Clones on the Court

A Supreme Court that once included former senators and governors is populated today by judges with identical résumés. Here's why that's a mistake.

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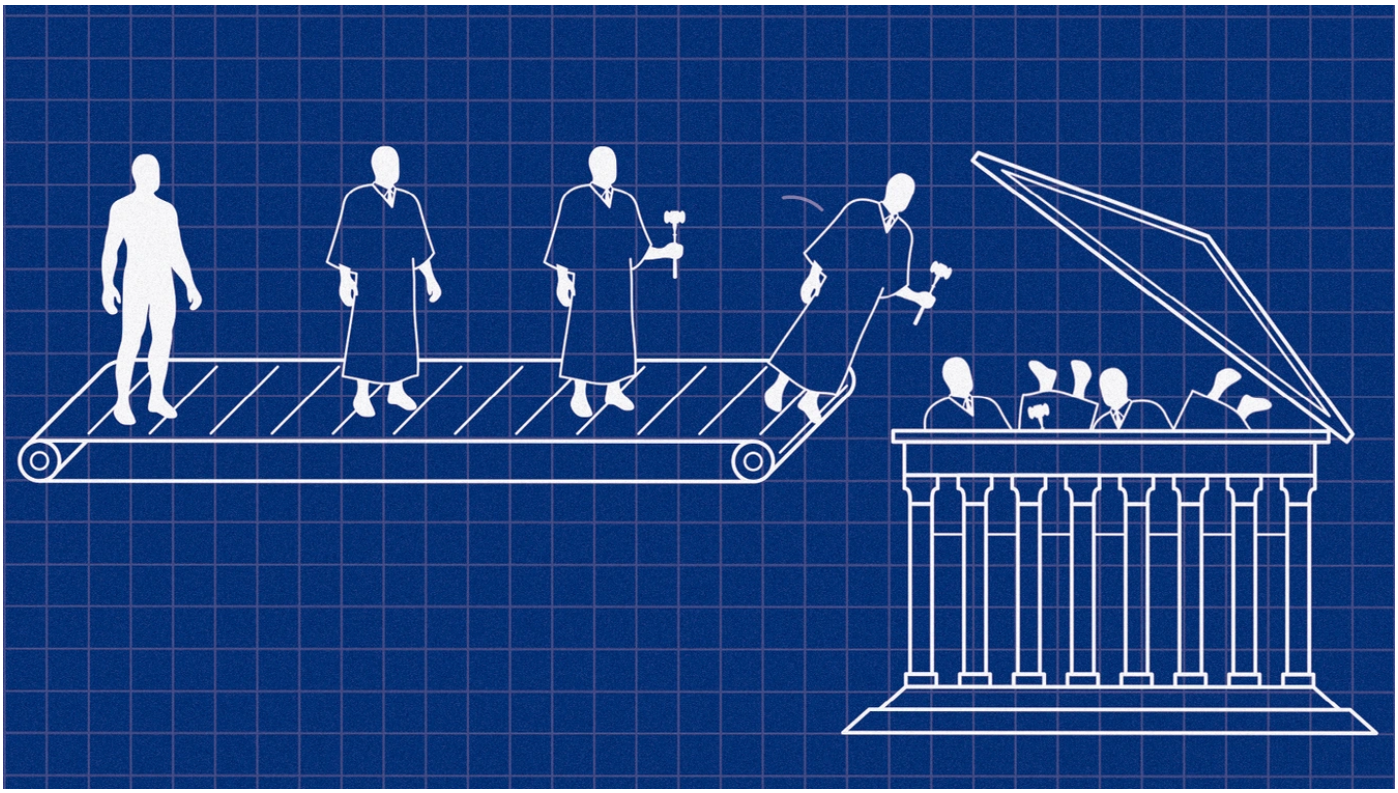


Edmon De Haro

The path to America's highest court nowadays narrows at a remarkably early stage in life and narrows even further soon thereafter. As youngsters, all of the justices on today's Supreme Court attended elite colleges: three Ivy League schools, Stanford, Georgetown, and Holy Cross. From there, they all went on to study law at Harvard or Yale (though Ruth Bader Ginsburg defected to Columbia for her final year); most then clerked for a judge in the Northeast. And from there, they advanced to the bench. On the day Samuel Alito replaced Sandra Day O'Connor, in early 2006, not only was every justice a former judge, but each had been a (1) sitting (2) federal (3) circuit-

court judge at the time of his or her Supreme Court appointment.

