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# THE ROLE OF JUDICIAL ISSUES IN PRESIDENTIAL CAMPAIGNS

William G. Ross\*

## I. INTRODUCTION

After sporadic appearances in presidential campaigns throughout American history, judicial issues are becoming a permanent fixture in presidential contests. The President's power to nominate federal judges has emerged as at least a moderately important issue during the past several presidential campaigns, and judicial issues were more prominent in the 2000 campaign than in any election since 1968. The growing salience of the courts in presidential elections reflects increasing public awareness of the power of federal judges, particularly the Supreme Court Justices, and heightened appreciation of the President's ability to influence the courts through judicial nominations. Growing public sophistication about the judiciary's importance seems likely to ensure that judicial issues will remain a feature of presidential campaigns.

If history is any guide, however, judicial issues are likely to continue to produce much campaign bluster but will affect few ballots. While the impact of judicial issues on voting patterns is difficult to discern, there is evidence that presidential candidates use judicial issues more as a means of rallying the party faithful than swaying undecided voters. Voters who agree with a candidate's judicial philosophy or with the type of judicial appointments that he promises to make are likely to agree with the candidate's views on legislative and administrative issues. Judicial issues therefore often merely reflect how voters already feel about a candidate on more salient

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legislative and administrative issues.

Nevertheless, judicial issues have significance in presidential contests that transcend the actual number of votes that they change. Presidential campaigns provide a unique forum for public discussion of judicial issues. Dialogue between voters and candidates about judicial issues, while too often shallow, helps to shape public opinion about individual judicial decisions as well as broader legal issues. It also provides a barometer of public attitudes toward the Supreme Court. Presidential contests therefore can influence and have indeed affected subsequent judicial nominations and legislation affecting the courts. The impact of judicial issues in presidential campaigns and elections has received very little attention from scholars or other commentators.<sup>1</sup> The subject is ignored even in detailed studies of presidential campaigns.<sup>2</sup> It deserves more attention because judicial issues have played a role in many elections during the past two hundred years and are now a staple of presidential politics. By chronologically tracing the use of judicial issues in past elections, this article will demonstrate that the use of judicial issues reveals much about the role of the judiciary in American society. In particular, this article will argue that the use of judicial issues in presidential campaigns illustrates 1) the decline of efforts by critics of the courts to curb the institutional powers of the courts and the concomitant growth of efforts to change judicial decisions by influencing the appointment of judges; 2) the abiding public respect of Americans for the judiciary; 3) the paucity of public sophistication about legal issues and the growth of such sophistication during recent years; 4) the manner in which judicial issues are inextricably intertwined with political issues; and 5) the ways in which voter reaction to judicial issues has influenced subsequent judicial appointments and legislation.

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1. Virtually the only study is DONALD GRIER STEPHENSON, JR., *CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS* (1999).

2. See BERNARD A. WEISBERGER, *AMERICA AFIRE: JEFFERSON, ADAMS, AND THE REVOLUTIONARY ELECTION OF 1800* (2000); JOHN C. WAUGH, *RE-ELECTING LINCOLN: THE BATTLE FOR THE 1864 PRESIDENCY* (1997); ZACHARY KARABELL, *THE LAST CAMPAIGN: HOW HARRY TRUMAN WON THE 1948 ELECTION* (2000); EUGENE H. ROSEBOOM, *A HISTORY OF PRESIDENTIAL ELECTIONS* (1957).

## II. DISCUSSION

Since presidential elections occur only every four years, a detailed study of the history of judicial issues in presidential elections is essential to understanding the role of such issues in elections. This historical study will demonstrate that certain features of judicial issues in presidential campaigns have remained remarkably consistent through the years. In particular, voters have sensed the importance of judicial issues, but have lacked the sophistication or interest to respond to nuanced discussion of legal issues. Judicial issues have often served as proxies for broader political issues. Moreover, the abiding respect of voters for the Court has inhibited candidates from criticizing the Court as an institution or attacking individual Justices.

