

## Index

legacy of, 196-7

abortion, privileged responses, 238-9, 247-8 abortion, right to privacy, 119-23, 147-50 Adkins v. Children's Hospital, 187 AFL-CIO (American Federation of Labor and the Congress of Industrial Organizations), 130, 184 Alito, Samuel, 24, 39, 46, 228-9 American Bar Association (ABA), 61 nominee hearings and, 43 nominee rating by, 32-3 President and, 33 American Civil Liberties Union (ACLU), 35, 183 anti-canon cases, 182-90 anti-Semitism, 125-6 Bail Reform Act of 1966, 137 Bayh, Evan, 173-4 Berger v. New York, 120 Biden, Joe, 32, 199, 238 Bipartisan Campaign Reform Act of 2002, 154 Black American Law Students Association, 172 Black, Hugo, 23, 36 Bolling v. Sharp, 167, 213-6 Borah, William, 126 Bork nomination Biden exchange, 203-4 Bolling v. Sharp and, 213-16 Bork's credentials, 199 constitutional choices and, 200-2 Equal Protection Clause and, 208-13 freedom of speech and, 219-21 gender discrimination and, 205-13 Griswold v. Connecticut and, 202-5 Harper v. Virginia Board of Elections and,

Oil, Chemical, and Atomic Workers v. American Cyanamid and, 206-8 overview, 197-200 Reagan administration strategy, 198-200 Reynolds v. Sims and, 217-18 right to privacy and, 202-5 Shelley v. Kraemer and, 216 voting rights and, 213-19 Bork, Robert, 12-13, 49-51, 123, 175, 245 Brandeis, Louis, 35 Brandenburg v. Ohio, 154 Brennan, William, 81, 245 Breyer, Stephen, 117–19, 135, 228, 240–1 Brown, Hank, 72 Brown, Prentiss, 36–7 Brown, Scott, 60 Brown v. Board of Education, 7, 109-10, 111-12, 151, 161-76, 267-70 Burger hearings, 171 Carswell hearings, 172-3 constitutionalization of, 175-6 Ervin critique of, 164-5 Fortas hearings, 167 Goldberg hearings, 166-7 Harlan hearings, 163 Haynsworth hearings, 171-2 Johnson appointees and, 166 Marshall hearings, 167-9, 171 Rehnquist hearing, 173-5 Stewart hearings, 164-6 Brown v. Louisianna, 251 Burdick, Quentin, 173 Burger, Warren, 24, 117, 171 Bush, George H. W., 24, 28 Bush, George W., 19, 30



292 Index

Byrd, Robert, 171 Senate support, roll call votes, 51-3 Byrnes, James, 23 testimony, witnesses, 41-3 Congressional Black Caucus, 172 Carswell, G. Harrold, 27, 172-3 Congressional Quarterly Almanac, 83 Carter, Jimmy, 20 Conkling, Roscoe, 49 Chase, Samuel, 19 Conservative Digest, 203 Citizens for Kennedy-Johnson, 30 constitutional consensus, 4-5, 225-30, 267-70 Citizens United v. Federal Election constitutional questions, currently contested Commission, 56, 119, 154 defined, 231 civil rights, 103-11 super precedents and, 232-4 privileged responses, 237-43 Coolidge, Calvin, 35 Civil Rights Act of 1866, 164 Cornyn, John, 132-4, 188-9 Civil Rights Act of 1964, 107, 213 Coburn, Tom, 189 Davis, David, 22 DeConcini, Dennis, 115-16, 181 Communism, 35, 183-5 confirmation conditions, defined, 11-12, 103-6, Denton, Jeremiah, 178-9 Department of Justice, 26 141-7, 155-7, 248-9, 255-7 confirmation hearing dialogue Dirkson, Everett, 186 discrimination coding statements, 102, 109-10, 134 issues addressed, 103-6 Bork nomination, 213-19 overview, 101-6 gender, sexual orientation, 111-12, 176-82 confirmation hearings racial, 111-12, 151, 213-19 administration of, 123-8 racial, privileged responses, 242 common characteristics, 160-1 District of Columbia v. Heller, 63-6, 149, constitutional choice and, 160-2, 193-4 precedent and, 11-12, 67-78, 99 Drachsler, Margaret, 178 confirmation process Dred Scott v. Sanford, 151 celebratory view of, 2, 7-8, 15 Dronenburg v. Zech, 116 closed-door session, 43 Due Process Clause, 214, 222, 226-8 confirmation vote delay, 47 Durbin, Dick, 171 Constitution and, 5-7, 16 Duvel, Gabriel, 21 constitutional change and, 10-11, 62, 101, Eastland, James, 131, 163-4, 168, 240 138-9, 275-7 constitutional consensus and, 4-5 Eisenstadt v. Baird, 149-50, 263 contested constitutional meanings and, Employment Division v. Smith, 117 End Gun Trafficking Act, 64 criticism of, 1 Equal Protection Clause, 116, 151, 162, 168, 177-8, 179, 208 empirical research of, 8-10 interest groups and, 39 Bork nomination, 208-13 nominee background checks, 38 Equal Rights Amendment, 112 Ervin, Sam, 117, 164-5, 167-9, 240 nominee hearing preparation, 40 nominee letters of record, 39 Escobo v. Illinois, 153 nominee visits to Senators, 39-40 Establishment Clause, 117 nominee's answers to questions, 38-9 Ex Parte McCardle, 248 post-confirmation, 53-4 the public, constitutional change and, 2-4 Fair Labor Standards Act, 186 Farmer, Fyke, 81-2 public hearings, 35-8, 40 question and answer session, nominee and Federal Bureau of Investigation (FBI), 26, 43 Senator comments, 40-1, 72-3 Feingold, Russell, 72, 154 received, rejected, 16-17 First Amendment, Bork nomination, 219-21 reform of, 15 Fong, Hiram, 167, 239



