"The Supremes"

An Introduction to the U.S. Supreme Court Justices

SECOND EDITION

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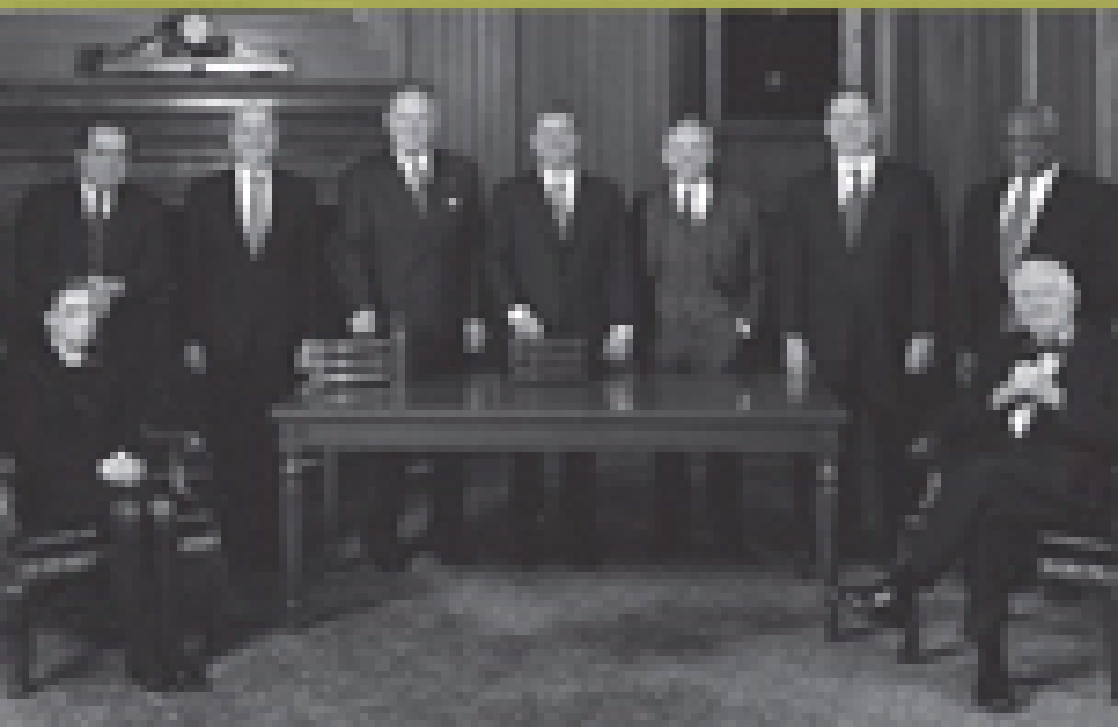

Introduction

The title of this book of essays on contemporary members of the Supreme Court of the United States will perhaps recall the popular Motown singing trio led by Diana Ross in the 1960s, but the title is meant to convey the obvious supremacy of the highest court in the land and the demonstrable merit of the tribunal's members in the early twenty-first century.

Most observers agree that the justices who currently occupy the black leather chairs behind the Supreme Court's mahogany bench are among the most capable to serve the tribunal since the Roosevelt Court in the 1940s. As of 2008, the Court's membership included, in order of seniority, with the chief justice first:

- John G. Roberts, Jr. (nominated by George W. Bush in 2005);
- John Paul Stevens (nominated by Gerald Ford in 1975);
- Antonin Scalia (nominated by Ronald Reagan in 1986);
- Anthony M. Kennedy (appointed by Ronald Reagan in 1988);
- David H. Souter (nominated by George H. W. Bush in 1990);
- Clarence Thomas (nominated by George H. W. Bush in 1991);
- Ruth Bader Ginsburg (nominated by Bill Clinton in 1993);
- Stephen G. Breyer (nominated by Bill Clinton in 1994);
- Samuel A. Alito, Jr. (appointed by George W. Bush in 2006).

Their educational backgrounds are superb. Roberts and Souter received both their undergraduate and law degrees from Harvard. Kennedy and Breyer attended Stanford as undergraduates and then moved on to Harvard Law School, where Scalia also received his law degree. Ruth Bader Ginsburg earned her bachelor's degree from Cornell, studied law for two years at Harvard, and completed her law degree at Columbia after she moved to New York to be with her husband. Thomas and Scalia attended Catholic institutions for undergraduate studies—Holy Cross and Georgetown, respectively; Thomas went on to Yale Law School as did Alito, who was an undergraduate at Princeton. Stevens, with deep roots in the Windy City, attended the University of Chicago and Northwestern Law School.

Two justices did postgraduate work at Oxford (Souter on a Rhodes Scholarship, Breyer on a Marshall Scholarship). Kennedy studied at the London School of Economics. Most would have been considered classic "overachievers," having received stellar grades and graduating at or near the top of their classes. Six were elected to Phi Beta Kappa as undergraduates (Roberts, Stevens, Kennedy, Souter, Ginsburg, and Breyer); two-thirds served on law reviews (Roberts, Stevens, Scalia, Ginsburg, Breyer, and Alito).