Judicial issues may have figured in some elections before 1860. In 1800, for example, the controversy over the federal judiciary's enforcement of the Alien and Sedition Acts may have helped to defeat President John Adams and elect Thomas Jefferson.<sup>3</sup> Although political controversy over the Marshall Court's activism did not transform the Court into an

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3. See STEPHENSON, *supra* note 1, at 31-51. See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 168 (rev. ed. 1937). The so-called Alien and Sedition Acts were enacted in response to Federalist fears of foreigners that arose from antagonism between the Americans and the French during the Napoleonic Wars. See, e.g., 1 MELVIN UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES, 182 (2002). The Alien and Sedition Acts included the Naturalization Act, which increased from five to fourteen years the residency requirements for naturalization; the Alien Act, which gave the President power to expel suspected subversive non-citizens; the Alien Enemies Act, which permitted the President in time of war to imprison or expel aliens; and the Sedition Act, which forbade "false, scandalous and malicious writing" against the President or Congress. *Id.* The Sedition Act, which was intended in part to discourage Republican criticisms of the Federalists during the upcoming presidential campaign, was strongly opposed by Republicans, whose general sympathies toward the French also made them hostile to the anti-alien legislation. See *id.* The relish with which Federalist judges enforced the laws helped to transform the Acts into an election issue. See STEPHENSON, *supra* note 1 at 34-37, 39-41. As Professor Stephenson has explained, "[d]enunciation of the Alien and Sedition Acts comprised a key part of the policy alternatives Republicans offered voters in 1800. Those laws were not the only issue of the campaign . . . but without them it is far from certain that Republicans would have won." *Id.* at 39. In particular, Jefferson encouraged newspapers to warn voters that the legislation threatened liberty, and numerous editors and publicists used the legislation as an argument against Adam's re-election. See *id.* at 39-40. Federalists tended to ignore Republican attacks on the Acts, but they warned that election of Jefferson could produce public disorder or even anarchy. See *id.* at 40.

election issue during the early nineteenth century,<sup>4</sup> judicial issues played an important role in the election of 1832, in which the controversy over President Jackson's veto of the renewal of the charter of the Bank of the United States focused public attention on the Court's decisions expanding the federal government's power, particularly its 1819 decision in *McCulloch v. Maryland*<sup>5</sup> sustaining the Bank's constitutionality.<sup>6</sup> National Republicans warned that Democratic support for measures to forbid appeals from state courts to the U.S. Supreme Court threatened the Court's independence and power.<sup>7</sup> It was only in the 1860 election, however, that judicial issues became prominent.

#### A. *The 1860 Election*

The Supreme Court's highly controversial defense of slavery in its 1857 *Dred Scott* decision<sup>8</sup> caused judicial issues to be significant in the election of 1860.<sup>9</sup> In contrast to later periods of controversy over the Court, opponents of *Dred Scott* sought merely to overturn this particular decision rather than to curb the Court's institutional powers.

[T]he Republican remedy for the *Dred Scott* decision was to win the election of 1860, change the personnel of the Court, and have the decision reversed. According to Lincoln, a Republican victory at the polls would be enough in itself to prevent further proslavery onslaughts by the existing Court.<sup>10</sup>

Likewise, advocates of slavery were convinced that Republicans would appoint anti-slavery Justices who would overrule *Dred Scott*.<sup>11</sup> Fear of extension of slavery enabled Lincoln to

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4. See STEPHENSON, *supra* note 1, at 68-69 (discussing the fact that the Court was not an issue in the campaigns of 1820, 1824, or 1828). Professor Stephenson has concluded that the Court did not become an issue, despite widespread opposition to its nationalizing decisions, because the elections of the 1820's tended to focus on personalities rather than on policies. *See id.*

5. 17 U.S. (4 Wheat.) 316 (1819).

6. See STEPHENSON, *supra* note 1, at 53-80.

7. *See id.* at 75.

8. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

9. For an extended discussion of the Court's role in the 1860 campaign, see STEPHENSON, *supra* note 1, at 81-106.

10. DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 454 (1978).

11. See WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS* 51-52 (1988).

sweep the North so thoroughly that Charles Warren declared, "Chief Justice Taney elected Abraham Lincoln to the Presidency."<sup>12</sup>

But while Republicans had bitterly assailed the Court for *Dred Scott* for a long while after the decision was rendered in 1857,<sup>13</sup> Republican attacks on the Court "were softened during the campaign or dropped outright" as "part of the Republican attempt to moderate their stance and undercut charges that the party was disloyal to the Constitution."<sup>14</sup> Although the Republican platform did not specifically mention the Supreme Court or *Dred Scott*, it implicitly repudiated the Court's decision in *Dred Scott*.<sup>15</sup> In contrast, the Democratic platform on which Stephen A. Douglas stood declared that "the Democratic party will abide by the decision of the Supreme Court" regarding slavery in the territories.<sup>16</sup> The reluctance of the Republicans to criticize the Court despite the widespread execration of *Dred Scott* provides an early example of how politicians have recognized that the Court is so widely respected, even when its decisions are unpopular, that attacks on the Court are politically parlous.

### B. *The 1864 Election*

In 1864, the looming appointment of a successor to Chief Justice Roger B. Taney, who died three weeks before the election, did not become an election issue. Although Republican George Templeton Strong expressed confidence in his diary that "[e]ven should Lincoln be defeated, he will have time to appoint a new Chief Justice,"<sup>17</sup> the Senate in the past had

12. 2 WARREN, *supra* note 3, at 357.

13. The decision was a prominent feature of the debates between Abraham Lincoln and Stephen A. Douglas in their 1858 contest for an Illinois Senate seat. See THE LINCOLN-DOUGLAS DEBATES 22, 42, 101-02, 151, 168-73, 263-64, 295-96, 320, 325, 360, 361-62 (Harold Holzer ed., 1993).

14. LASSER, *supra* note 11, at 51.

15. The platform declared that the new dogma that the Constitution, of its own force, carries slavery into any or all of the territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; it is revolutionary in its tendency, and subversive of the peace and harmony of the country.

1 NATIONAL PARTY PLATFORMS 32 (Donald Bruce Johnson compiler, 1978).

16. See *id.* at 31.

17. 3 THE DIARY OF GEORGE TEMPLETON STRONG 500 (Allan Nevins & Milton Halsey Thomas eds., 1952).

generally looked unfavorably upon Supreme Court nominations by lame duck presidents.<sup>18</sup> The failure of the appointment to influence the election, even though the appointment probably hinged on the election's outcome, may have reflected preoccupation with the war or perhaps a belief that either Lincoln or the Democratic candidate George McClellan would appoint a similar person. Strong's observation that Lincoln could not "appoint anyone worse than Taney"<sup>19</sup> suggests that he and other Republicans felt that neither would McClellan appoint anyone worse than the despised author of *Dred Scott*.

### C. *The 1896 Election*

The tumultuous 1896 contest between Republican William McKinley and Democrat William Jennings Bryan was the first in which the Court itself appears to have been a significant election issue. Populists who supported Bryan were outraged by the Supreme Court's triad of 1895 decisions that invalidated the federal income tax,<sup>20</sup> vitiated the Sherman Antitrust Act,<sup>21</sup> and upheld the conviction of labor leader Eugene V. Debs for violating a federal injunction against disorder during a strike.<sup>22</sup> Since many populists believed that these decisions sharpened the "crown of thorns" that Bryan alleged that plutocrats were trying to "press down upon the brow of labor," hostility toward the Court probably intensified support for Bryan.

The Democratic platform focused on the Court as the source of many problems.<sup>23</sup> Specifically, the Court's decisions nullifying the income tax were a major focus. The platform blamed the national deficit on the Court's decisions nullifying the income tax, which the platform derided for overturning

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18. The Senate rejected or refused to act on five of President Tyler's six nominees during Tyler's fourteen months in office, the Senate refused to act on three of President Fillmore's nominees during his final year as President, and the Senate rejected a Buchanan nominee during Buchanan's last month in office. See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 105-06, 110-11, 114-15 (2d ed. 1985).

19. *Id.* at 110.

20. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

21. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

22. See *In re Debs*, 158 U.S. 564 (1895).

23. See 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 99.

nearly a century of precedent,<sup>24</sup> and declared that Congress had a duty to use its constitutional power to ensure an equitable allocation of taxation.<sup>25</sup> The Democratic platform expressed objection "to government by injunction as a new and highly dangerous form of oppression by which Federal Judges . . . become at once legislators, judges and executioners."<sup>26</sup> Accordingly, it supported pending federal legislation to provide for trial by jury in certain cases of contempt.

