

Jumbled justices



Benjamin G. Shatz

Partner, Manatt, Phelps & Phillips LLP

We have a new justice in One First Street. The homepage for the Supreme Court displays, under a COVID-19 public health announcement, that the Honorable Amy Coney Barrett (née 7th Circuit judge) is now the 103rd associate justice of the Supreme Court of the United States. Any SCOTUS nomination receives tremendous public attention, and the bandwidth for this particular

nomination and confirmation hit new highs, given its controversial timing so close to the presidential election.

But you knew all this already; it would've been impossible to miss. In fact, desired or not, you no doubt encountered much discussion, if not heated debate, about the nominee, nomination, confirmation hearings, and the Supreme Court in general. You are, after all, a lawyer -- possibly even an appellate lawyer -- meaning that your friends and relations, and everyone else at life's cocktail party, assumes that you have an intimate and fluent familiarity with all matters and personalities SCOTUSical. But the truth is that very few lawyers ever took classes on Supreme Court history and few have found time after law school to diligently study the high court. It's hard enough to learn all about the courts where you actually practice. And yet the expectations persist. Hence this year-end column's gift to you is a bit of untangling the jumbled justices on the SCOTUS roster.

With only a few over a hundred justices in the court's history, you might think there'd be no reason for confusion. Surely there are enough names and surnames to go around, right? But the quirks of history have made for a confounding jambalaya of justices.

Starting at the top, our current chief justice, the 17th, John Roberts, is the 4th chief named John, after John Jay, John Rutledge and John Marshall. Nothing surprising there; John is a common first name, shared by nine other justices too (Blair, McLean, Catron, McKinley, Campbell, Harlan I, Clarke, Harlan II and Stevens). But where it can get complicated is that CJ Roberts is not the first Justice Roberts. There was a Justice Owen Roberts from 1930 to 1945. That Justice Roberts often decided whether President FDR's New Deal legislation would pass constitutional muster, and his decision to uphold a state minimum wage law was the famous "switch in time that saved nine." (And with court-packing plans back in the national conversation, maybe the current Justice Roberts will have a similar chance to preserve the status quo?)

Joining Owen Roberts as the other swing vote back then, between the liberal Three Musketeers (Brandeis, Cardozo and Stone) and the conservative Four Horsemen (McReynolds, Sutherland, Van Devanter and Butler), was Charles Evans Hughes. There was only one Justice Hughes, but it may seem like two because after a first stint at the court (1910-1916) he resigned to run for president, but then returned 14 years later as chief justice (1930-1941).

To maintain confusion, there was a Justice Charles Evans Whittaker (1957-1962). His claim to fame was being the first justice to have served as a district court judge, Court of Appeals judge, and Supreme Court justice -- like Justice Sonia Sotomayor. But he is also known for suffering a nervous breakdown leading to his retirement for agonizing about how to vote in *Baker v. Carr*. How Supreme Court historians view him may be surmised from the title of a 2005 biography: "Failing Justice."

It was Chief Justice John Marshall who wrote the most significant constitutional decision ever, *Marbury v. Madison*, creating the doctrine of judicial review by ruling that "it is emphatically the province and duty of the judicial department to say what the law is." His tenure as chief remains the longest (1801-1835) and he is probably the most influential justice in history. The great chief was succeeded by the infamous Roger Taney (last name pronounced "Tawney"; chief from 1836-1864), who authored the dreaded *Dred Scott v. Sanford*, 60 U.S. 393

(1857), opinion holding that members of "the unhappy black race" could not be citizens and Congress could not prohibit slavery in the territories.

Next came Salmon P. Chase (chief from 1864-1873), who served in all three branches of the federal government and presided over Andrew Johnson's impeachment. Because he had been Abraham Lincoln's Treasury secretary, his visage graced the largest denomination of publicly circulated American currency, the \$10,000 bill (printed 1918-1945). Like Taney, Chase died while on the court, which then began the tradition of draping black crêpe over the courtroom's entrance and over a recently deceased justice's chair, recently seen for Justice Ruth Bader Ginsberg (even though no one was actually in the courtroom). Chase's name lives on via Chase Bank, even though he personally had no affiliation with its predecessors. As for confusion, note that there was (of course!) another Justice Chase (Samuel Chase, 1796-1811), famous for beating impeachment charges, as chronicled in Robert Caro's third volume on Lyndon Johnson: "The Master of the Senate." The House charged Chase with political bias, but the Senate voted to acquit him, setting important precedent protecting the independence of the federal judiciary.