Index 293

```
Fortes, Abe, 22, 24, 30, 46, 135-7, 153, 167,
                                                     civil rights, 103-11
                                                     discrimination, gender, sexual orientation,
Frankfurter, Felix, 21, 25, 35, 37, 125-6,
    183-4
                                                     discrimination, racial, 111-12
Freedom Riders, 177
                                                     freedoms of speech, religion, 116-19, 219-21,
freedoms of speech, religion, 116-19, 219-21,
    240-1
                                                     hearing administration, 123-8
Frontiero v. Richardson, 115
                                                     importance of, 100
                                                     judicial philosophy, 131-4
Gallup Poll, Second Amendment, 63-4
                                                     law, crime, family, 135-7
gender discrimination, sexual orientation,
                                                     nominee background, 128-31
    111–12, 176–82
  Bork nomination, 205-13
                                                  J. P. Stevens, 130
  early hearings on, 176
                                                  Jackson, Robert, 135
  Ginsburg hearings, 180-1
                                                  Jay, John, 22
  O'Connor hearings, 178-9
                                                  Johnson, Lyndon, 24, 166
  privileged responses, 243
                                                  Johnson, Thomas, 23
  Rehnquist hearings, 177, 179
                                                  Johnston, Olin, 109-10, 169
  Scalia hearings, 179
                                                  judicial philosophy, 131-4
  Stevens hearings, 177-8
                                                  Judiciary Act of 1789, 18
  White hearings, 176-7
                                                  Judiciary Act of 1802, 29
Gideon v. Wainwright, 154
                                                  Justices
Ginsburg, Ruth Bader, 115-16, 180-1, 228, 242,
                                                     background check, screening mechanisms,
Goldberg, Arthur, 25, 117, 132, 184-5
                                                     impeachment of, 18-19
Graham, Lindsey, 61, 126-7, 236
                                                     investiture ceremony, 54
Grassley, Chuck, 82
                                                     law schools, 27-8
Gregg v. Georgia, 198
                                                     nominees, presidential decision dynamics,
Griswold v. Connecticut, 119-20, 149-50,
                                                       26-8
                                                     oaths of office, 53-4
    250-1
  Bork nomination, 202-5
                                                     from Office of Attorney General, 27
Gun Free School Zones Act, 152
                                                     from Office of Solicitor General, 27
                                                     politics and, 28-30
                                                     Presidential appointments, 16-17, 25-30,
Harlan, John Marshall II, 163, 184, 263-4
Harper v. Virginia Board of Elections, 217
                                                       48-51, 198-9
Hart, Philip, 172, 177
                                                     recess appointments, 31
Harvard Law Armed Forces Association, 61
                                                  Justices, vacancy causes
Hatch, Orin, 65-6, 119, 175-6, 187, 233-4
                                                     ambition, 21-2
Haynsworth, Clement, 130, 171-2
                                                     death, 19
hearing administration, 123-8
                                                     external pressures, 22
Hennings, Thomas, 130-1
                                                     job satisfaction, vacancy due to, 22-3
Hruska, Roman, 177
                                                     political considerations, vacancy due to,
                                                       23-4
impeachment process, Justices, 18-19
                                                     strategic retirement, 24
Indiana Law Review, 203, 208, 219
                                                     voluntary departure, vacancy, 19-21
institutional powers, 151-2
interest groups, outside influences, 39, 59-60,
                                                  Kagan, Elena, 48, 119, 126-8, 132-4, 154,
                                                       188-90, 191-2
Iran-Contra hearings, 197
                                                     ABA ranking, 61
                                                     background, 56-7
issues
  abortion, right to privacy, 119-23
                                                     confirmation hearings, 60
```