Fearing that direct criticism of the courts would bolster Republican warnings that he was a revolutionary, Bryan in his campaign generally eschewed acerbic rhetoric and made a deliberate effort to emphasize that he did not challenge judicial authority.<sup>27</sup> As Bryan campaigned tirelessly through the country, he often implied that the Court's decisions had tightened the yoke of oppression from which he promised to free the people. In contrast to Theodore Roosevelt in 1912 and Robert M. LaFollette in 1924, however, Bryan proposed no institutional changes. Despite the circumspection of Bryan and most of his supporters, Republicans throughout the campaign attempted to exploit Democratic criticism of the courts. Various Republicans alleged that the Democrats sought to destroy judicial review and perhaps even constitutional government.<sup>28</sup>

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24. *See id.* at 98.

25. *See id.*

26. *Id.* at 99.

27. For example, in the legendary "Cross of Gold" speech that clinched his nomination, Bryan denied that populists had criticized the Court. Rebuking conservatives who "criticize us for our criticism of the Supreme Court," Bryan protested that populists had merely called attention to the Court's inconsistency and had defended the justice of an income tax. 2 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1847 (Arthur M. Schlesinger, Jr. ed., 1971). Likewise, Bryan declared in his acceptance speech that "we expressly recognize the binding force of [the] decision . . . as it stands as part of the law of the land" and that the Democratic platform contained "no suggestion of an attempt to dispute the authority of the Supreme Court." *Id.* at 1853.

28. In his letter accepting the nomination, for example, McKinley vowed that Republicans would vanquish "the sudden, dangerous, and revolutionary assault upon law and order." *Mr. McKinley Accepts*, N.Y. TIMES, Aug. 27, 1896, at 1. Former President Benjamin Harrison told a mass rally at Carnegie Hall that no issue was more important than the Democratic proposal for "protecting the power and duty of the National courts and National Executive." *General Harrison Heard*, N.Y. TIMES, Aug. 28, 1896, at 1. Harrison interpreted the Democratic platform as calling for the packing of the Supreme Court whenever the Court's interpretation of a law displeased Congress. Meanwhile, Roman Catholic Archbishop John Ireland of St. Paul accused the Democrats of attempting to strip the courts of their power and warned that this could lead to communism. *See CURRENT OPINION*, Oct. 22, 1896, at 517. Similarly, the in-

In the wake of the 1896 election, many newspapers interpreted McKinley's victory as an expression of popular support for the integrity of the courts.<sup>29</sup> An article in the *Yale Review* after the election concluded that Bryan's defeat was "undoubtedly due in part" to the Democratic platform's "attack upon the Supreme Court."<sup>30</sup> Scholars who have studied the election agree that these judicial issues probably influenced the outcome.<sup>31</sup> Most voters who were troubled by Republican characterizations of Democratic criticism of the courts, however, probably were also so frightened of Bryan's inflationary schemes that they would not have voted for Bryan anyway.<sup>32</sup> This is an early example of how judicial issues often merely help to confirm or reinforce voter preferences. Although one scholar has concluded that Bryan might have won more votes among Eastern workers if he had been more forceful in his criticism of the Supreme Court's recent unpopular decisions concerning the income tax and the use of the injunction in labor disputes,<sup>33</sup> the harsh Republican attacks on Bryan for even his mild criticism of the courts suggest that such a strategy would have been dangerous, even if Bryan had taken pains to emphasize his fidelity to judicial review and other constitutional principles.

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dustrialist Chauncey M. DePew alleged that Bryan sought to "abolish the Supreme Court and make it the creature of the party caucus whenever a new congress comes in." CHAUNCEY M. DEPEW, *SPEECHES AND ADDRESSES OF CHAUNCEY M. DEPEW* 62 (1898). Likewise, another McKinley supporter warned that the Democratic platform vowed to reduce the Supreme Court "to a mere creature of legislative will and subject it to the dangerous influence of party expediency or caprice." George A. Benham, *Notes and Comments: The Supreme Court of the United States*, *NORTH AMERICAN REVIEW*, Oct. 1896, at 506-07. Distorting the platform's careful language, which stated that Congress should remain within the bounds laid down by the Court, this author condemned the platform for favoring doctrines "striking at the very root of our system of government." *Id.* For a detailed discussion of editorial and other public reaction to the Democratic platform, see Alan F. Westin, *The Supreme Court, the Populist Movement and the Campaign of 1896*, 15 *J. OF POLITICS* 3, 30-39 (1953).

