INTRODUCTION

A Political Supreme Court

There are two parties in the United States, most decidedly opposed to each other as to the rights, powers and province of the judiciary. . . . One party almost claims infallibility for the judges, and would hedge them round about in such a manner that they cannot be reached by popular opinion at all, and . . . the other would subject them to the vacillations of popular prejudice and seemingly require it of them to define and administer the law, and interpret the Constitution, according to the real or apparent expediency of things.

—NILES’ WEEKLY REGISTER (1822)

It was one of George Washington’s first concerns as president: who would sit on the Supreme Court of the United States? “Impressed with a conviction that the true administration of justice is the firmest pillar of good government,” he wrote future Attorney General Edmund Randolph in 1789, “I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system.” Under the Articles of Confederation, which the recently ratified Constitution replaced, there had been no national judiciary. The Court’s role in the new political system was unclear, but Washington realized the impact the Court might have in the young Republic. This required, he told Randolph, “the selection of the fittest characters to expound the laws and dispense justice. . . .” As he selected the six justices Congress had authorized, Washington also made sure that each section of the nation was represented and that the six were strong supporters of the new Constitution.

The first session of the newly constituted Supreme Court was scheduled for February 1, 1790, in the Exchange Building at the foot of Broad Street in New York City. The occasion was inauspicious. Only three of the six justices were present, so the Court adjourned until February 2. By then a fourth justice had arrived. In contrast to the black robes worn today, the justices were dressed in black and red.
2 Introduction

gowns. A newspaper account of the day reported, “As no business appeared to require immediate notice, the Court was adjourned.”

Against the background of the Court’s beginnings in 1790, anyone embarking on the study of constitutional law today is aided by an appreciation of three points. First, the justices have had an impact on American life that can scarcely be exaggerated. This reality is made possible by and is bound up with democratic politics and a written Constitution. Students of political science therefore pay attention to Supreme Court decisions because they matter. As Washington anticipated, what the Court does—or does not do—affects the allocation of power. Second, the Court of Washington’s time was not the Court of today. Like Congress and the presidency, it has changed markedly as an institution. Third, even though people frequently think of the Court as being “above” politics, it is not. From the outset, the membership of the Supreme Court has consisted of politicians (all justices have had some experience in public affairs, and many were active in partisan politics before going on the bench) appointed by politicians (presidents) and confirmed by politicians (senators). Moreover, the Court’s decisions have given the justices a hand in governing the nation. That fact alone makes the Court political. This introductory chapter considers these points in turn. Later chapters will explore the organization and jurisdiction of the federal courts and many of the constitutional issues that have bedeviled the justices and the nation for more than two centuries.

CONSTITUTIONAL INTERPRETATION AND POLITICAL CHOICE

“[W]e must never forget that it is a constitution we are expounding.” With this commanding reminder, Chief Justice John Marshall interrupted a closely reasoned argument in *McCulloch v. Maryland* (1819). He did not pause to spell out what he had in mind. His meaning emerged from other passages in the opinion.

As Chapter Four will show, Marshall found in the Constitution a deep reservoir of congressional power and a subordinate place for the states in the federal system. Even without express authorization in the Constitution, Congress could charter a national bank. Furthermore, Maryland and other states could not tax it. The Supreme Court, as expounder of the Constitution, would correspondingly have a narrow but nonetheless important role, guarding national over state interests. The results of *McCulloch* have been far-reaching.

In *McCulloch* Marshall made constitutional law. Constitutional law or jurisprudence consists of the prevailing meaning of the Constitution as found mainly in decisions by the U.S. Supreme Court. As law, these decisions are “legal,” to be sure, but the law they announce is not ordinary law. Because it deals with fundamental matters such as the organization of government and the authority of officials over the lives of citizens, constitutional law is a very special kind of law, fusing politics, history, and political philosophy. This art of interpreting the Constitution is a lawyer’s art only in the narrow sense that all justices of the Supreme Court have

---

1 Throughout the book, emphasis within quotations is in the original, unless otherwise indicated.
2 Boldface italic type is used throughout to indicate those cases reprinted in the book.
3 Key terms, boldfaced at the point in each essay where they are first explained, also appear in a list at the end of each chapter essay as well as in a glossary in the appendix.
been lawyers, even though some people are surprised to learn that the Constitution does not require that the justices be lawyers or even that they have judicial experience. But the justices have had to be more than mere legal technicians. Supreme Court justices succeed as credible constitutional authorities to the degree that they are persuasive that it is the Constitution, not their individual preferences, that speak.

A theme of this book is the continuing importance of constitutional interpretation. After 200 years, the Constitution is far more than a historic relic on display for tourists visiting the National Archives in Washington. The Constitution is the vital foundation of our political system. Broad or narrow, the prevailing interpretation of the Constitution at different times has been a major influence on the kind of nation and society Americans have enjoyed. Interpretation requires choice and is always the product of contending values. Some of these ideas promote centralized power; others, control by the states. Some enlarge or diminish the influence of one branch of the national government in relation to another. Some expand individual liberties; others expand the powers of government, state and national, at the expense of the individual. Still others allow government to protect minorities from majorities.

Constitutional interpretation occurs when the Supreme Court and other courts decide cases that require judges to give meaning to particular words and passages in the Constitution. Cases are disputes handled by a court. They may pit one individual against another, the government against an individual or corporation, and so forth. Cases are thus the raw material of the judicial process. Although many cases do not involve conflicting interpretations of the Constitution, those that do enable courts to apply the nation's fundamental law—largely crafted for an agrarian society near the end of the eighteenth century—to the needs of a technological nation in the twenty-first century.

The justices long ago established the Supreme Court as the oracle of the Constitution through the power of judicial review: the authority to set aside laws passed by Congress and the state legislatures as being contrary to the Constitution. Accordingly, judicial review is law steeped in politics. The development of judicial review has meant that two branches of the national government—Congress and the presidency—are preoccupied with partisan pressures. The third branch—the judiciary—is preoccupied with constitutional principles packed with political significance. Constitutional interpretation is political in the broadest sense because it makes courts, especially the Supreme Court, participants in the process of government. American courts are therefore distinctive because they routinely speak the language of the fundamental values of the political system.

A CHANGING JUDICIARY

Understanding constitutional law today is helped by an awareness of the Court's institutional development.

Beginnings. The Court's first decade was characterized by obscurity, weakness, and uncertainty. To a degree, each was both a cause and an effect of a high turnover in membership, an absence of effective leadership, and relatively few cases to decide. After George Washington filled the six positions Congress had authorized, he and his successor, John Adams, encountered eight vacancies between 1790 and 1800. Moreover, the Court had three chief justices during the same period (John Jay, John Rutledge, and Oliver Ellsworth). By contrast, of all
chiefs to date since 1800, only two (Harlan Fiske Stone and Fred M. Vinson) served for fewer than eight years.

For some early jurists, other positions were more appealing. Washington's first choice for one of the initial appointments in 1789 was Robert Harrison. Five days after his confirmation by the Senate he was selected chancellor of Maryland, a position he preferred to the seat on the Supreme Court. Without having attended a single session of the Court, John Rutledge resigned as associate justice in 1791 to become chief justice of South Carolina. He would later return when Washington handed him a recess appointment to be the second chief justice, a nomination the Senate rejected a few months later. (A recess appointment allows the president to fill a vacancy when the Senate is not in session. It expires at the end of the next session unless the Senate has acted on the nomination.) Chief Justice Jay did not attend a session of the Court after 1793; accepted a diplomatic mission to England in 1794, which led to an accord that today bears his name; and resigned in 1795 to become governor of New York. Departing Treasury Secretary Alexander Hamilton then turned down Washington's offer of the chief justiceship so he could resume law practice in New York. Today, presidents are rarely rebuffed by prospective nominees. Moreover, a justice's tenure is usually long, with both the average and median length of service for justices appointed since 1900 equaling nearly four presidential terms.

