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Brannon P. Denning
bpdennin@samford.edu

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THE CASE AGAINST APPOINTING POLITICIANS TO THE SUPREME COURT

*Brannon P. Denning**

INTRODUCTION

Ben Barton's recent paper concludes that the members of the current Court are more "cloistered and detached" than at any other point in the Court's history.¹ His findings are bound to renew calls for the appointment of politicians to the Court;² but I argue that remedying the perceived deficit of life experience and "practical wisdom"³ by appointing persons currently or formerly active in partisan politics would likely not deliver the claimed benefits and might affirmatively harm the Court as an institution.

I. THE CASE FOR POLITICIANS ON THE COURT . . .

Robert Alleman and Jason Mazzone recently argued that the absence of politicians on the current Court is an unwelcome historical anomaly.⁴ Appointing politicians, they argue, would introduce an accountability occasioned by the nominee's public record as an elected official who has "tak[en] definite stances on concrete legal and political issues" and "has suffered the slings and arrows of national electoral politics or has served in a high profile administrative office"⁵ Such persons have "acquired public trust before being placed in the least accountable of all federal offices."⁶ By contrast, the pre-appointment vetting most nominees to the Court receive consists of a lengthy background check and confirmation hearings that "reveal virtually nothing about the nominee."⁷ Alleman and Mazzone further argue that politicians can lend legitimacy to judicial decisions "involving the scope of powers of the branches of government" in which they've served.⁸ Moreover, "a

* Professor of Law, Cumberland School of Law, Samford University. Thanks to Ben Barton and the editors of the *Florida Law Review* for the invitation to contribute to this discussion. Robbie McNaughton, Cumberland Law School, Class of 2013, provided helpful research assistance.

1. Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1172 (2012).

2. See, e.g., Robert Alleman & Jason Mazzone, *The Case for Returning Politicians to the Supreme Court*, 61 HASTINGS L.J. 1353 (2010).

3. Barton, *supra* note 1, at 1182.

4. Alleman & Mazzone, *supra* note 2, at 1359–61; see also Barton, *supra* note 1, at 1154–55 ("One of the great surprises from studying the pre-appointment experiences of Supreme Court Justices is the sheer amount of time prior Justices spend as non-lawyer, elected officials.") (footnote omitted).

5. Alleman & Mazzone, *supra* note 3, at 1384.

6. *Id.*

7. *Id.* at 1382.

8. *Id.* at 1385; see also *id.* at 1385–86 (suggesting former President Taft's authorship of

national politician would bring to the Court a unique skill set acquired through experience in high-level legislative or executive positions.”⁹ Their “statesmanship” and understanding of “political consequences” enable politicians to both “predict[] . . . and manag[e]” the “fallout” of the consequences attending controversial decisions.¹⁰

II. . . . AND A CASE AGAINST

Color me skeptical. Given the highly partisan, polarized nature of contemporary politics, nominating individuals with a lifetime party identification is not a recipe for improving the perceived legitimacy of Court decisions. Each of the Justice’s opinions would likely be viewed through that partisan lens even more than today. Worse, it might be difficult for a politician *cum* Justice to shed party attachments even after donning her robes. Active politicians may also continue to harbor desire for—even pursue—elective office while serving as a Justice.¹¹

The politicians recently appointed to the bench also ought to give pause. For every Earl Warren, there is Fred Vinson. For every Charles Evans Hughes, there is James Byrnes, Frank Murphy, or Sherman Minton. The last elected official on the Court, Sandra Day O’Connor, was frequently criticized for opinions that were “ticket[s] for one train only,”¹² providing little guidance for policymakers or lower courts. Recent politician-Justices have often been bored, overwhelmed, or frustrated by the technical, even tedious, nature of many cases on the Court’s docket. Several simply delegated responsibilities to their clerks.

If Senators are unable to get much information out of today’s nominees during confirmation hearings,¹³ that says as much about the caliber of Senate questioning as it does about the reticence of nominees, especially those with records of judicial service. That active politicians would have acquired a lengthy public record on the burning legal and political issues of the day is, for me, a bug, not a feature. While Alexander Bickel’s description of judges having “the leisure, the training, the insulation to follow the ways of the scholar in pursuing the

Myers v. United States, 272 U.S. 52 (1926), enhanced its legitimacy). *But see* *Humphrey’s Executor v. United States*, 295 U.S. 602, 627–29 (1935) (limiting *Myers*).

9. Alleman & Mazzone, *supra* note 2, at 1386.

10. *Id.* at 1388; Barton, *supra* note 1, at 1176–77 (suggesting that “[a]s the Court begins to more closely resemble a policymaking, ‘Olympian’ body, it is especially important to appoint individuals with real-life experiences,” including those gained in politics).

11. *See, e.g.*, William G. Ross, *Presidential Ambitions of U.S. Supreme Court Justices: A History and an Ethical Warning*, 38 N. KY. L. REV. 115, 160–70 (2011) (describing the dangers of having politically ambitious Justices on the Court).

12. JOAN BISKUPIC, SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 286 (2005) (quoting Jeffrey Rosen).

13. Alleman & Mazzone, *supra* note 2, at 1382 (noting that Senators frequently ask questions written by staffers and “often do[] not know how to ask good follow-up questions”).

ends of government”¹⁴ edges towards a judicial nirvana fallacy,¹⁵ most prefer the Justices to come to cases with as much disinterest as engaged humans can muster. Litigants would question the impartiality of Justices who have taken well-publicized stands on issues before the Court; perceptions about the integrity of its opinions would likely suffer.

Judicial opinions, moreover, are different from legislation. The latter requires no written record of reasons for preferring one option to another. The Court’s work product by contrast stands or falls based on the cogency of its reasoning. Its integrity and legitimacy depends on more than simply wrangling five votes. If the public sees the Court operating no differently than other political institutions, then the rationale for the Court’s unique features— life tenure, the lack of transparency, judicial review—becomes less apparent.

14. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25-26 (2nd ed., 1986) (1962).

15. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 40 (2006) (describing the “nirvana fallacy” as “[a] familiar shorthand . . . in which an excessively optimistic account of one institution is compared with an excessively pessimistic account of another.”).