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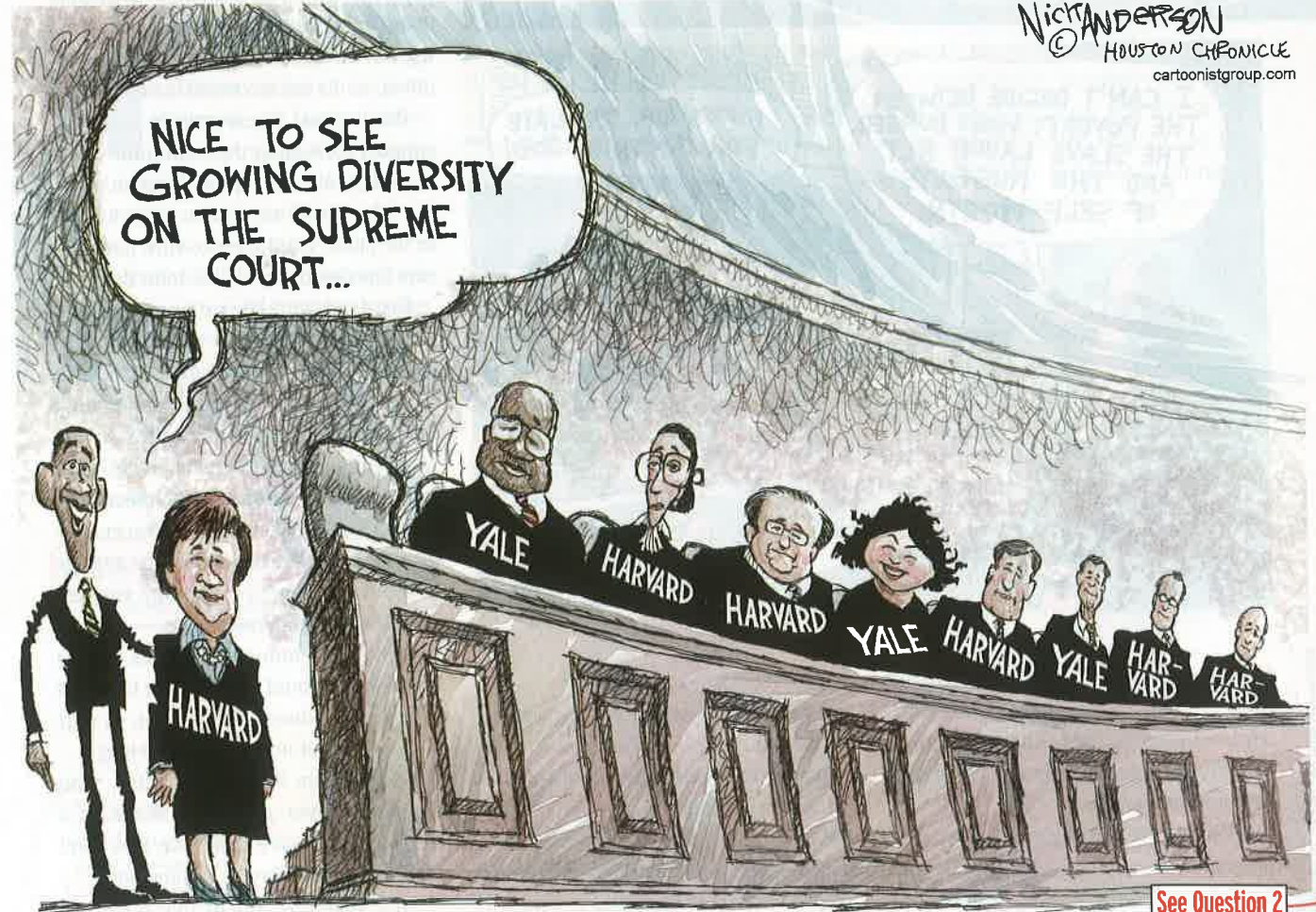
MORE THINGS YOU NEED TO KNOW ABOUT

# The Supreme Court

PART 2 of 2

How does the nation's highest court really work? Here are more of the basics from former *New York Times* Supreme Court correspondent Linda Greenhouse.