Detracting from the attractiveness of the high bench in the early years was the circuit riding Congress imposed on the justices, a duty not finally eliminated until 1891. In addition to sitting collectively as the Supreme Court, justices sat as judges of the circuit courts, one of the two types of lower federal courts established by the Judiciary Act of 1789. Though the act provided for three types of courts (district courts, circuit courts, and the Supreme Court), it authorized the appointment of judges only for the district courts and the Supreme Court. Except for a brief period in 1801–1802, no separate circuit judgeships existed until 1855 (for California) and then in 1869 for the rest of the nation. Each circuit court was at first staffed by two justices (a number soon reduced to one) and one district judge. As a result, the early justices spent far more time holding circuit court than they did sitting on the Supreme Court. Nonetheless, though small in number, some of the Court's decisions in this first decade were instrumental in laying the foundations of an enlarged judicial power that emerged in the nineteenth century.

Whether a justice traveled by carriage or by boat, riding circuit was onerous. The rigors must have tested devotion to Court and country. Not only were the distances long, but each justice paid his expenses out of his own salary. Accommodations were rarely ideal. Justice Cushing once found himself with twelve other lodgers in a single room, and Justice Iredell reported unexpectedly encountering "a bed fellow of the wrong sort." While crossing the frozen Susquehanna River at Havre de Grace, Maryland, Justice Chase fell through the ice and almost drowned.

**The Court Comes of Age.** Although the Supreme Court had three chief justices in its first decade, the combined service of the next three chief justices (John Marshall, Roger Taney, and Salmon Chase) totaled 72 years. As an institution of American government, the Supreme Court owes much to John Marshall, sometimes called "the Great Chief Justice" as if no other occupant of that office could ever be his equal. Appointed in the last days of John Adams's term after former Chief Justice Jay had refused reappointment (in declining, Jay wrote Adams that the Court "would not obtain the energy, weight and dignity which are essential to its affording due support to the National Government"), Marshall served 34 years, longer than any other chief.
Marshall dominated the Court like no chief justice before or since, making the Court the institution Jay had doubted it could become. Some of the factors that contributed to Marshall’s influence were his personality and political acumen, the issues embedded within the cases the Court decided, and his determination to use the federal judiciary as a means to reinforce constitutional principles he thought vital to the advancement of the nation. In addition, circumstances of life in Washington—the justices resided and took their meals at the same boardinghouse and traveled together across town to the small courtroom in the Capitol basement—made it easier for a strong-willed individual like Marshall to influence his colleagues. Marshall also ended the practice of seriatim opinions inherited from English courts whereby each judge gave his view of the case. Henceforth, the Court would speak with one voice—the opinion of the Court—and the voice was usually Marshall’s.

**Judicial Business in the Nineteenth Century.** Despite Marshall’s deserved reputation in constitutional law, the bulk of the Court’s work in his time and for years afterward was nonconstitutional in nature. Private law cases vastly outnumbered public law cases. In fact, of the 1,121 cases the Court decided during Marshall’s tenure between 1801 and 1835, only 76 raised federal constitutional issues. The majority involved admiralty and maritime issues (these cases were numerous given the fact that most of the nation’s commerce before the Civil War was waterborne), common-law matters, and diversity disputes. (Created by the Judiciary Act of 1789, *diversity jurisdiction* allows federal courts to hear some suits involving ordinary matters of state law when the parties are citizens of different states.) In 1825 for example, there were no constitutional cases decided at all, and 54 percent of the docket involved admiralty, common-law, and diversity matters. As late as 1875, such cases consumed 45 percent of the docket; constitutional cases amounted to but 6 percent of the total. The Court of the nineteenth century was still largely a tribunal for the final settlement of disputes between individual parties. Its role as policymaker was decidedly secondary.

Though secondary, policymaking was hardly unimportant. Congress recognized as much in a series of statutes that altered the number of justices. Between 1789 and 1869, Congress changed the number of justices from six to five, five to six, six to seven, seven to nine, nine to ten, ten to seven, and seven to nine (the number authorized today)—each time partly with an eye toward influencing the Court’s constitutional decisions.

**The Modern Court.** The federal judiciary underwent important structural changes beginning in the late nineteenth century. By the 1880s it had a case backlog of several years. A cartoon of the day depicted the justices wading about their courtroom in a sea of briefs and other documents, pleading for relief, but a docket in arrears was not simply the product of an expanding population. Congress had gradually enlarged the jurisdiction of the federal courts, meaning that a greater variety of questions confronted the justices. Through its cases, the Court could hardly escape embroiling itself in virtually every political movement of the day. Swollen dockets prompted Congress to act. First, in 1891 Congress authorized intermediate appellate courts called circuit courts of appeals. For the first time, the federal judiciary had appellate tribunals below the Supreme Court. For most cases, the old circuit courts had not been appellate tribunals; a case began in either the district or circuit court depending on the subject matter. The old circuit courts were soon merged into the district courts. Circuit riding by the justices, already reduced substantially in the latter half of the nineteenth century, came to an end (ironically just as interstate rail transportation had become faster, more reliable, and more comfortable).
6 Introduction

Second, the 1891 statute introduced some certiorari, or discretionary, jurisdiction. This meant that there were fewer categories of cases the justices were legally obliged to hear and that the new courts of appeals became the courts of last resort for many cases.

Third, as a result of intense lobbying by Chief Justice William Howard Taft (the only president to have become chief justice), Congress in 1925 passed the Judges Bill, which expanded discretionary jurisdiction even further. Now, the Court was in control of most of its docket, not only in terms of the number of cases it would decide each year but also, for the most part, of the issues it would confront. Taft's political talents left another institutional legacy; the Supreme Court Building. With construction finished in 1935, five years after Taft's death, the justices finally had a home of their own.

Today, in contrast to the docket in the nineteenth century, public law consumes the Court's time. Roughly half of the Court's business now consists of constitutional cases, with statutory interpretation accounting for almost all of the rest. Moving beyond its dispute-resolution role, the Court has become mainly a maker of public policy for uniform application across the nation.

APPOINTMENT POLITICS, 1968–1984

The Constitution entrusts the selection of Supreme Court justices, as well as judges of the lower federal courts, to both the president and the Senate. The choice of the former requires the consent of the latter. Senatorial approval is usually forthcoming, but not always. Through 2007, 110 individuals have served on the Court. Of the 157 nominations presidents have submitted to the Senate, 35 have failed to pass, all but eight in the nineteenth century. Several confirmed persons have declined to sit. By contrast, the Senate has blocked only nine nominations to the Cabinet since 1789. In exercising their constitutional obligation to give “advice and consent,” senators ordinarily employ greater scrutiny and more independence with the review of justices than with heads of executive departments. Enhanced attention to the former is explained by the Court's place in the political system, life tenure for justices, and the fact that the Court, unlike the Cabinet, is not part of the executive branch.

Most senatorial scrutiny today occurs during hearings before the Judiciary Committee at which the nominee testifies. For most of American history, however, Supreme Court nominees did not appear before the committee to answer questions. The first was Harlan F. Stone in 1925, who did so only after his nomination by President Calvin Coolidge ran into difficulty. The second was Felix Frankfurter in 1939, who agreed to appear only when supporters informed him that he would probably be rejected if he did not. Such appearances did not become the rule until after 1954. Ever since, all nominees have been expected to appear, although concerns persist over the propriety of questions that senators ask and what obligation the nominee has to answer them. Moreover, as shown in this chapter, hearings since 1965 have usually been both exhaustive and, for the prospective justice, exhausting. Gone are the days of the cursory Senate probing that Kennedy nominee Byron White experienced in 1962, when public hearings lasted a scant one hour and 35 minutes.