Since then, the basic pattern has remained in place. After graduating from Princeton and then Yale Law (like Alito before her), Sonia Sotomayor spent 17 years as a judge before being tapped to be a justice. More recently, Elena Kagan, after graduating from Princeton and Harvard Law, did two early clerkships and later served as the solicitor general of the United States. (The solicitor general, while not, strictly speaking, a judge, is very similar to one: he or she has an office in the Supreme Court building, and specializes in Supreme Court oral arguments.)

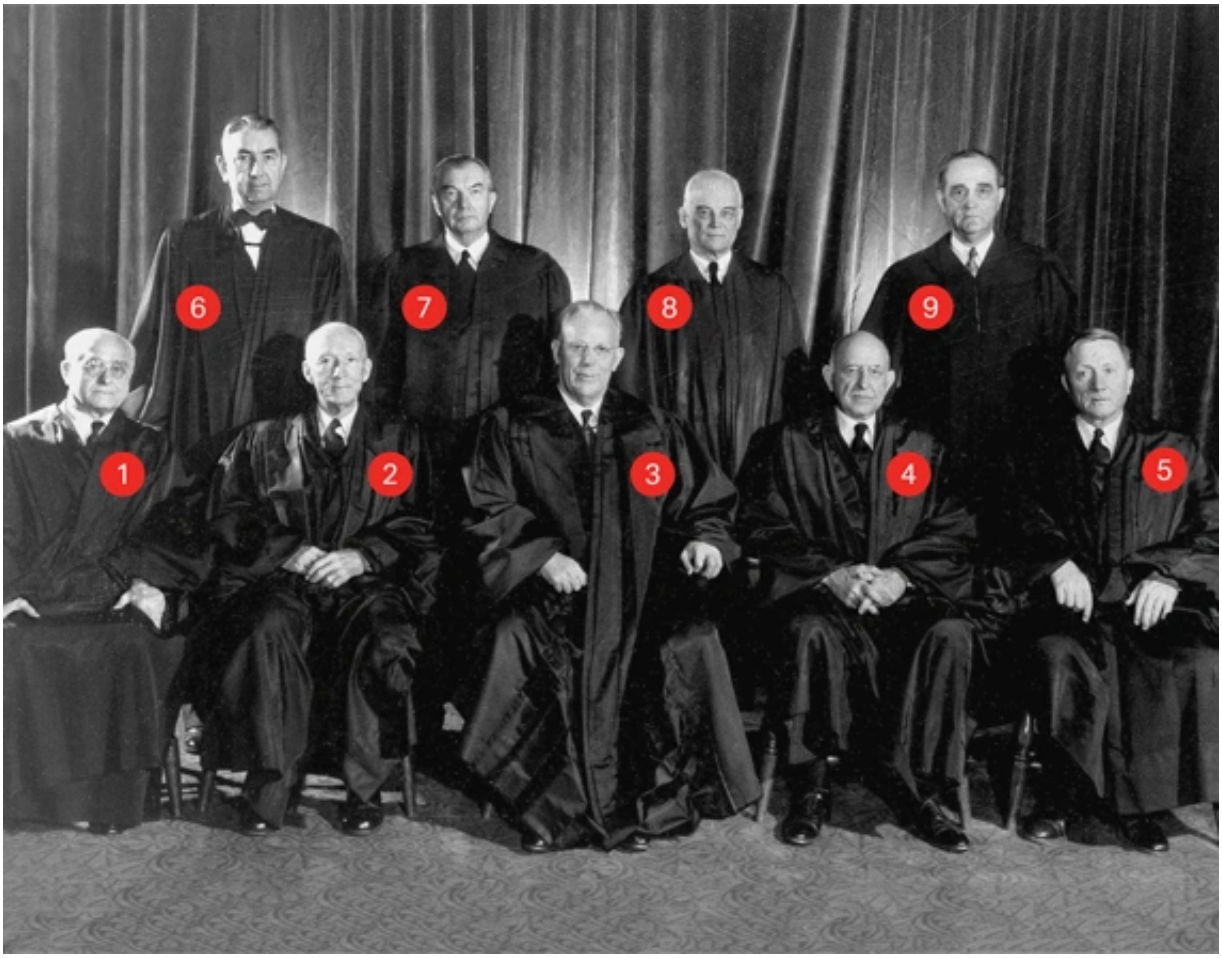
To appreciate how novel this Court-replenishment pattern is, recall the greatest case of the last century: *Brown v. Board of Education*, decided in 1954. Apart from the rather forgettable former Senator Sherman Minton, who had sat on a federal appellate court, none of the members of the *Brown* Court—not Earl Warren, not Hugo Black, not Robert Jackson, not Felix Frankfurter, not William O. Douglas—had *any* prior experience as a federal judge.

