

THE PRE-APPOINTMENT EXPERIENCE OF SUPREME COURT
JUSTICES: RESPONSE TO PROFESSOR BARTON

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Benjamin H. Barton's recent article, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*,¹ makes a significant contribution to the growing body of work that compares and contrasts the professional and educational backgrounds of the current members of the Roberts Court with their predecessors. I share Professor Barton's concerns. In 2007, I wrote an article bemoaning the fact that all but one Justice on the Supreme Court at that time had attended law school at either Harvard or Yale and had come to the Court directly from a judgeship on a federal court of appeals.² I thus referred to the Supreme Court members at that time as "The Stepford Justices."³

Professor Barton makes a convincing case that, unlike their predecessors, the current justices lack experience in areas such as the private practice of law, trial judging, and politics.⁴ I especially agree with the latter. Since the retirement of Justice Sandra Day O'Connor in 2006, for the first time in American history there is not a single Supreme Court Justice who has ever served as a legislator at any level of government.⁵ Moreover, for the first time in history the Supreme Court lacks even one Justice who has ever run for political office of any kind.⁶

I agree with Professor Barton that it would be good to see a Supreme Court composed of Justices with wider professional and personal life experiences. But there is one key constituency that disagrees: recent Presidents of the United States. And to illustrate this, I want to focus on one aspect of his article.

Barton shows that around 1990, the average Justice on the Supreme Court had spent about 2 ½ years of his prior professional life in Washington, D.C.⁷ But then something extraordinary happens. Today, the average Justice on the Supreme Court has spent almost 9 years of his prior professional life working in Washington, D.C.⁸ That is an increase of over 350% in the past two decades.

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1. Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137 (2012).

2. Timothy P. O'Neill, "The Stepford Justices": *The Need for Experiential Diversity on the Roberts Court*, 60 OKLA. L. REV. 701, 702 (2007).

3. *Id.* at 702.

4. *See* Barton, *supra* note 1, at 1151–55.

5. *Id.* at 726–30.

6. *Id.*

7. Barton, *supra* note 1, at 1164 (figure 13).

8. *Id.*

The reason for this has been explained in a new book written by Lee Epstein, William M. Landes, and Richard A. Posner.⁹ First, this book agrees with Barton that ideology and politics play significant roles in the decisions of the Supreme Court.¹⁰ Thus, the assumption is that a President will nominate Justices whom he hopes will share his political ideology. Therefore, Epstein and the other authors examine the phenomenon of “ideological divergence” between Presidents and the Justices they nominate. They define “ideological divergence” as “the tendency for the gap between the ideology of a Justice and the ideology of the President who appointed him to widen with the length of the Justice’s service.”¹¹ The variable they found to be one of the strongest indicators that a Justice’s ideological decisions would not deviate from the ideology of the President who nominated him was simply whether the Justice was working in Washington, D.C., as an employee of the federal government at the time he was nominated.¹²

To illustrate just how strong a predictor this one factor is, consider this. Take the average ideological divergence after just one year on the Court between a President and his nominated Justice if that Justice was not a federal employee in Washington at the time of his nomination. Call that divergence “X.” That is exactly the same ideological divergence you would find between a President and his nominated Justice *after twenty years on the Court*—providing the nominee had been working in Washington as a federal employee at the time of his nomination.¹³

Clearly, “working for the federal government in Washington at the time of appointment” is a proxy for people who have probably revealed their own politics in a highly political town. Ideology is going to be harder—if not impossible—to conceal in Washington.

And this brings us back to the phenomenal increase between 1990 and the present in the number of years the average Justice worked in Washington prior to appointment. My guess is that this was a direct reaction to the nomination mistake no President of either party wants to make again—the nomination of David Souter.

Recall that when President George H. W. Bush nominated Souter in 1990, the press dubbed him the “Stealth Candidate” for his lack of an

9. LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE* (Harvard 2013).

10. *Id.* at 103 (“We find strong evidence that ideology does influence the Justices’ judicial votes . . .”); *see also* Barton, *supra* note 1, at 1175 (“[I]f the Supreme Court has not always been a political, policy-making body, it is now.”).

11. EPSTEIN ET AL., *supra* note 9, at 117.

12. *Id.* at 118, 120.

13. *Id.* at 120 (Table 3.7). This graph covers members of the Supreme Court between 1953-2008.

ideological paper trail.¹⁴ In lieu of a written record, President Bush relied on the assurance of Republican New Hampshire Senator Warren Rudman that Souter was “one of the most extraordinary human beings [he’d] ever known.”¹⁵ From a conservative Republican perspective, the Souter nomination will go down as a major political blunder.

No President—Republican or Democrat—has made the same mistake again. President Bush next nominated Clarence Thomas, a Washington veteran with strong Republican ties. President Clinton chose Ruth Bader Ginsburg and Stephen Breyer, two federal court of appeals judges who each had extensive Washington political experience. George W. Bush chose John Roberts and Samuel Alito, two federal court of appeals judges with Washington experience in the Reagan administration. Barack Obama chose Elena Kagan, his own Solicitor General. The only confirmed Justice since Souter with no Washington experience is Sonia Sotomayor. Yet her extensive record as a federal judge in New York left President Obama little doubt as to her position on the conservative-liberal judicial axis.

A President, given the choice between naming a historically “great” Justice or simply nominating a Justice who will reflect his ideological predilections, will take the latter every time. Barton’s article convincingly shows that this is resulting in Justices who are being selected from a smaller and smaller pool.

14. TINSLEY E. YARBROUGH, DAVIS HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT 94–146 (2005).

15. *Id.* at 100.