The nine justices also brought a range of political, governmental, and judicial experience to the Supreme Court. The Reagan administration placed a premium on previous court service, especially at the federal level, and succeeding presidents have also used that selection criterion. No member of the present Court has ascended the bench without previous experience as a federal judge. Roberts, Stevens, and Breyer had been Supreme Court clerks, for William Rehnquist, Wiley Rutledge, and Arthur Goldberg, respectively. Souter possessed extensive state court experience in New Hampshire. Kennedy, Ginsburg, Breyer, and Alito all had tenures of a dozen years or more on the U.S. circuit courts. Stevens and Scalia each spent five years on the federal appeals tribunals; Roberts had two years there. Souter and Thomas briefly served on the U.S. circuit benches just prior to their appointments to the Supreme Court. Experience in all three branches of the federal government before coming to the high court gives Justices Thomas and Breyer the edge in breadth of previous public service. Chief Justice Roberts and Justice Kennedy possess the most experience in private law practice (thirteen and fourteen years, respectively). Roberts and Alito had extensive service in the executive branch. Roberts was a special assistant to the attorney general and principal deputy solicitor general in the Department of Justice. The future chief justice also served as an associate counsel to President Reagan in the White House Counsel's Office. Alito was assistant to the U.S. solicitor general and deputy assistant to the attorney general. He also had the most prosecutorial experience before arriving at the Supreme Court, as assistant U.S. attorney and U.S. attorney, both in New Jersey. Justice Thomas held two appointed positions in the federal government (at the Department of Education and the Equal Employment Opportunity Commission) before his first judgeship. Academe was Justice Ginsburg's proving ground for the federal bench, and Justices Kennedy and Breyer have taught extensively as adjunct professors. Scalia's résumé reflects a background of teaching law, executive branch service, think tank research, and private practice.

In its social characteristics, the Supreme Court of the early twenty-first century can hardly be said to "look like America," but it is far more "representative" than in the distant past. Today's Court has only one female member. The "black seat," established in 1967 with Thurgood Marshall's appointment, remained intact (albeit controversial) with Clarence Thomas's 1991 nomination. Only recently did the Court achieve a majority of members from minority religious groups: Roberts, Kennedy, Scalia, Thomas, and Alito are Roman Catholic; Ginsburg and Breyer are Jewish. To have a majority of Catholics on the high bench is unprecedented. Souter is Episcopalian, and Stevens does not belong to any particular Christian denomination. In geographic terms, this bench is fairly balanced. Kennedy and Breyer hail from northern California. Scalia and Ginsburg were raised in New York, Alito in New Jersey, and Souter in New England. Roberts and Stevens are Midwesterners. Clarence Thomas is the only Southerner on this Court. Of course, in some cases, careers and lifestyle choices have taken the justices far from their roots. Stevens spends considerable time at his Florida home, and Breyer still maintains a home near Boston, where he served on the U.S. First Circuit Court of Appeals. Roberts has spent virtually all of his adult life on the East Coast and now has a summer home in Maine. Ginsburg lived for thirteen years in Washington as a judge on the U.S. Court of Appeals for the District of Columbia. As of 2008, the average age of the justices was 68.5: Stevens was the oldest at 88, Ginsburg 75, Kennedy and Scalia 72, Breyer 70, Souter 69, Thomas 60, Alito 58, and Roberts 53.

While most of the current justices came from middle- or upper-middle-class households and enjoyed numerous advantages in making their way up the educational and professional ladder, two had to overcame societal discrimination to achieve their positions on the nation's highest court. Ginsburg faced gender-based handicaps at the outset of her career. Although she graduated at the top of her Ivy League law school class, she was not offered a prized Supreme Court clerkship, nor could she find an associate's position in New York law firms. Ginsburg procured a clerkship with a U.S. district court judge through her mentor, Professor Gerald Gunther, and then became a law professor. Justice Thomas overcame a poverty-stricken early childhood to advance through Yale Law School's affirmative action program, only to be denied a position in law firms; he began his career in the Missouri attorney general's office. Several members of the current Court have triumphed over personal tragedies and hardships. As a teenager, Ruth Bader Ginsburg lost her mother to cancer and then nursed her husband through testicular cancer while they both were in law school. She

successfully battled her colorectal cancer a decade ago. Early in his career, Justice Kennedy's father died prematurely of a heart attack, and then Kennedy's mother, sister, and brother passed away in quick succession. In 2006 Kennedy had a second stent inserted in a blood vessel near his heart to prop open an artery that doctors had unclogged. Justice Thomas's father abandoned his family when Thomas was a young boy, and he and his brother were raised by their strict grandparents. Thomas and Stevens have endured divorces; both remarried. Chief Justice Roberts seemed to lead a charmed life until a frightening seizure hospitalized him in 2007. The public learned that it was his second such episode in fourteen years, but doctors reportedly could not pinpoint any diagnosable reason for them. A pack of young thugs set upon Justice Souter while he jogged through Washington streets in 2004, but his injuries were minor. Court police officers could find no evidence that the street hooligans even recognized their famous victim, a testament to why most justices prefer not to allow cameras to televise their public sessions!

