominating him as chief justice in 1953—a nomination Eisenhower later called “the biggest damn-fool mistake I ever made.” Perhaps Warren’s greatest accomplishment on the Court was his painstaking and successful effort to maintain a united front as the Court overturned the separate but equal doctrine in Brown v. Board of Education, 347 U.S. 873 (1954), and then confronted southern violence and intransigence. Warren himself believed that his opinion in Reynolds v. Sims, 377 U.S. 533 (1964), establishing the one person, one vote formula, was of greater significance. In the end, however, it may have been his opinions in the field of criminal procedure—especially Miranda v. Arizona, 384 U.S. 436 (1966)—that attracted the most controversy. This controversy tended to obscure the fact that there was a strong conservative and moralistic tone to many of Warren’s opinions. He opposed constitutional protection for “pornographic” literature, for example, and dissented in Shapiro v. Thompson, 394 U.S. 618 (1969), when the Court invalidated durational residency requirements for welfare recipients. Warren was distrustful of complex doctrinal argument. His opinions were thus marked by a confident, intuitively grounded insistence on fair play and fundamental justice. See B. Schwartz, Superchief (1983); E. Warren, The Memoirs of Earl Warren (1977); G. White, Earl Warren (1982).

BYRON R. WHITE (1917–1992): An outstanding scholar-athlete, Byron “Whizzer” White was first in his class at the University of Colorado, a Rhodes scholar, and a professional football player with the Detroit Lions before beginning his legal career. White served in the navy during World War II and graduated from Yale Law School magna cum laude. After serving as law clerk to Chief Justice Fred Vinson, he returned to his native Colorado where he practiced with a prominent Denver law firm for fourteen years. A long-time friend of John F. Kennedy, White headed Kennedy’s preconvention presidential campaign in Colorado in 1960 and subsequently became chairman of National Citizens for Kennedy. After the election, President Kennedy named him deputy attorney general and in 1962 elevated him to the Court. As a justice, White was known as
a strong advocate of school desegregation and a defender of the rights of minorities.
Although more ready than his colleagues to find legislation lacking in a “rational basis”
when challenged under “low-level” equal protection review, he also criticized his
colleagues for too aggressive use of substantive due process analysis. For example, joined
only by Justice Rehnquist, White dissented in Roe v. Wade, 410 U. S. 113 (1973), which
held that women have a constitutionally protected liberty interest in securing abortions.
White opposed many of the Warren Court decisions extending new protections to
criminal defendants and in later years often voted to limit the scope of those holdings.
See D. Hutchinson, The Man Who Was Whizzer White: A Portrait of Justice Byron R.

Constitutional Law
The Supreme Court since 1789
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Earl
Warren

1955

1960
Kennedy

Harlan F.
Stone

James F.
Byrnes

Wiley B.
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*In 1863 Congress established a tenth seat, to which Stephen J. Field was appointed.
**In 1866 Congress reduced the size of the Court to six justices. Consequently, the seats of Justices Catron and Wayne remained unfilled after their deaths in 1865 and 1867. Congress restored the Court to nine seats in 1869.
Constitutional Law