Although both John Rutledge and Charles Evans Hughes served as associate justice, then resigned and were later named chief justice, each is counted only once. Similarly, Edward Douglass White, Harlan Fisk Stone, and William H. Rehnquist—the only three chief justices to have been appointed from the ranks of associate justices—are counted only once.
A Political Supreme Court

“The good that Presidents do is often interred with their Administrations,” The Nation editorialized in 1939. “It is their choice of Supreme Court Justices that lives after them.” Although the separate institutions mandated by the Constitution make possible the Court’s considerable independence from outside political pressure, three factors thrust the Court into the partisan life of the nation: the role of interpretation the Constitution allows, the significance of the decisions the justices render, and the method of judicial selection the Constitution imposes. Little wonder the appointment of justices is of paramount concern to presidents, senators, and citizens alike, as events since 1968 illustrate.

From Warren to Burger. On June 26, 1968, President Lyndon Johnson announced Chief Justice Earl Warren’s intention to resign. Appointment of a chief justice is a rare occurrence. There have been 43 presidents, counting Grover Cleveland’s separated presidencies twice, but only 17 chief justices. During the 34 years John Marshall sat in the Court’s center chair, there were six presidents. The contrast is significant substantively as well as statistically, a fact that prompted President John Quincy Adams to rate the office of chief justice as “more important than that of President.” Chief justice since 1953, Warren’s tenure had been one of the most active and remarkable in American history. By one count, in the approximately 150 years before Warren’s appointment, the Court had overruled 88 of its precedents. In Warren’s 16 years it added another 45 to the list. Hardly an aspect of life had gone untouched by landmark decisions on race discrimination, legislative apportionment, and the Bill of Rights. The Warren Court initiated a revolution that is measured by President Dwight Eisenhower’s latter-day lament over Warren’s appointment: “The biggest damn fool mistake I ever made.”

On June 27, President Johnson nominated Associate Justice Abe Fortas, a close friend, to succeed the controversial chief. Accusing President Johnson of “cronyism,” opposition formed immediately. Fortas was charged with various improprieties, including participation in White House strategy conferences on the Vietnam War and acceptance of high lecture fees raised by wealthy business executives who happened to be clients of Fortas’s former law partner, Paul Porter. After four days of deliberation, the Senate voted 45–43 on October 1 to cut off debate, well shy of the margin necessary to end the anti-Fortas filibuster. Two days later, the ill-fated justice withdrew his name. For the first time, nomination of a Supreme Court justice had been blocked by a Senate filibuster.

It remains unclear why Johnson refused to submit another name to the Senate. The lame-duck president left this high-level appointment to President Richard M. Nixon, whose 1968 campaign for the White House had been in part a campaign against the Warren Court. President Nixon’s first step toward fulfilling his 1968 campaign promise to strengthen the “peace forces as against the criminal forces of the country” was the selection of Warren Earl Burger, 61, chief judge of the U.S. Court of Appeals for the District of Columbia Circuit. Burger’s confirmation came 18 days later on June 9, 1969, by a vote of 74–3.

Fortas Resigns. In the spring of 1969, Life magazine revealed that Justice Fortas had received a yearly $20,000 fee from the Family Foundation of Louis Wolfson, then serving a prison term for selling unregistered stock. Once again the judicial fat was in the political fire. Fortas’s resignation on May 16, 1969, the first by a justice because of public criticism, opened the way for Nixon’s nomination of Clement F. Haynsworth, Jr., chief judge of the Court of Appeals for the Fourth Circuit. Because Haynsworth had taken a restrictive view of school desegregation and had been insensitive to proprieties in matters involving finance and conflict of
Interest, the Senate, still in Democratic hands, in a surprise vote rejected the president's nominee 55–45.

Rejection of Haynsworth strengthened Nixon's determination to "pack" the Court with "strict constructionists." His next nominee, G. Harrold Carswell, had served seven years as a federal district judge in Florida and six months on the Court of Appeals for the Fifth Circuit. In 1948, he had said, "I yield to no man as a fellow candidate [he was then running for political office] or as a fellow citizen in the firm, vigorous belief in the principles of White Supremacy, and I shall always be so governed." Quite apart from Judge Carswell's avowed racism (which he now disavowed), critics charged that President Nixon's nominee was mediocre. Accepting the criticism, Nebraska Senator Roman Hruska tried to convert it into an asset: "Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises, Cardozos and Frankfurters and stuff like that there."

Carswell was rejected 51–45. Not since the second presidency of Grover Cleveland in 1893 and 1894 had the Senate refused to accept two nominees for the same Supreme Court vacancy. Nixon's third choice was Chief Justice Burger's longtime Minnesota friend, Harry A. Blackmun of the Court of Appeals for the Eighth Circuit. Blackmun aroused little opposition and was promptly confirmed 94–0 and sworn in on June 9, 1970.

Powell, Rehnquist, and Stevens. In the fall of 1970, President Nixon was still determined to appoint a southerner to the Supreme Court. The most likely spot to be vacated was that occupied by 84-year-old Justice Hugo Black. Asked for his reaction, Black replied, "I think it would be nice to have another Southerner up here." The Alabaman had moved into third place in length of service. The longevity goal was in sight, but fate defeated its realization. In September 1971, Justices Black and John Harlan, both ailing, resigned within days of each other. Black fell eight months shy of Justice Stephen J. Field's record of 34$\frac{1}{2}$ years.

Nixon now had an opportunity no president had experienced since 1940—that of simultaneously filling two Supreme Court vacancies. His choices were Lewis F. Powell, Jr., 64, a distinguished Richmond lawyer, and William H. Rehnquist, 47, law clerk, 1952–1953, to the late Justice Robert H. Jackson, and since 1969 assistant attorney general in charge of the Justice Department's Office of Legal Counsel.

Powell, arousing little or no objection, was confirmed 89–1 on December 6. Rehnquist ran into stormy waters. Among other things, critics charged that he had advocated curtailment of defendants' rights in criminal cases, use of electronic surveillance, preventive detention, and "no knock" police entry. He had proclaimed virtually unlimited war power for the president and sanctioned mass arrest of demonstrators against the Vietnam War. Confronted with these barbed attacks, Rehnquist told the Judiciary Committee: "My fundamental commitment, if I am confirmed, will be to totally disregard my own personal belief." Rehnquist received Senate approval on December 10, 1971, 68–26. Powell was sworn in on January 6, 1972, and Rehnquist on January 7.

On New Year's Eve 1974, Justice William O. Douglas suffered a stroke. Although seriously disabled, Douglas was reluctant to retire. "Even if I'm only half alive," he remarked, "I can still cast a liberal vote." But some of his colleagues questioned whether he should be casting any votes at all. "I should like to register my protest," Justice Byron White wrote Chief Justice Burger on October 20, 1975 (with copies to the other justices), "against the decision of the Court not to assign the writing of any opinions to Mr. Justice Douglas. . . . [T]here are one or more Justices
who are doubtful about the competence of Mr. Justice Douglas that they would not join any opinion purportedly authored by him. At the very least, they would not hand down any judgment arrived at by a 5–4 vote where Mr. Justice Douglas is in the majority. . . . That decision, made in the absence of Mr. Justice Douglas, was supported by seven Justices. It is clear that the ground for the action was the assumed incompetence of the justice." White then reminded the "Brethren" (as the justices used to refer to themselves) that "nowhere" does the Constitution provide "that a Justice’s colleagues may deprive him of his office by refusing to permit him to function as a Justice. . . . If the Court is convinced that Justice Douglas should not continue to function as a Justice, the Court should say so publicly and invite Congress to take appropriate action."