In oral arguments, the current justices constitute one of the liveliest benches in recent memory. All but Thomas are frequent, persistent, and incisive questioners. Moreover, this Supreme Court contains some of the wittiest inquisitors the hallowed courtroom has ever witnessed. Increasingly, the sober, church-like atmosphere there is interrupted by laughter when Roberts makes a wry observation, Scalia delivers a sarcastic one-liner, Souter utters a droll quip in his New England accent, or Breyer presents an ironic, professorial comment. With their rapier-like intellects and wits, these justices have made oral argument sessions unexpectedly entertaining, as well as edifying, events.

Jurisprudential and ideological labels are imprecise at best, but most observers agree on general categories and descriptions of the current justices' voting postures. From right to left on the political spectrum, Justices Scalia and Thomas are considered the most conservative, with their commitment to a text-based, original understanding of the Constitution. Chief Justice Roberts and Justice Alito, both life-long conservatives, represent the cultural conservatism of George W. Bush. They eschewed overarching judicial theories in their Senate confirmation hearings but claimed respect for precedent and narrow interpretations of statutes and the Constitution. Roberts has publicly expressed a desire to decrease the number of 5–4 rulings. "Why don't you come along with a very narrow opinion. We can get seven votes for that. It will look a lot better," Scalia has quoted the new chief imploring his colleagues. In the category of moderate-conservative "swing voter," Justice Kennedy prides himself on his

considered, sometimes agonizing, case-by-case approach to decisions. The most common voting alignment in narrowly decided rulings has recently consisted of Chief Justice Roberts and Justices Kennedy, Scalia, Thomas, and Alito.

No social liberals in the William Brennan or Thurgood Marshall image remain on the Court, but Justice Souter has often followed in the footsteps of his late friend Justice Brennan. Justices Souter, Stevens, Ginsburg, and Breyer frequently side as a liberal bloc, and, if they can attract a fifth vote (usually Kennedy), will win, as they have in terrorist detainee rights, juvenile death penalty, and environmental cases. Justices Ginsburg and Breyer are deemed moderate liberals for their reluctance to impose highly activist standards even when they reach a liberal decision. Justice Stevens's sometimes maverick approach to the law can oblige him to write solo dissents or concurrences. His seniority, however, means that when the chief justice is in dissent and Stevens is in the majority, he can write the opinion for the Court himself or assign it to a colleague.

The Roberts-led Court, with his fellow Bush II appointee Justice Alito, has only been in place for a full term since 2006–07. Along with the preceding Rehnquist Court, it has modified and occasionally rolled back precedents of the Warren and Burger eras. Abortion remains legal, with some limits on access to the procedure, including a national ban on partial-birth methods; organized, state-sponsored prayer in public schools remains unlawful, but states can display the Ten Commandments under certain conditions; free-exercise-of-religion claims have been upheld but not if general secular laws impinge on those claims only incidentally; free speech and press continue to lie at the heart of American democracy, except for students, child pornographers, and some campaign finance laws; affirmative action programs are constitutional if they meet the highest level of judicial scrutiny, which race-based public school assignments do not; majority-minority voting districts are also subject to strict scrutiny; gender classifications trigger a lower standard of scrutiny but generally have been nullified; statutory procedures for determining gender-based pay inequity have been narrowly interpreted; homosexual activity is now protected under privacy rights; criminal rights have been somewhat diluted, especially in the search-and-seizure category, and public school students in extracurricular activities may be subjected to random drug-testing; capital punishment is unconstitutional for mentally retarded or juvenile defendants and child rapists; lethal-injection protocols have been upheld; statutes passed under Congress's interstate commerce power have fared poorly; and presidential power regarding alleged terrorists has been limited.

Although its docket has shrunk by more than half since the 1980s for a variety of reasons,[1] the Supreme Court remains the jewel in the crown of the American governmental system. Indeed, it is the envy of judiciaries worldwide for its leadership of an independent judicial branch, for the professionalism and integrity of its members, and for the dignity of its public procedures and symbolism. Not surprisingly, it consistently scores higher than Congress or the presidency in polls measuring public confidence in governmental institutions. It did so even after its divisive *Bush v. Gore* decision that settled the 2000 presidential election. As Justice David Souter describes the Supreme Court's exalted status in the American polity: "Most people are willing to accept the fact that the Court tries to play it straight. That acceptance has been built up by the preceding hundred justices . . . going back to the beginning. We are, in fact, trading on the good faith and the conscientiousness of the justices who went before us. The power of the Court is the power of trust earned—the trust of the American people."[2]