29. See Westin, *supra* note 28, at 38.

30. Thomas Thacher, *Limits of Constitutional Law*, 6 *YALE REVIEW* 7, 7 (1897). Thacher argued that many voters who supported the free silver plank and "were ready to fall in line with Bryan and his followers drew back when they realized that the programme included an assault upon the 'bulwark of the Constitution' or an attempt to still its 'living voice.'" *Id.*

31. See *id.*; WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 37 (1994).

32. See ROSS, *supra* note 31.

33. See LOUIS W. KOENIG, *BRYAN: A POLITICAL BIOGRAPHY OF WILLIAM JENNINGS BRYAN* 225 (1971).

#### D. *The 1908 Election*

The 1908 election was perhaps the first election in which Supreme Court appointments figured as a significant issue. Since four of the Justices were older than seventy, some voters appear to have considered what types of persons Republican William Howard Taft or Democrat William Jennings Bryan would nominate to the Court. Predicting that at least four vacancies would occur during the next presidential term, *The World's Work* declared that "few more important questions than this will come up during the campaign."<sup>34</sup> Similarly, *The New York Times* stated in February that the likelihood that Roosevelt's successor would name four Justices to the Court was attracting widespread attention among politicians.<sup>35</sup> A group of prominent New York Democrats were so worried that fears about Bryan's Court appointments would erode Democratic support in the business community that they urged Bryan to publicly declare that he would nominate conservatives to the Court. Bryan flatly refused.<sup>36</sup> Although judicial appointments were not as important an issue as some predicted, the judicial significance of the election was even greater than most voters could have supposed, for Taft had the opportunity to nominate six Justices during his four years in office.<sup>37</sup> The 1908 election therefore presaged the emergence of judicial appointments as a significant issue in presidential campaigns during the late twentieth century.

#### E. *The 1912 Election*

Judicial issues were more prominent in 1912 than in any election campaign except those of 1924 and 1968. Long-simmering discontent among populists, progressives, and labor unions over the judiciary's hostility toward social and economic regulation reached the boiling point in 1912, just as the Progressive movement was reaching its crest. In response to judicial obstruction of reform legislation, progres-

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34. *The Presidency and the Supreme Court*, THE WORLD'S WORK, May 1908, at 10171. See also *The Supreme Court and the Next President*, THE WORLD'S WORK, October 1908, at 10740.

35. See *Campaign to Affect Court*, N.Y. TIMES, Feb. 10, 1908, at 1.

36. See JOSEPHUS DANIELS, EDITOR IN POLITICS 548-50 (1941).

37. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 309-13 (1999).

sives in several western states had enacted measures for the recall of state judges,<sup>38</sup> and congressional liberals had proposed a spate of proposals for curbing federal judicial power.<sup>39</sup> Attacks on the judiciary had become a staple of rhetoric among progressives and labor unions, and two widely distributed broadsides against the courts were published during 1912.<sup>40</sup>

Despite all of this criticism of the courts, judicial issues might not have become prominent in the 1912 election campaign if former President Theodore Roosevelt, seeking the presidency on the third-party Progressive ticket, had not made the courts a major issue in his spirited campaign. In his speech announcing his candidacy for the Republican nomination in February 1912, Roosevelt unveiled a proposal for curbing state courts that created almost as much of a sensation as did his decision to challenge Taft for the nomination. Roosevelt advocated a procedure for a so-called "recall" of judicial decisions which would permit the people of a state to revise state supreme court decisions that nullified state statutes on the grounds that they violated the state or federal constitutions.<sup>41</sup> Roosevelt's proposal reduced conservatives and even many moderates to a form of political apoplexy.<sup>42</sup> A host of critics alleged that it would substitute mob rule for constitutional government.<sup>43</sup>

After Taft defeated Roosevelt for the Republican nomination, the platform of the newly formed Progressive Party adopted Roosevelt's proposal, demanding "such restriction of the power of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social

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38. See ROSS, *supra* note 31, at 110-29.