Raised again was the thorny question of how to remove an incapacitated Supreme Court justice. The Constitution supplies no answer, but history does. On more than one occasion, the power of persuasion exerted on a faltering justice by colleagues has proved effective. In 1869, Justice Field convinced Justice Grier that he was too ill to continue. Later, according to one account, when Justice Field became incapacitated, the first Justice Harlan asked his colleague whether he remembered urging Grier to retire. "Yes," Field snapped, "and a dirtier day’s work I never did in my life." Ignoring or eluding pressure from whatever source, Douglas reached his own decision to leave the Court on November 12, almost a year after he was stricken. He had served 36 years, surpassing the record long held by Justice Field.

For Douglas’s seat President Ford nominated John Paul Stevens, a 55-year-old appeals court judge from the Seventh Circuit and a former clerk to Justice Wiley Rutledge. The Senate quickly confirmed 98–0, and on December 19, 1975, Stevens was sworn in.

The First Woman Justice. The judiciary figured prominently in the presidential campaign of 1980. Five years had passed without a Supreme Court vacancy on a bench where more than half the justices were above 70 years of age. Moreover, the Court only seven years before had injected itself into the most divisive of contemporary moral issues by declaring abortion to be a constitutional right. Three Nixon appointees had voted with the majority, and one of them—Blackmun—had written the majority opinion. This case alone was reminder enough that Republican presidents Eisenhower, Nixon, and Ford had not been notably adept in picking nominees who accorded with their political views. Warren, Brennan, Blackmun, and Stevens had all proved to be "surprises" in various ways, lending credence to President Truman’s lament: "Packing the Supreme Court simply can’t be done. I’ve tried and it won’t work." This time, conservative Republicans wanted to try harder.

The Republican platform therefore called for judges “who respect traditional family values and the sanctity of innocent human life.” The second part was a code word for opposition to abortion. Denounced by the National Organization for Women for “medieval stances on women’s issues,” Ronald Reagan confounded the campaign by promising to name a woman to fill one of “the first Supreme Court vacancies in my administration.”

As president, Reagan soon had his chance. At age 66, Potter Stewart, appointed by President Eisenhower in 1958 and long regarded as a “swing vote” among the justices, announced his retirement on June 18, 1981. Reagan’s choice for a successor was Sandra Day O’Connor, 51, of the Arizona Court of Appeals. A law student with Justice Rehnquist at Stanford University (he finished first, she third, in the class of 1952), not only was O’Connor to be the first woman to sit on the High
10 Introduction

Court, she was the first since Brennan to have had experience on a state bench. Moreover, she was the first since Justice Harold Burton, Stewart’s predecessor, to have served as a state legislator. Criticized by some for injecting gender into justice, Reagan’s fulfillment of a campaign pledge placed him squarely in an established tradition in which other presidents considered region, religion, and race in making appointments to the Court. Despite concerns of right-to-life groups that she was “unsound” on abortion, the Senate, under Republican control for the first time since 1955, confirmed her 99–0 on September 21.

With the approach of the 1984 presidential race, the Court’s future again became an issue. The High Bench was the second oldest in history, just behind the “Nine Old Men” of Franklin Roosevelt’s first term in the 1930s. Yet, in headline-generating remarks, Justice Rehnquist tried to minimize the impact of any president on the Court: “Presidents who wish to pack the Supreme Court, like murder suspects in a detective novel, must have both motive and opportunity.” Even with both, “a number of factors militate against a president having anything more than partial success.” Chief among them was that neither presidents nor nominees “are usually vouchsafed the foresight to see what the great issues of 10 or 15 years hence are to be.”

APPOINTMENT POLITICS, 1984–1992

On June 17, 1986, President Reagan announced Chief Justice Burger’s retirement and his intention to nominate Rehnquist as chief justice. Rehnquist would become only the third chief to have been selected from the Court itself.

At age 78, Burger had served longer than any other chief justice nominated in the twentieth century. Although Nixon named Burger to the Court in 1969 to fulfill a campaign pledge against judicial activism, the Court during Burger’s time did not overturn outright a single major decision of the activist Warren Court (1953–1969). The persistence of the Warren Court’s jurisprudence was all the more remarkable when it is remembered that by 1986, only three members of the Warren Court were still serving, and of the three only two (Justices Brennan and Marshall) had been closely identified with the Warren Court’s major accomplishments. Although some of the Warren Court’s landmark rulings on criminal procedure were restricted—most notably the exclusionary rule (see Chapter Ten)—the Burger Court practiced its own kind of judicial activism, especially with respect to racial and sexual equality, abortion, and other privacy issues (see Chapters Thirteen and Fourteen). With the possible exception of William Howard Taft, Burger was the most active chief justice outside the Supreme Court. He treated his office like a pulpit from which to campaign energetically for changes in legal education, professional standards for bench and bar, criminal sanctions, prisons, and the administration of justice.

Also on June 17, 1986, Reagan nominated Antonin Scalia, 50, of the Court of Appeals for the District of Columbia Circuit as associate justice. Scalia would become the first Italian American to serve on the nation’s highest court. Formerly a law school professor and an assistant attorney general in the Department of Justice, he, like Rehnquist, was widely regarded as a politically conservative legal thinker.

Whose Supreme Court Is It? From the outset Rehnquist’s nomination encountered intense opposition, a “Rehnquisition,” as Senator Orrin Hatch called it, even though Republicans still controlled the Senate. If the president took a nominee’s views into account, should not the Senate do the same? Preferring to forget
their party’s opposition to Abe Fortas in 1968, Republican leaders wanted to limit the Senate to a consideration of character and merit, but some Democrats seemed intent on ensuring a coordinate role for the Senate. “The framers envisioned a major role for the Senate in the appointment of judges,” argued Senator Edward Kennedy. “It is historical nonsense to suggest that all the Senate has to do is to check the nominee’s I.Q., be sure he has a law degree and no arrests, and rubber stamp the President’s choice.” If Rehnquist’s vision of the Constitution was properly the Senate’s concern, how much should it matter? Neither the Constitution nor Senate tradition offered a conclusive answer.

Rehnquist’s nomination was unusual because it offered a rare second chance to vote on the results of a justice’s career, not just on its prospects. With characteristic bluntness, Kennedy charged that the nominee was “too extreme on race, too extreme on women’s rights, too extreme on freedom of speech, too extreme on separation of church and state, too extreme to be Chief Justice.”

Hearings by the Judiciary Committee on the Rehnquist nomination consumed four days, and Senate floor debate five. Confirmation, 65–33, came on September 17. Not since 1836, when the Senate confirmed Roger Taney, had a nominee for chief justice been approved by a ratio of less than 2–1.

Perhaps because the Senate’s scrutiny of Rehnquist was so intense, Scalia’s nomination generated only mild turbulence. The Judiciary Committee’s hearings on Judge Scalia lasted only two days. Floor debate did not exceed five minutes. Following the vote on Rehnquist, the Senate confirmed Scalia, 98–0.

**The Bork Debacle.** At the end of Rehnquist’s first term as chief, Justice Lewis Powell announced his retirement. For several years Powell had held a pivotal seat on the Court, especially in abortion, privacy, church-state, and affirmative action cases. Reagan now had a chance to advance his social agenda judicially, much of which had been rebuffed by Congress.