NICK ANDERSON  
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See Question 2



**Protesters** for and against Obamacare outside the Court in 2012; the justices later ruled the law constitutional.

## 1 Does public opinion influence the Court?

As the late Chief Justice William Rehnquist once said, it would be remarkable if judges were *not* influenced by public opinion. They live in the world, they go home to their families, they watch television, read newspapers, and many surf the Web.

The idea that the Supreme Court “follows the election returns”—that its decisions tend to move in line with popular sentiment—is true in the sense that presidents, who are elected, are likely to make at least one Supreme Court appointment. If Barack Obama had lost the 2008 presidential election to John McCain, it’s a safe bet that the liberal-leaning justices, Sonia Sotomayor and Elena Kagan, would not have been appointed to fill the two most recent vacancies. A Republican president would likely have appointed conservative-leaning justices, which would have sharply shifted the Court to the right.

But does public opinion on specific issues influence the

Court? Consider race. There’s no doubt that the growing sense in much of the country in 1954 that segregation was fundamentally wrong paved the way for the Court’s 9-to-0 ruling in *Brown v. Board of Education*, which barred segregation in public schools. The social revolution of the 1960s and the widespread entry of women into the workplace certainly played a role in the Court’s decisions, beginning in the early 1970s, prohibiting discrimination against women. The Defense of Marriage Act, passed by Congress in 1996, barred same-sex couples married under state law from receiving the same federal benefits heterosexual couples get. It’s quite possible the Court wouldn’t have struck down the law last year if a dozen states hadn’t already legalized same-sex marriage by the time the justices ruled.

As former Justice Benjamin N. Cardozo observed in the 1920s, “The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”

## 2 Has the presence of women and minorities changed the Court?

Until Thurgood Marshall, who was black, was sworn in as the 96th justice in 1967, only white men had sat on the Supreme Court. With a few exceptions, the justices were all Protestants. In the 47 years since, things have changed dramatically.

The Court today consists of one African-American (Clarence Thomas); one Hispanic (Sotomayor); six Catholics (John G. Roberts Jr., Anthony M. Kennedy, Antonin Scalia, Samuel Alito, Thomas, and Sotomayor); three Jews (Ruth Bader Ginsburg, Stephen G. Breyer, and Kagan); and three women (Ginsburg, Sotomayor, and Kagan).

**The Old Days:**  
In 1965, the Warren Court was all white men.



programs stigmatize minority students and hurt their chances for success. The first woman to serve on the Court, Sandra Day O’Connor, named by President Ronald Reagan in 1981, was a moderate Republican who was more conservative than the second woman, Justice Ginsburg. But during the decade the two served together, they found common ground in decisions that

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### 3 What's the role of the chief justice?

The Constitution says almost nothing about the office of chief justice. In fact, we know only by inference that the Framers meant to create the position. Article I says that the chief justice presides over any presidential impeachment trial in the Senate. There have been only two such trials in American history (of Andrew Johnson in 1868 and Bill Clinton in 1999), so that responsibility doesn't account for much of a chief justice's time.

But the chief still has plenty to do. Of course, in terms of the Court's most important work—deciding cases—he's only one of nine votes.

"His judgment has no more weight, and his vote no more importance, than those of any of his brethren," wrote Chief Justice Salmon P. Chase in 1868.