294 Index

Kagan, Elena (cont.) NAACP Legal Defense Fund (LDF), 167, 169 confirmation, judicial oath, investiture National Association of Women Judges, 61 ceremony, 61-2 National Crime Gun Identification Act, 64 hearing preparation, 58-9 National Organization of Women (NOW), ideology, 57 112, 178 National Women's Law Center, 61 meetings with Senators, 59 Neely, Mathew, 126 nomination of, 54-62 personal ties, 58 Nelson, Ben, 48, 61 politics and, 57-8 New Republic, 213 The New York Times, 37, 64 in private sector, 57 Senate Judiciary Committee nomination Nixon, Richard, 27 report, 61 nomination history, 16-17 nominee background, 128-31 special interest groups and, 59-60 Katz v. United States, 120 Katzenbach v. Morgan, 151-2, 216-17, 239 Obama, Barack, 32 Kagan nomination and, 54-6 Keating, Kenneth, 186 O'Connor, Sandra Day, 22, 29–30, 178–9, 245 Kennedy, Anthony, 12-13, 43 confirmation hearings, 221-7 Office of Attorney General, 27 Kennedy, Edward (Ted), 102, 123, 131, 173, 200, Office of Solicitor General, Justices from, 27 Oil, Chemical, and Atomic Workers v. 218, 240 Kerry, John, 60 American Cyanamid, 206-8 Klobuchar, Amy, 127-8 Omnibus Crime Control and Safe Streets Act Ku Klux Klan (KKK), 36 of 1968, 120, 241 law, crime, family, 135-7, 243-4 Parents Involved v. Seattle School District, Lawrence v. Texas, 261-2 250-60 Leadership Conference on Civil Rights, 172, Patient Protection and Affordable Care Act, 188, 194, 252-4, 259 Leahy, Patrick, 60, 65, 82, 191, 220 Pittsburgh Post-Gazette, 36 Planned Parenthood v. Casey, 149-50, 250-1 Ledbetter, Lilly, 61 Lemon v. Kurtzman, 117, 154-5 Plessy v. Ferguson, 7, 131, 151, 267-8 Life, 22 Poe v. Ullman, 263-4 Lochner v. New York, 158, 161-2, 182-90 Policy Agenda Project, 78 politics, 28-30, 57-8 Kagan hearings, 188-90 Rehnquist comments on, 187 Powell, Lewis, 198 Thomas comments on, 187 precedent, precedent cases Long, Edward, 177 abortion, right to privacy, 147-50 Brandenburg v. Ohio, 154 Major League Baseball, 32 Citizens United v. Federal Election Marbury v. Madison, 152, 252 Commission, 154 Marshall, Thurgood, 21, 24, 153, 167-9, 171, confirmation hearings and, 11-12, 67-78, 99 criminal rights, 152-4 McCarthy, Joseph, 81, 184 discussion overview, 141-7 McClellan, John, 72, 109-10, 135-7, 164, District of Columbia v. Heller, 149 166-7, 168, 244 Dred Scott v. Sanford, 151 McDonald v. Chicago, 63, 191 Eisenstadt v. Baird Griswold, 149-50 Meany, George, 130 Escobo v. Illinois, 153 Metzenbaum, Howard, 72, 179, 207 First Amendment cases, 154-5 Miers, Harriet, 30 Gideon v. Wainwright, 154 Griswold v. Connecticut, 149-50 Miranda v. Arizona, 251 Morrison v. Olson, 152 institutional powers, 151-2