Reagan’s announcement on July 1, 1987, was no surprise. At his side was Robert H. Bork, age 60, of the Court of Appeals for the District of Columbia Circuit, who had been passed over in favor of Scalia the year before. A legal scholar and former solicitor general, Bork was also a prolific writer. Not since Felix Frankfurter’s appointment in 1939 had the Senate considered a Supreme Court nominee with such a long paper trail. Of particular interest was a 1971 article in the *Indiana Law Journal* that, among other things, called into question the constitutional underpinnings of *Griswold v. Connecticut*, the landmark 1965 ruling on a right of privacy and birth control. If *Griswold* rested on dubious ground, so did *Roe v. Wade*, the 1973 abortion rights decision (see Chapter Thirteen).

Bork’s nomination was therefore guaranteed to be rancorous. The midterm elections in 1986 had converted a 53–47 Republican majority in the Senate into a 54–46 Democratic one. A Democrat, not a Republican, therefore chaired the Senate Judiciary Committee, two of whose members (Joe Biden and Paul Simon) were running for president. Moreover, public confidence in the Reagan administration had recently been shaken because of foreign policy scandal.

Before the Judiciary Committee began its record-setting 12 days of hearings on the nomination on September 15 (Bork would testify and be questioned on five of those days), the battle lines had already been drawn. Hesitation expressed in 1986 over close scrutiny of a nominee’s judicial philosophy vanished. Some Democrats, including Biden, let it be known well before the hearings started that they would vote against the nomination. The nomination had hardly been announced before Senator Kennedy fired one of the opening shots. “Robert Bork’s America is a land in
which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, school children could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy."

Bork's supporters had gravely underestimated the nature and extent of the opposition. Democrats like Kennedy succeeded in demonizing Bork before he could define himself.

Cooperating with Democrats in the Senate was the Leadership Conference on Civil Rights, an umbrella organization of nearly 200 groups. It coordinated a massive public relations drive to galvanize public opposition. Direct mail, television and newspaper advertisements, and other techniques of modern interest-group politics for the first time were aimed squarely against a Supreme Court nominee. Not since Woodrow Wilson nominated Louis Brandeis in 1916 had a confirmation battle become so vitriolic. On October 23, Judge Bork's Senate opponents prevailed, 58–42, a larger negative vote than either Haynsworth or Carswell endured. The phrases "to Bork" or "to be Borked" consequently entered the American political lexicon.

In place of Bork, President Reagan's advisers recommended a conservative without a paper trail. Senate Minority Leader Robert Dole advised anyone with ambitions to sit on the Supreme Court not to "write a word. I would hide in the closet until I was nominated."

On October 29, Reagan selected Douglas H. Ginsburg, one of Bork's colleagues on the District of Columbia Circuit, but senators never got a chance to query Ginsburg. Problems surfaced almost instantly. As an official in the Justice Department, he had handled a major case regarding the cable television industry while owning $140,000 worth of stock in a Canadian cable company. Then Ginsburg acknowledged that he had used marijuana as a student in the 1960s and more recently as a member of the Harvard law faculty in the 1970s. On November 7, the nomination went up in a puff of smoke as he withdrew his name from consideration.

Not since 1970 had a president had to make a third nomination to fill a single vacancy. Time was critical. Reagan was nearing the start of his last year in office. "Lame-duck" talk abounded. Like Johnson with Fortas in 1968, the vacancy might carry over to his successor in 1989. On November 10, Reagan made his next move, nominating long-time acquaintance Anthony M. Kennedy, 51, who had been a judge on the Ninth Circuit Court of Appeals since leaving private practice in 1975. Democrats could find little wrong with the nominee. An hour's debate in the Senate on February 3, 1988, preceded the vote to confirm, 97–0. Anthony Kennedy was sworn in on February 18 as the Court's 104th justice, ending a seven-month struggle over Justice Powell's successor.

The fight to replace Powell has had consequences apart from Kennedy's career on the Court. The tentative senatorial probing of ideology in the nominations of Rehnquist and Scalia in 1986 gave way to searching scrutiny in 1987. The Senate firmly reestablished the precedent that judicial philosophy is relevant and important. Two of President Reagan's contributions to American government were no doubt unintended: He helped to make the Senate a more equal partner in shaping the Supreme Court, and he and his staff demonstrated to successors how a Supreme Court nomination should not be managed.

**END OF THE BRENNAN ERA.** On the evening of July 20, 1990, Justice William J. Brennan, Jr., sent a note to the White House informing President George H. W. Bush...
that he would step down. The most senior justice in age (84) and in length of service (34 years), Brennan had suffered a mild stroke several days after the Court’s term ended on June 27. With four years of experience on the New Jersey Supreme Court, Brennan’s career on the High Court began in 1956 when President Eisenhower offered him a recess appointment after Justice Sherman Minton retired. Brennan’s contribution to American constitutional law was substantial. Since the 1960s, he had been leader of the Court’s liberal bloc and one of the driving forces behind the Court’s major decisions on subjects as varied as racial justice, affirmative action, criminal procedure, access to the courts, privacy and abortion, religious freedom, free speech and press, and legislative districting.

Bush faced a Senate firmly in Democratic hands. Moreover, his previously high public approval ratings had fallen precipitously. In short, the president was in no position to force a contentious nominee on the Senate. Within 72 hours of Brennan’s retirement, Bush picked David H. Souter who had been appointed just three months before to the First Circuit Court of Appeals. The first justice to be named from New Hampshire since Levi Woodbury in 1845 and the first bachelor since Frank Murphy in 1940, Souter had been state attorney general and a trial judge before Governor John Sununu (later Bush’s chief of staff) placed him on the New Hampshire Supreme Court in 1983. Yet this background yielded few clues to his thinking on the most divisive federal constitutional issues. For Alabama’s Senator Howell Heflin, Souter was “the stealth candidate.” On national television Justice Thurgood Marshall harrumphed, “Never heard of him.” The contrast with what had abundantly been known about Bork was stunning, deliberately so in the opinion of suspicious senators. Many forgot that Brennan himself had seemed rather obscure upon his appointment in 1956.

Bush disavowed the use of “any litmus test” on abortion or on any other specific matter. Was Bush heeding Abraham Lincoln’s advice? Presented with the opportunity to name Roger Taney’s successor as chief justice in 1864, Lincoln advised, “We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known.”

Members of the Senate Judiciary Committee unabashedly asked the questions President Bush had not, making it clear that abortion was the ever-present issue at the hearings. Democrats especially wanted to satisfy themselves that Souter passed the “not Bork” test. They fretted that Justice Kennedy’s nomination had moved through the Senate virtually unopposed in the wake of the rejection of Bork. They remembered Bork’s retort after Kennedy’s first full term that the new justice had voted in accordance with his own views in every case, save one. While Souter spoke to some issues, he remained silent on the abortion right. His reticence made it difficult for opponents to mobilize the kind of interest-group opposition that had worked so well in stopping Bork. On October 2, the Senate voted overwhelmingly (90–9) to confirm Souter as the 105th justice, barely two weeks after his 51st birthday.

The appointment again demonstrated how both the president and senators have an interest in the views of the nominee. Yet Souter presented a dilemma. When the accessible record of nominees leaves their constitutional values shrouded in mystery, should they be expected publicly to lay bare their positions on current constitutional controversies? If they do, has their independence as justices been compromised? If they do not, does the Senate’s approval amount to informed consent?