Indeed, before John Roberts became chief justice, in late 2005, the Court had always had at least one member who had arrived without judicial experience. On this point, the biographies of America's chief justices are particularly illustrative. From John Marshall, appointed in 1801, to Melville Fuller, who served until 1910, every one of the nation's chief justices came to the Court with zero judicial experience. The same was true of Earl Warren, who joined the Court in 1953. Three other 20th-century chiefs—Charles Evans Hughes, Harlan Fiske Stone, and William Rehnquist—came to the Court as associate justices wholly lacking any experience as a judge.

None of this means that these various pre-Roberts chiefs were unqualified. Rather, their pre-Court credentials involved notable service outside the judiciary. For example, among the justices who decided *Brown* in 1954, Hugo Black, Sherman Minton, and Harold Burton all came to the Court having served in the Senate; Earl Warren had served three terms as the governor of

California and in 1948 had come within a whisker of being elected vice president, as Thomas Dewey's running mate; Robert Jackson and Tom Clark had served as U.S. attorney general, and William O. Douglas had headed up the Securities and Exchange Commission.

Until the resignation of Sandra Day O'Connor—who had served as the majority leader in Arizona's state legislature—America had always had at least one justice who brought to the Court high-level elective or ultra-high-level appointive political experience. By contrast, none of the current justices has ever served in the Cabinet or been elected to any prominent legislative or executive position—city, state, or federal.



Above, the Supreme Court justices who heard *Brown v. Board of Education*, photographed the year before their landmark decision. Prior to joining the Court, Felix Frankfurter (1) helped found the American Civil Liberties Union and was a trusted New Deal adviser of President Roosevelt's. Hugo Black (2), Harold Burton (8), and Sherman Minton (9) served as U.S. senators. Chief Justice Earl Warren (3) was governor of California and then ran for vice president. Stanley Reed (4) and William O. Douglas (5) both reached the upper ranks of federal agencies (Reed was general counsel of the Federal Farm Board and the Reconstruction Finance Corporation; Douglas was

chairman of the Securities and Exchange Commission). Tom Clark (6) and Robert Jackson (7) served as attorney general. (Associated Press)

The aversion to nominating former politicians may be new, but from a president's perspective, it's hardly irrational. For starters, presidents have more sitting federal judges than ever to pick from. In the 1790s, there were six Supreme Court justices and only 15 judges in the lower federal courts. Today, while the number of Supreme Court justices has edged up to nine, the number of judges in the lower federal courts has skyrocketed to nearly 1,000. And about 200 judges now sit on federal circuit courts, where they hear cases and write appellate opinions as members of judicial panels—a job rather analogous to that of a Supreme Court justice. Not surprisingly, presidents now look first to the wide and deep federal appellate bench.