Back to John Marshall. Because of his outsized role in setting the court's powers, many mistakenly think John Marshall was the first chief, but he wasn't even the first chief named John. Those distinctions go to John Jay, who was followed by John Rutledge. John Marshall's renown probably confuses some people given that another Justice Marshall, first name Thurgood, also achieved fame and acclaim (albeit centuries later) as the first non-white person on the court. But where it gets really confusing is that the name John Marshall also appears in the names of Justices John Marshall Harlan (who served 1877-1911) and his grandson John Marshall Harlan (who served 1955-1971). How remarkable is it that someone named after the most famous Justice became a justice himself and then had a grandson, with the same name, who also served on the court?! (And the "John Marshall" part of their names isn't the only confusing element, given that there also was a Justice *Harlan* Fiske Stone (1925-1941, chief 1941-1946). Justice Stone wrote the most famous footnote in Supreme Court history, footnote 4 in *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938), giving birth to the strict scrutiny standard of review.)

JMH I came from a prominent slave-holding Kentucky family, yet he became known as The Great Dissenter for dissenting in cases restricting civil rights, like the *Civil Rights Cases* and *Plessy v. Ferguson* ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful."). (And you thought that Oliver Wendell Holmes (1902-1932) was the Great Dissenter?) JMH II became known as "The Great Dissenter of the Warren Court" because he often opposed the reforms promulgated by that liberal Court.

The Warren Court derives its name from former California Governor Earl Warren, who served as chief from 1953-1969. Spearheaded by CJ Warren and Justice William Brennan, the court expanded judicial power and moved constitutional law in liberal directions. Eisenhower, who had appointed both justices later quipped, "I made two mistakes [as president] and both are sitting on the Supreme Court."

Following the liberal Warren Court was the more conservative Burger Court, which sounded more like a place to grab lunch than to shift jurisprudence. (Insert Justice Frankfurter (1939-1962) joke here.) But yes, there comes another wacky connection: Chief Earl Warren was

succeeded by Chief Warren Earl Burger (Chief from 1969-1986). While we can forgive Justices Thomas Johnson (1792-1793) and William Johnson (1804-1834) for having common names (and common careers), it is harder for fate to account for major eras in Supreme Court history moving from Earl Warren to Warren Earl Burger. Coincidences like that (and others noted here) seem purposely designed for some tricky multiple-choice quiz.

Ergo, sorting out Supreme Court justices is not a simple matter of black and white. Best not to confuse Justice Hugo Black (1937-1971) with Justice Blackmun (1970-1994). Nor do you want to be the one to confuse Justice Edward White (1894-1910, chief 1910-1921) with Justice Byron "Whizzer" White (1962-1993). On the topic of nicknames, CJ Burger and Justice Blackmun (boyhood friends from St. Paul -- Blackmun was the best man at Burger's wedding -- and both nominated by President Nixon) were called the Minnesota Twins since they hailed from the North Star State. But Blackmun (author of *Roe v. Wade*) significantly liberalized during his tenure, and the twins concept -- and their friendship -- deteriorated.

Of course, the worst way to confuse the justices is to do so in real-time during oral arguments. Most famously, during the December 11, 2000 *Bush v. Gore* arguments, one lawyer called Justice Stevens "Justice Brennan" (who had retired in 1990 and died in 1997) and then referred to Justice Souter as "Justice Breyer." This prompted another justice -- known for his levity -- to interject "I'm Scalia."

Polls typically show that -- RBG's notoriety notwithstanding -- nearly 60% of Americans cannot name a single Supreme Court justice. Lawyers, of course, can name many, past and present. But the name-game can get confusing. With any luck, this article will help dispel some of the most typical supreme mix-ups.