**The Thomas Maelstrom.** Souter’s first term marked Thurgood Marshall’s last. On June 27, 1991, five days shy of his 83rd birthday, Justice Marshall, citing the physical toll taken by age and ill health, sent President Bush his notice of retirement.
“What’s wrong with me?” he responded to a reporter, “I’m old! I’m getting old and coming apart.” Despite his age, the announcement took some by surprise. Only recently, Marshall had been characteristically defiant about stepping down. “I have a lifetime appointment, and I intend to serve it.” His attitude seemed not to have changed from the day in 1970 when President Nixon, upon learning that Marshall was ill with pneumonia at Bethesda Naval Hospital, asked to see his medical records. Marshall let the records be sent, but not before scrawling on the folder in large print, “NOT YET.”

Marshall occupies a unique place in Supreme Court history. Not only was he the first black justice, but in a way equaled by few, he helped to shape constitutional law off the Court as well as on the bench. His appointment by President Johnson in 1967 was as much recognition of what he had accomplished as it was an expectation of what he would do as a justice. From 1938 until his appointment by President Kennedy in 1961 to the Court of Appeals for the Second Circuit, he was one of the leaders in efforts by the Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP) to use the judiciary as a vehicle to combat racial discrimination. He argued 32 cases before the Supreme Court and won 29, including *Brown v. Board of Education* in 1954, reprinted in Chapter Fourteen. As a justice he remained a tenacious advocate of civil rights.

The irony created by Marshall’s departure escaped few. As an outspoken opponent of racial quotas, would the president name a black person to the bench? The suspense was short-lived. On July 1, Bush turned to Clarence Thomas, 43, of the U.S. Court of Appeals for the District of Columbia Circuit. A 1971 graduate of Holy Cross with a law degree from Yale, Thomas had been an assistant attorney general in Missouri and a lawyer for the Monsanto Company before going to work for Senator John Danforth. He was assistant secretary for civil rights in the Department of Education in 1981 and 1982 and then chaired the Equal Employment Opportunity Commission (EEOC) until his appeals court appointment in 1990.

Although an African American like Marshall, the contrast between the two was striking. True, both had been reared in a racially segregated environment, but Marshall came from a middle-class Maryland home. Thomas had been born into abject poverty in the tiny coastal plain community of Pin Point, Georgia, and was deserted by his father at the age of two. More significant, Thomas rejected much of what Marshall had strived for. He had questioned the wisdom of busing to achieve racial integration and opposed preferences for racial minorities, among other things. During the five days Thomas appeared before the Senate Judiciary Committee in September, Democrats especially pressed him to reveal his position on abortion. Although acknowledging the existence of a constitutional right to privacy, Thomas rebuffed their entreaties, asserting that he had not formed an opinion on the subject and claiming that he could not maintain his impartiality as a judge if he had. He wanted to avoid testimony that would give senators reason to reject him. The Souter approach had been to come across as a compassionate person but to leave senators in doubt on constitutional particulars. Robert Bork, after all, gave forthright answers and was rejected.

Objections to what Thomas’s constitutional values might be and concern over his qualifications, however, led to a 7–7 split when the Judiciary Committee voted on September 27. The nomination thus went to the Senate floor without a recommendation, as press accounts predicted that Thomas would be approved easily in a vote scheduled for October 8.

Events suddenly took an unexpected turn when a leak to the press during the weekend of October 5 placed the nomination in doubt. Several weeks before the
committee’s vote, Professor Anita F. Hill of the University Of Oklahoma School Of Law had notified the committee’s staff, in confidence, that Thomas had sexually harassed her in 1981–1983 while she was his assistant, first at the Department of Education and later at the Equal Employment Opportunity Commission. Some members of the committee were aware of Hill’s accusations prior to their vote on September 27. Thanks to the leak, virtually the entire nation knew about them.

Now senators were themselves on trial for failing to take sexual harassment seriously. Accordingly, they sent the nomination back to the Judiciary Committee. What followed was a television spectacle that left few satisfied: 28 hours of additional hearings marked by lurid details, bitter charges and countercharges, and equally bitter denials and counterdenials. Thomas told the committee that he was the victim of a “high-tech lynching for uppity blacks.” Likened by some to a morality play or a psychodrama, the acrimonious hearings drew a larger viewing audience than the National League and American League playoffs going on at the same time.

The charges were grave and were potentially fatal. Thomas had headed the agency responsible for enforcing the law against sexual harassment. Moreover, the charges undercut his principal strength. Without a record of legal scholarship or extensive judicial service, the merits of the nomination had rested all along on character—precisely what Hill called into question. On October 15, such doubts helped to make the Senate’s vote to confirm, 52–48, one of the closest on record for a successful Supreme Court nominee. Only the approval of Stanley Matthews by a vote of 24–23 in 1881 had generated a higher percentage of negative votes.

Thomas took the constitutional oath at a public ceremony at the White House on October 18, and the chief justice administered the judicial oath in a private ceremony at the Court on October 23. Not since the controversy over membership in the Ku Klux Klan enveloped Hugo Black shortly after his confirmation in 1937 had a justice begun his tenure under such a cloud of suspicion.

APPOINTMENT POLITICS, 1992-2006

Bill Clinton’s inauguration as the 42nd president in 1993 was soon followed by news of an impending vacancy on the Supreme Court as Justice Byron White on March 19 announced his intention to retire. Placed on the Court in 1962 by President John F. Kennedy, White was by 1993 the sole justice to have been nominated by a Democrat. Nonetheless, he voted against abortion rights in every case decided by the Court, in favor of most laws that arguably supported religion, and usually with the government in criminal justice matters. The length of his judicial career was itself a lesson in constitutional change. Some of the issues that occupied the Court’s time near the end of his tenure were not even on the docket in the early 1960s. Similarly, some highly visible issues in White’s first year on the Court had all but disappeared by his last.

GINSBURG AND BREYER. During the 1992 campaign Clinton had indicated a preference for Supreme Court nominees with stature in public life who had run for election, not just those with prior judicial service. (Excepting only White and Rehnquist, the justices in 1993 had all come to the Court with at least some prior judicial experience, and only O’Connor had ever faced the voters in an election.) Clinton thought that the Court in previous decades had benefited from the presence of persons such as Chief Justice Warren, who had never been a judge but who was governor of California from 1942 until 1953. On June 14, he revealed his
choice: Ruth Bader Ginsburg, 60, of the Court of Appeals for the District of Columbia Circuit, and one of President Carter’s last nominations to the federal bench in 1980.

If approved, she would become the first Jewish justice since Abe Fortas resigned in 1969. Ginsburg had been turned down for a Supreme Court clerkship in 1960 by Justice Frankfurter, who explained to her Harvard professor that he “just wasn’t ready to hire a woman.” Ginsburg had never held public office, but she had been in public life. As founder and director of the Women’s Rights Project of the American Civil Liberties Union, she had participated in 35 cases in the Supreme Court, had argued six, and had won five, including Frontiero v. Richardson (see Chapter Fourteen). Of recent justices, only Thurgood Marshall had come to the Court with similar experience in the creative use of constitutional law to right social wrongs.

Ironically, Ginsburg had been critical of Roe v. Wade. Although favoring a woman’s right to abortion, she had suggested in a lecture at New York University in March that the right might more properly rest on equal protection, not privacy, doctrine. That is, “disadvantageous treatment of a woman because of her pregnancy and reproductive choice is a paradigm case of discrimination on the basis of sex.” Roe may even have been untimely, she mused, because state legislatures had begun to loosen restrictions on abortions in the early 1970s. Had Roe been more limited in its scope, it might have “invited . . . dialogue with legislators,” thus continuing the trend. Instead, the decision provoked a backlash and “prolonged divisiveness.”