39. See *id.* at 89, 90, 218.

40. See WILLIAM L. RANSOM, *MAJORITY RULE AND THE JUDICIARY* (1912); GILBERT E. ROE, *OUR JUDICIAL OLIGARCHY* (1912).

41. See Theodore Roosevelt, President of the United States, Speech Announcing his Candidacy for the Republican Nomination (Feb. 1912), in *THE OUTLOOK*, Feb. 24, 1912, at 390-412. Although Roosevelt publicly emphasized that the proposal did not extend to federal decisions, he privately admitted that it probably would. See Letter from Theodore Roosevelt, President of the United States, to Herbert Croly (Feb. 29, 1912) (on file with Theodore Roosevelt Papers, Series 31, Reel 374). Critics of the proposal had warned of this. See, e.g., William B. Hornblower, *The Independence of the Judiciary, The Safeguard of Free Institutions*, 22 *YALE L.J.* 1, 9-10 (1912).

42. See ROSS, *supra* note 31, at 137-38.

43. See *id.* at 143-44, 147-48.

welfare and public policy."<sup>44</sup> Although Roosevelt defended the recall of decisions in his acceptance speech,<sup>45</sup> he devoted less attention to judicial issues during his autumn campaign, perhaps because he believed that the issue had cost him votes among moderates during the spring and had hindered his effort to obtain the Republican nomination.

The Democratic candidate, Woodrow Wilson, also was reticent about judicial issues. After denouncing the recall of judicial decisions during the spring of 1912,<sup>46</sup> Wilson virtually ignored the issue during the autumn campaign. He addressed it only in September when he reiterated his earlier assertions that reform of the judicial selection process was the only way to purge the bench of judges who were beholden to special interests.<sup>47</sup> Like Wilson, the Democratic platform was circumspect about judicial issues.<sup>48</sup>

Unlike Wilson and Roosevelt, Taft emphasized judicial

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44. 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 176. The platform also urged the states to adopt the initiative, referendum, and recall, although it did not explain whether this was intended to embrace the recall of judges. *See id.* The platform further called for "a more easy and expeditious method of amending the Federal Constitution." *Id.* It also endorsed legislation to permit the Supreme Court to review state court judicial decisions that struck down state statutes as violative of the federal constitution, a measure that was designed to provide for federal review of state court decisions that struck down economic regulatory legislation. *See id.* This measure was later embodied in the Judiciary Act of 1914, 38 Stat. 790.

45. *See* Theodore Roosevelt, President of the United States, Purposes and Policies of the Progressive Party, Acceptance Speech before the Progressive Party Convention in Chicago (Aug. 6, 1912), in S. DOC. NO. 904, at 9 (1912). In words that made conservatives wince, Roosevelt declared that "the people themselves must be the ultimate makers of their own Constitution." *Id.*

46. *See* 24 PAPERS OF WOODROW WILSON 235-36, 350-51 (Arther S. Link ed., Princeton Univ. Press 1977); *Wilson Opposes Recall of Judges*, N.Y. TIMES, Apr. 28, 1912, at 6.

47. *See* PAPERS OF WOODROW WILSON, *supra* note 46, at 240-41. Wilson explained that the recall of judges selected by powerful corporate interests would accomplish no good if those same interests were permitted to select new judges. *See id.*

48. The Democratic platform reiterated its 1908 platform's allegations that the Republicans had raised "a false issue respecting the judiciary" and that "it is an unjust reflection upon a great body of our citizens to assume that they lack respect for the courts." 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 172. As in 1908, the Democratic platform called for vigilance against abuse of judicial processes and expressed support for reform of federal contempt proceedings. *See id.* at 174. The platform also recognized "the urgent need of reform in the administration of civil and criminal law" and recommended the enactment of measures to "rid the present legal system of delays, expense, and uncertainties." *Id.*

issues throughout the campaign. In his speech accepting the G.O.P. nomination, he declared that the preservation of the Constitution was "the supreme issue" of the election.<sup>49</sup> Taft bitterly assailed "hostility to the judiciary and the measures to take away its power and its independence,"<sup>50</sup> including the judicial recall and measures to restrict the use of the injunction against secondary boycotts and to confer the right to a jury trial in contempt proceedings.<sup>51</sup> He reserved particular acerbity for Roosevelt's "grotesque proposition" for recall of decisions.<sup>52</sup> While the Republican platform did not explicitly mention Roosevelt's recall proposal, the G.O.P. promised to maintain the "authority and integrity" of the state and federal courts, which the platform portrayed as the guardians of civil liberties, political stability, and orderly progress.<sup>53</sup>