Index 295

Katzenbach v. Morgan, 151–2	Thornbury, 239–40
Lemon v. Kurtzman, 154–5	voting rights issues, 245–7
Lochner v. New York, 158	Wickard v. Filburn, 252–4
Marbury v. Madison, 152	public hearings, 35–8, 40
Miranda v. Arizona, 152–3	public opinion
most frequently addressed, 147–9, 151,	confirmation process and, 67
155–7, 158	economy and, 88–91, 93–6
Planned Parenthood v. Casey, 149–50	empirical testing, data, methodology, 78-85
Plessy v. Ferguson, 151	empirical testing, results, 85–96, 97–8
racial discrimination, 151	influences on issues, confirmation hearings,
reproductive rights, 147–51	87-8, 94-6
Roe v. Wade, 147–50	media and, 73–4
Stovall v. Denno, 153	national defense and, 88-9, 91-6
U.S. v. Lopez, 152	
which precedents?, 147–58	racial discrimination, 111-12, 213-19
Youngstown Sheet and Tube Company v.	Rauh, Joseph, 173
Sawyer, 152	Reagan, Ronald, 197–9
privileged responses	Reed v. Reed, 115, 179
abortion rights issues, 241, 247-8	Regents of the University of California v.
anti-government activities issues, 242-3	Bakke, 198
Bork, 245	Rehnquist, William, 19, 46, 120, 131, 137,
Brennan, 245	173–5, 179, 187, 241, 248
Brown v. Louisianna, 251	Reynolds v. Sims, 167, 217–18, 238–9
case-based analysis of, 249–54	Riggs, Betty, 207
changes to issues, cases and, 234-5, 265	right to privacy, abortion, 119–23, 202–5
civil rights issues and, 237-43	Roberts, John, 19, 228–9, 232–4, 240, 245,
Fortas, 242–3	252–4, 258–9
freedoms of speech, religion, 240-1	Roberts, Owen, 23
gender, sexual orientation, 243	Roe v. Wade, 39, 120, 147–50, 232–4,
Ginsburg, 245	250–1
government operations issues, 245	Roosevelt, Franklin Delano, 36
Griswold v. Connecticut, 250–1	Rule of Eighty, 19–21
investigating, 235-49	Rutlege, John, 32
judicial philosophy issues, 243–5, 248–9	
law, crime and family issues, 243-4	Scalia, Antonin, 175, 179, 261–3
Marbury v. Madison, 252	Schumer, Charles, 253–4
Marshall, 243–4	Scott, Hugh, 172
Miranda v. Arizona, 251	Second Amendment, 63–6, 149, 191–3
most frequent issue areas, 236-7, 245-7	Kagan hearings, 191–2
nominee candor and, 235, 254-7, 265-6	Sotomayor hearings, 191–2
nominee "mismatches" and, 235, 257-64,	Second Amendment Enforcement Act, 64
266	Senate Judiciary Committee, 14, 34–45
O'Connor, 245	Committee report to Senate, 43–4
percentage by nominee, 255–7	hearing preparation by, 40
Planned Parenthood v. Casey, 250–1	intermediary role, 44–5
privilege defined, 234	makeup of, 34–5
racial discrimination issues, 242	nominee background checks by, 38
Rehnquist, 248	nominee letters of record, 39
Roberts, 236, 245, 252–4, 258–9	nominees' answers to questions, 38–9
Roe v. Wade, 250–1, 265	Senate recommit of nomination, 46–7
specific cases, 249–54	Sessions, Jeff, 60



296

Index

Shelley v. Kraemer, 216 Sherbert v. Verner, 117 Sotomayor, Sonia, 32, 54, 82, 191-2, 260-2 Second Amendment and, 64-6 Souter, David, 23, 28, 64, 225-7, 238 Specter, Arlen, 72-3, 214-16, 232-4 Speedy Trial Act of 1971, 137 Sprigle, Ray, 36 stare decisis, 140. See also precedent Stevens, John Paul, 30, 54, 102, 177 Stewart, Potter, 22, 109–10, 132, 164–6 Stone, Harlan, 35, 47 Stonewall Riot, 112-15 Stovall v. Denno, 153 super precedents, 232-4 Supreme Court Constitution and, 5-7, 16 geographical representation on, 29 national dialog and, 14-15 non-geographic constituencies and, 30 size, 18 Sotomayor's press conference, 32 vacancies, 17-25

Teapot Dome scandal, 35, 47 terrorism, terrorists, 126–7 Thomas, Clarence, 24, 29, 227–8, 242, 261–2, 262–4 Thornberry, Homer, 239–40 Thurmond, Strom, 168, 169–70, 242–3 Tydings, Millard, 135

unanimous consent vs. filibuster, 45–6 U.S. v. Robel, 242 U.S. v. Virginia, 261

Vend-a-Matic, 130 Vinson, Fred, 30 Voting Rights Act of 1965, 107, 151, 216–17, 239 voting rights, Bork nomination, 213–19

Walsh, David, 36–7 Warren, Earl, 24, 25, 214 Watkins, John, 130–1 Wechsler, Herbert, 162, 267 White, Bryon, 30 Whittaker, Charles, 21, 81–2, 130–1 *Wickard v. Filburn*, 252–4, 258–9 Wiley, Alexander, 184–5 Williams, George H., 46–7 Works Progress Administration, 135

Youngstown Sheet and Tube Company v. Sawyer, 152

Zoll, Allen, 126