Ginsburg’s record spawned few serious doubts when the Senate Judiciary Committee convened for four days of hearings on July 20. Cautious in discussing most issues except abortion, Ginsburg appeared to be a person of politically liberal views with a sense of limits to judicial power. On August 3 the Senate approved her by a vote of 96–3; on August 10 she took the constitutional and judicial oaths as the Court’s 107th justice. The occasion was noteworthy. For the first time a nominee to the Supreme Court had been forthright in presenting her views on abortion and had been confirmed.

In the public’s mind, no justice has been more closely linked with abortion than Harry A. Blackmun, author of the Court’s opinion in Roe v. Wade. On April 6, 1994, Blackmun, age 85, announced his forthcoming retirement. Although 20 justices (including White) since 1789 had served longer than Blackmun’s 24 years, only 2 were older at the times they left the Court. Widely expected to practice judicial restraint and to harbor conservative judicial values when appointed, Blackmun soon left the reservation. Insisting at retirement that the Court, not he, had changed, he was only partly correct. He had changed as well. At the hearings on his nomination in 1970, for example, senators queried him on only a single specific constitutional issue: capital punishment. His position then on that question was the exact opposite of his position two decades later. While he still sided with the government on Fourth Amendment issues, in nearly every other category of constitutional law he had become by 1991 the Court’s most consistently liberal voice.

Speculation focused immediately on outgoing Senate Majority Leader George Mitchell as a successor. Mitchell, who also had experience as a federal judge in Maine, was not only politically liberal; as a politician of national stature, he seemed made to order for Clinton. Equally important, like Ginsburg, he seemed highly confirmable. Within a week, however, Mitchell removed himself from consideration, leaving the spurned president to cast about for other candidates. Having called for a nominee who possessed a “big heart,” the president made his decision on May 13: Judge Stephen G. Breyer, 55, of the Court of Appeals for the First Circuit, who had been a contender for White’s seat. Clinton’s announcement was unprecedented. He publicly agonized over his decision, discussed reasons why he could not offer the seat to two others, and left the impression that Breyer was third best.
Breyer had clerked for Justice Arthur Goldberg, worked on the Watergate prosecution team, taught at Harvard Law School, and was chief counsel to the Senate Judiciary Committee before Carter named him to the federal bench in 1980. With legal interests in administrative law and regulation and a reputation for assessing laws by their effects, Breyer was well-known and highly regarded by both Democrats and Republicans in the Senate, and so encountered only minor resistance. On July 12, hearings convened for four days with confirmation, 87–9, following on July 29. With the addition of Breyer, when the Court convened on October 3, the bench contained two Jewish justices for the first time since 1938.

**A New Chief Justice.** As Democratic and Republican nominees John Kerry and George W. Bush campaigned for the presidency in the fall of 2004, both acknowledged that the future direction of the Supreme Court might well rest in the outcome of the election. This seemed true for two reasons. First, on a series of salient “hot-button” constitutional issues ranging from abortion and affirmative action to federalism and religious liberty, the Court early in the new century was divided 5–4 or 6–3. Second, the membership of the Court had remained unchanged since Breyer’s arrival in 1994. This fact was unique. Since 1869, when Congress set the Court’s roster at the current complement of nine justices, there had been no other period of at least ten years without the retirement or death of a justice.

That fact, however, did not mean that the politics of judicial selection took a vacation. In particular with respect to nominees to the courts of appeals, an ideological and political war seemingly with no end in sight had been raging between the White House and Senate Democrats over who becomes a judge ever since the Supreme Court had effectively handed the presidency to Bush following the electoral contest between Bush and challenger Al Gore in 2000. (See *Bush v. Gore* in Chapter Five.) Even after Republicans gained a one-vote majority in the Senate in the 2002 midterm elections and maintained control until after the 2006 elections, Democrats deployed or threatened to deploy the filibuster against certain nominees favorably reported by the Judiciary Committee. Most notably, on September 4, 2003, Justice Department attorney Miguel Estrada, whom Bush probably wanted to groom for the Supreme Court as the first Hispanic justice, asked the president to withdraw his name after his nomination to the court of appeals for the District of Columbia Circuit had languished in the Senate for nearly two years. Overall during his first term, the Senate confirmed 53 percent of Bush’s 52 appeals court nominees, with Democrats successfully blocking ten with a filibuster. Bush’s confirmation rate was below that of some recent presidents but better than the fate accorded Clinton’s second term nominees, some 40 percent of whom were left in limbo by Republicans.

By early 2005, Republicans were determined to break the Senate logjam and threatened to resort to a parliamentary maneuver popularly called the “nuclear option” to make judicial nominees filibuster-proof. With potentially disruptive or destructive consequences for Senate procedures and traditions (hence the term “nuclear”) the Senate leadership, under this option, would seek a ruling from the chamber’s presiding officer (then Republican Vice President Cheney) that filibusters against judicial nominees were unconstitutional. It would then take only a simple majority to sustain the chair’s ruling, a number far easier for Republicans to achieve than the 60 votes needed to break a filibuster or the 67 votes required to change Senate rules outright.

On May 24, a showdown was averted when a bipartisan group of 14 senators agreed neither to support the filibuster of a judicial nominee (except in “extraordinary circumstances”—a phrase left undefined), nor to support a rule change that would limit debate on future appeals court and Supreme Court nominees. The
immediate effect of the agreement was the confirmation of several heretofore controversial nominees, but observers wondered whether the truce would hold once a seat on the Supreme Court became vacant. They did not have long to wait.

On July 1, 2005, Justice Sandra Day O'Connor notified President Bush of her retirement to become "effective upon the nomination and confirmation of my successor." The only member of the Court in 2005 to have held elective office, the first woman justice had served the equivalent of six presidential terms. During that time she established a reputation as a "swing vote" on the bench, often making the difference in closely-divided cases, especially those dealing with voting rights and social issues such as abortion, affirmative action, and religion in public life. Her stance on issues was so pivotal that attorneys frequently pitched their arguments mainly to her, since the positions of the other five justices were all but apparent in advance. While news of the first retirement at the Court in eleven years took few by surprise, most thought Rehnquist would be the first to go after an announcement on October 25, 2004, that he was afflicted with thyroid cancer. Although present for Bush's inauguration on January 20, the enfeebled chief missed most sessions of Court thereafter, working from home instead. Anticipating a vacancy, interest groups were primed to mobilize the grass roots for or against practically anyone whom the president might choose. A March email alert from NARAL Pro-Choice America (formerly the National Abortion Rights Action League) was subtitled "Emergency instructions for a Supreme Court retirement" and urged supporters to "print, cut, and fold this card and keep it in your wallet. When a Supreme Court justice retires, you'll be READY for action." The same email referred recipients to a Web site "for more action instructions." Conservative organizations were in a similar campaign mode.

On July 19, 2005, disregarding First Lady Laura Bush's preference for a woman nominee, Bush announced his choice for O'Connor's seat: Harvard educated and former Rehnquist law clerk John G. Roberts, Jr. Age 50 and a judge on the United States Court of Appeals for the District of Columbia Circuit since May 2003, Roberts had worked in the Reagan White House, served as special assistant to the attorney general in 1981–1982 and had been principal deputy solicitor general during the presidency of George H. W. Bush. Both there and in private practice, he was widely regarded as a legal superstar, a "lawyer's lawyer," who, having argued 39 cases before the Supreme Court and prevailed in 25 of them, had become a member of a rarified inner circle of appellate advocates. Acknowledging his skill and brilliance, Democrats thought that his years in the White House and the Department of Justice might incline him to view claims of presidential power too generously. They were also troubled by a footnote in a brief he had signed in an abortion financing case where he argued that *Roe v. Wade*, the landmark abortion rights decision, should be overturned because it "finds no support in the text structure or history of the Constitution." In short, they feared that he would tilt a closely-divided Court to the right.