Appointing a sitting federal appellate judge also gives a president a unique twofer opportunity, creating a lower-court vacancy that the president can fill with a second (presumably supportive) appointee. If a sitting federal appellate judge placed on the Supreme Court is in turn replaced by a sitting federal trial judge, a president can turn a single Supreme Court vacancy into *three* judicial appointments.

Now factor in today's televised Senate confirmation hearings, in which nominees are grilled on the finer points of current Supreme Court doctrine. The rules of this game advantage sitting federal judges, whose daily job involves applying the Court's intricate commands, over, say, thoughtful lawyers in other parts of the government who may be less familiar with the Court's jargon and multipart doctrinal tests.

And let's not forget the value of prior vetting and confirmation. Every sitting federal judge has already been approved once by the Senate for a job in the judiciary. By contrast, most elected officials and other plausible Supreme Court candidates have never been confirmed by the Senate for any position.

Why, you may ask, is any of this a problem? Why would we want ex-senators

—or ex–Cabinet officials, or ex-governors, or other sorts of ex-pols, for that matter—on our highest court?

While a bench overloaded with ex-pols would be unfortunate, the Court would benefit from having at least one or two justices who know how Washington works at the highest levels, and who have seen up close how presidents actually think, how senators truly spend their days, how bills in fact move through Congress, and so on—in short, one or two justices whose résumés resemble those of former Secretary of State John Marshall, Hugo Black, and Robert Jackson. Think of it as simple portfolio diversification: The Court works best when its justices can bring different perspectives to bear on difficult legal issues. Constitutional law, done right, requires various tools and techniques of argumentation and analysis. No single technique works best across all constitutional questions that have ever arisen or will eventually arise. Some problems may be best considered through a combination of close textual analysis of a particular clause and holistic analysis of the Constitution's overall structure. On other topics, the original intent behind a provision may be especially significant. Still other issues should be approached through the prism of prior case law. Sometimes, however, text, structure, original intent, and precedent may not cast much light on the legal issue at hand. In those cases, justices would be better off focusing on the relevant nonjudicial actors' past institutional practices—say, settlements and agreements between members of different political branches that effectively glossed ambiguous constitutional text. Ex–attorneys general such as Robert Jackson and ex-senators such as Hugo Black may enrich the Court by brilliantly deploying tools and techniques of constitutional interpretation that lifelong judges may lack.

One virtue of appointing federal appellate judges to the Court is that these highly judicialized folk are already masters at applying Supreme Court doctrine. After all, this is what circuit-court judges do every day: they study and apply what the Supreme Court has said about one legal issue or another. One problem, however, is that Supreme Court precedent can be dead wrong.

Sometimes, in fact, it is baloney. And lower-court judges, who daily slice and eat this doctrinal baloney, may be ill-equipped to see it for what it is. Specifically, they may be inclined to think that judges are more right than they really are, and other branches of government, more wrong. A lower court's job is to follow the Supreme Court's precedents, whether right or wrong. But the Supreme Court's job, in certain situations, is to correct its past mistakes—to overrule or depart from erroneous precedents. (*Brown* famously and gloriously abandoned *Plessy v. Ferguson*'s malodorous "separate but equal" doctrine.) Someone who has not spent his or her entire life reading Supreme Court cases—who has instead spent time thinking directly about the Constitution and also spent time in a nonjudicial branch of government with its own distinct constitutional perspectives and traditions—may be particularly good at knowing judicial baloney when he or she sees it.

Consider a piece of judicial analysis that is, by acclamation, one of the greatest Supreme Court performances of the last century: Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*. In that case, the Court upheld a lower court's injunction barring President Harry Truman from continuing to hold private steel mills his government had seized. Truman had argued that this action was necessary to prevent a strike that threatened the production of steel needed for the Korean War.