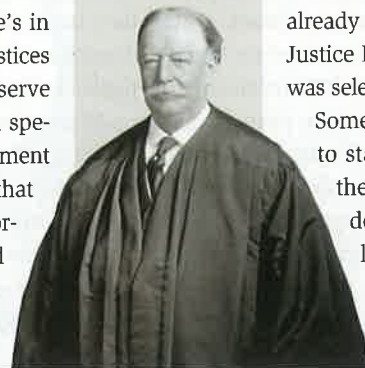
In other ways, however, he (all 17 chief justices have been men) is a powerful figure. He decides who writes the majority opinion in cases in which he's in the majority. He runs the meetings at which the justices discuss cases. And he selects federal judges to serve on the Foreign Intelligence Surveillance Court, a special court that meets in secret to evaluate government requests for foreign wiretaps. (This is the court that approved the phone and Web surveillance that former National Security Agency contractor Edward Snowden leaked to the press last year.)

The Constitution says nothing about how the



#### William Howard Taft

President from 1909 to 1913, Taft later served as chief justice from 1921 to 1930. He is the only person to have held both positions.



Chief Justice Roberts swears in President Obama for his second term in 2013.

chief justice is appointed, but when President George Washington appointed the first justices, he specifically named John Jay as chief justice, establishing the precedent of separate nomination to the post. A nominee for chief justice can be someone who's already on the Court or an outsider, such as Chief Justice Roberts, who was a federal judge when he was selected by President George W. Bush in 2005.

Sometimes the name of a powerful chief comes to stand for the Court's distinctive role during the period. The "Warren Court," for example, denotes not only Chief Justice Earl Warren's leadership from 1953 to 1969, but also the huge expansion of individual rights over which he presided.

### 4 Why are the justices so camera shy?

"The day you see a camera come into our courtroom, it's going to roll over my dead body," retired Justice David H. Souter once declared. Many countries, including England and Canada, and many states allow their high court proceedings to be televised. While audio and transcripts of Supreme Court arguments are available online, the justices have resisted TV and video.

The usual explanation is some variation of "if it ain't broke, don't fix it." And it's not hard to understand the justices' concern that selective video clips from a lively oral argument could make the Court look more like a squabbling debate club

of months (see Part I of this article).

Breyer has a point, but there would be a vast audience for televised oral arguments in important cases. People would get to see the Court in action and would, for the most part, come away impressed by the unscripted exchanges between the justices and the lawyers for both sides





**Elena Kagan** at her Senate confirmation hearings in 2010

## 5 What's gone wrong with the confirmation process?

In 1975, the Senate unanimously confirmed Supreme Court nominee John Paul Stevens by a vote of 98 to 0—after just five minutes of polite discussion.

Today, the hearings have become big political spectacles geared to the TV audience. They're broadcast live and last for days as senators prod nominees to discuss specific cases and their judicial philosophies. But the nominees have learned that they gain little—and risk a lot—by saying much of anything.

Confirmation hearings have “never been terribly illuminating, but these days the job of the nominee is to make sure he or she says nothing that the opposition can latch onto,” says Lucas Powe, a law professor at the University of Texas.

Many people attribute the change to the nomination of Robert H. Bork by President Reagan in 1987. Bork was a well-known conservative judge with a long “paper trail”—writings and speeches in which he criticized many landmarks of modern constitutional law. He gave extensive answers to questions about his

judicial beliefs, which made it clear he would have shifted the Court to the right. Democrats, who controlled the Senate, were determined to defeat him, and the nomination failed. Reagan later nominated the more moderate Anthony Kennedy, who today is considered the Court's swing vote.

### Hearings have become big political spectacles geared to TV.

A Supreme Court confirmation hearing is politics at its worst. The stakes are very high, especially if the nomination can shift the Court's ideological balance. The hearings are essentially billboards onto which politicians try to project their own agendas. Senators hostile to the president try to catch the nominee in an inconsistency or slip-up of some kind. Even friendly senators take the opportunity to lecture the nominee on what they think the Court should be doing.

“Their whole purpose is to get some television time for senators,” says Powe. “We'd be better off if there were no hearing and they just voted.” •

*Additional reporting by Patricia Smith.*