On September 3, however, shortly before hearings on the nomination were to begin in the Senate Judiciary Committee, Chief Justice William Rehnquist lost his struggle with cancer. For the first time since 1971, a president would have two Supreme Court seats to fill.

Rehnquist's tenure of nearly 19 years as chief ranked him fourth on the all-time list, behind John Marshall's 34, Roger B. Taney's 28, and Melville W. Fuller's 22. In early 1999, after the House of Representatives voted impeachment charges against President Clinton, Rehnquist became only the second chief justice to preside over the Senate trial of a president. Although he often found himself in the minority in abortion, affirmative action, and church-state cases, particularly during his early years on
the bench, when law clerks dubbed him the “Lone Ranger,” he was nonetheless viewed as an effective spokesperson for conservative judicial values. His most lasting legacy may prove to be the Court’s recent decisions reemphasizing the role of states in the federal system. A vigorous defender of judicial independence, Rehnquist was held in affectionate high esteem by the other justices, especially with respect to such internal Court matters as the fairness he exhibited in the assignment of opinions and the efficiency which marked the dispatch of the Court’s business. For Justice Brennan, hardly an admirer of Rehnquist’s constitutional views, he was “the most all-around successful chief justice” he had known, including Earl Warren. The sixteenth chief justice also had a sense of humor, being known to pass trivia questions to his colleagues during oral argument, plot practical jokes, and to take wagers on nearly anything.

The president moved promptly to fill the Rehnquist seat. Bypassing a chance to make history by naming the first woman chief justice, Bush announced on September 5 that he would nominate Roberts for the chief justiceship. The decision surprised few. Four days of hearings by the Senate Judiciary Committee commenced on September 12. By most accounts, Robert’s performance was masterful. Like most recent nominees, he generally declined to address issues that would come before the Court for decision. Reflecting the values of the president who nominated him, he advocated a modest role for the judiciary in a democratic political system. “Judges and justices are servants of the law, not the other way around,” said the nominee. “Judges are like umpires. Umpires don’t make the rules; they apply them. And I will remember that it’s my job to call balls and strikes and not to pitch or bat.”

Yet being mindful of Democrats and others who were concerned lest cherished rights-friendly decisions be placed in jeopardy, he expressed a respect for precedent. In particular, he assured the Committee that he recognized a constitutionally protected right to privacy. *Roe v. Wade,* he said “is settled as precedent of the court, and is entitled to respect under the principles of *stare decisis*” [to stand by what is decided]. “I do think that it is a jolt to the legal system when you overrule a precedent,” he added. “It is not enough that you may think the prior decision was wrongly decided.” After emphasizing that he had “no agenda” and was “not an ideologue,” the committee voted favorably on the nomination 13–5 on September 22. On September 29, the full Senate confirmed Roberts as by a vote of 78–22, with exactly half the Senate’s 44 Democrats voting in the affirmative. Roberts a was sworn in a few hours later at the White House, as John Paul Stevens, senior associate justice, administered the constitutional oath to the seventeenth Chief Justice of the United States.

Attention then returned to a replacement for Justice O’Connor with Bush announcing on October 3 that her seat should go to White House Counsel Harriet Miers. A Bush confidant since his days as Texas governor and holding a law degree from Southern Methodist University, Miers, age 50, had been co-managing partner of one of the state’s largest law firms and the first woman to be elected president of the State Bar of Texas. She also had experience in state and local electoral politics, having served a term on the Dallas City Council. Lacking any judicial experience, however, the nominee failed to generate enthusiasm, especially among Republicans and others who had been expecting someone in the Roberts mold or at least one more solidly grounded than Miers in conservative legal thinking. Some accused the president of “wasting” an opportunity to reshape the Court. Others wondered out loud whether she had the intellectual wherewithal to advance the president’s agenda judicially. Rather than risk the embarrassment of an inadequate performance at the Senate hearings, especially following the flair Roberts had displayed, or, worse still, rejection by the Senate, Bush withdrew the nomination on October 27. For the
Introduction

first time since the Grant administration in the 1870s, a Supreme Court nomination had effectively been scuttled by members of the president’s own political base, and for the first time 1987, a president would be required to submit a second name for the same Court position.

On October 31, Bush turned to Judge Samuel A. Alito, Jr., age 55. The son of Italian immigrants, Alito since 1990 had been judge on the United States Court of Appeals for the Third Circuit and previously United States Attorney for New Jersey. Educated at Princeton and Yale Law School, the nominee, like Roberts, had experience in the Department of Justice during the Reagan presidency, although unlike Roberts he had no experience in private practice. And he possessed the acumen and conservative credentials that Miers’s detractors thought she lacked. Five days of hearings before the Judiciary Committee opened on January 9, 2006. As with Roberts, liberals suspected that Alito—“Scalito”—some disparagingly called him because of his supposed affinity for Justice Scalia’s constitutional views—was hostile to abortion rights and, in light of revelations in late 2005 of massive warrantless electronic eavesdropping by the Bush administration (see Chapter Ten), too inclined because of his executive branch experience to look favorably on claims of presidential power. With respect to the latter, the nominee declined to offer an opinion on the legality of the eavesdropping policy but insisted that “Our Constitution applies in times of peace and in times of war.” With respect to abortion, in what is now in the post-Bork era a mandatory ritual for Supreme Court nominees, Alito expressed support for a constitutionally protected right of privacy, one that encompassed access to contraceptives. When asked about a statement he once wrote on a Justice Department job application that there was no constitutionally protected right to abortion, Alito explained, “That was what I thought . . . from my vantage point in 1985 . . . as a line attorney in the Reagan administration.” Since that time, Alito reminded the panel, as an appeals judge he had voted to uphold one law restricting abortion access and struck down two others. “If I had had an agenda to . . . uphold any regulation of abortion that came up in any case,” he insisted that he would have voted differently. As for the sanctity of precedent, he echoed Roberts in saying, “There needs to be a special justification for overruling a prior precedent.”

That he failed to assuage Democratic concerns was reflected by the straight party-line vote of 10–8 on January 14, when the committee acted favorably on the nomination. Republicans claimed that they had judged Clinton nominees Ginsburg and Breyer by more neutral and less ideological criteria in 1993 and 1994. Democrats countered that Bush was trying to pack the Court with staunch conservatives. Despite eleventh hour attempts by Senators John Kerry and Edward Kennedy to block the nomination with a filibuster—and editorial advice from the New York Times that senators were “in need of spine”—Republicans mustered sufficient votes to end debate with the Senate confirming Alito 58–42 on January 31, whereupon Chief Justice Roberts administered the constitutional and judicial oaths to the 110th Justice in a private ceremony at the Court an hour later. Notably, the Senate count reflected the smallest number of senators from the opposition party to support a Supreme Court nomination in modern times. Yet, the Roberts and Alito confirmations tend to defy recent conventional wisdom that Supreme Court nominees whose records cast doubt on the validity of abortion rights decisions are unconfirmable. What is certain is that as long as the Court decides cases that roil the political process, judicial nominations will remain contentious, as partisans on both sides acknowledge that elections have constitutional consequences.
KEY TERMS

constitutional law    judicial review    diversity jurisdiction
constitutional         recess appointment  Warren Court
interpretation          circuit riding    seriatim opinions
cases
22 Introduction


SELECTED READINGS ON THE SUPREME COURT


A Political Supreme Court


SELECTED BIOGRAPHIES