In his concurring opinion, Jackson—a justice appointed by a Democratic president, voting against a Democratic president in a landmark case—repeatedly called attention to his own past professional life. He began by noting that he had served "as legal adviser to a President in time of transition and public anxiety," an experience that, he confessed, probably had a greater influence on his view of the case than the Court's prior case law. From his unique vantage point, judicial precedent was not the be-all and end-all that some blinkered lifetime judicialized folk might imagine it to be. "Conventional materials of judicial decision," he wrote, "seem unduly to accentuate doctrine and legal fiction." Instead of single-mindedly focusing on judicial precedent, Jackson carefully canvassed the history of congressional and presidential

actions over the centuries, paying respect to the ways that the legislative and executive branches had come to understand and implement the ambiguous constitutional clauses allocating powers between these branches.

Robert Jackson skipped college and did not go to a fancy law school, nor did he work as a judicial law clerk. But once on the Court, he did hire law clerks, and one of his most notable hires was William Rehnquist, who later became chief justice. And in turn, one of William Rehnquist's law clerks was John Roberts, who eventually replaced Rehnquist as chief, in 2005.

In some ways, John Roberts is rather like his judicial grandsire, Robert Jackson, and in other ways he is quite different. Like Jackson, Roberts served as solicitor general, albeit in a temporary capacity. Like Jackson, Roberts brought to the Court years of service as a lawyer within the executive branch. But unlike Jackson, Roberts never reached the highest rung of executive-branch service. He was never in the president's innermost circle.

Now let us turn to the biggest judicial decision of John Roberts's career, in which he provided the crucial fifth vote to uphold the Affordable Care Act in the 2012 case of *National Federation of Independent Business v. Sebelius*. Most scholars believe that the law, whether or not it is good policy, is easily and obviously constitutional. But in our hyperpolarized political world, various interest groups ginned up newfangled constitutional attacks that fooled some otherwise admirable justices who had been appointed to the Court by Republican presidents.

Roberts was not entirely deceived, and ultimately voted to uphold the law as a simple exercise of the congressional power to raise revenue. The ACA is, among other things, a tax law, and the Constitution was emphatically adopted and later pointedly amended to give Congress sweeping tax power. None of the other conservative justices credited this basic point, but Roberts did, perhaps because he had spent more time than the other conservatives

in executive-branch positions in which the tax power was highly relevant. The party that put him on the Court was none too pleased with his act of judicial integrity, but somewhere, Robert Jackson must have been smiling.

Whether Roberts and his Court will continue to shine in the days ahead is less certain. Consider the two biggest issues of the current Supreme Court term. In *King v. Burwell*, the ACA is back before the Court. This time, the question at hand seems hypertechnical, involving the meaning of a single phrase in the sprawling statute. But if the justices read this phrase without heeding the basic objectives of the lawmakers who enacted the statute and of the executive agency charged with administering it, insurance markets could unravel, imperiling health care for millions of families. Justices with congressional or Cabinet experience—the John Marshalls and the Robert Jacksons of Courts past—were sensitive to the concerns (and the wisdom) of nonjudicial players. Will the current Court be similarly attuned?

As for this term's same-sex marriage cases—the *Brown v. Board of Education* of our era—the justices will surely pay close attention to judicial precedent. But no one on today's Court has spent years studying the Fourteenth Amendment, with its grand principle of equality, as the great Hugo Black did prior to *Brown*. Nor does anyone on the Court have Earl Warren's track record of bipartisan achievement at the highest levels of American politics.

I hope that today's justices will nonetheless rise to the occasion. But I would feel more confident about a bench that was not lacking a crucial advantage enjoyed by every bench prior to 2005. Supreme Court precedent is a deep source of wisdom, but so is our nation's long-standing tradition of composing a Court whose justices, and decisions, reflect a broad range of experience.