Roosevelt's campaign, however, helped to call attention to public discontent with the courts and provides a classic example of how a presidential candidate can use an election to encourage public dialogue about judicial issues. The fact that Roosevelt's radical court reform proposal did not prevent Roosevelt from obtaining twenty-eight percent of the popular vote and eighty-eight electoral votes, the best showing of any third party candidate during the twentieth century, provided at least indirect evidence of widespread dissatisfaction with the judiciary. This, in turn, may have emboldened Wilson to nominate the liberal Louis D. Brandeis to the Court in 1916, and may have encouraged the movement for what became the Judiciary Act of 1914, which enabled federal courts to review state decisions striking down social and economic regulatory legislation.<sup>54</sup>

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49. William Howard Taft, *Accepting the Republican Nomination for President of the United States* (Aug. 1, 1912), in S. DOC. NO. 902, at 5-6 (1912).

50. *Id.* at 10.

51. *See id.*

52. *See id.* at 10-11.

53. *See* 1 NATIONAL PARTY PLATFORMS, *supra* note 15 at 184.

54. The Judiciary Act of 1914, 38 STAT. 790, permitted the federal courts to hear appeals from state courts on all questions arising under the Constitution. Federal law previously had permitted such appeals only when a state court denied a right under the Constitution. When state courts during the late nineteenth and early twentieth centuries began striking down social and regulatory legislation as violative of the Federal Constitution, federal courts could not hear appeals because the decisions had upheld rather than denied a constitutional right. Since federal courts sometimes were more receptive to regulatory legislation than were state courts, the Judiciary Act of 1914 was intended to help pre-

### F. *The 1916 Election*

The Supreme Court made a brief appearance in the 1916 campaign because Charles Evans Hughes resigned from the Supreme Court to accept the Republican nomination for president. Even though Hughes had actively resisted efforts to draft him for the nomination, his immediate transformation from a presumably apolitical jurist to a partisan standard-bearer seemed to vindicate the allegations of progressives and labor unions that judges were merely politicians in robes. In resisting Republican efforts to nominate him, Hughes had warned that his resignation from the Court might weaken the independence of the judiciary and impair public confidence in the incorruptibility of the courts.<sup>55</sup>

Even though Hughes left the bench with the blessing of his brethren, Chief Justice Edward D. White feared that Hughes' nomination would debase the Court's reputation.<sup>56</sup> Similarly, *The New York Times* warned that Hughes' candidacy threatened to corrupt "the integrity and reputation of the Court."<sup>57</sup> Senate Democrats also expressed righteous indignation. At least two senators proposed constitutional amendments that would have limited political activity by former Justices.<sup>58</sup> Senator Thomas J. Walsh of Montana predicted that Hughes' nomination would forever cause Americans to distrust the motives of federal judges in rendering their decisions and would trigger demand for radical changes

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vent state courts from strangling progressive measures. See ROSS, *supra* note 31, at 80-84.

55. See 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 300 (1951); 51 CONG. REC. 11851 (1916).

56. See PUSEY, *supra* note 55, at 332 (quoting JAMES E. WATSON, AS I KNEW THEM 164 (1936)).

57. Editorial, *The Supreme Court and the Presidency*, N.Y. TIMES, June 15, 1916, at 10. The *Times* later lamented that Hughes' candidacy had broken the "great tradition which permitted us to assume that the Justices upon that bench were altogether and permanently removed from the brawls of partisan politics." *The Judge in Politics*, N.Y. TIMES, June 15, 1916, at 8.

58. Senator Joel Stone of Missouri, the chairman of the upcoming Democratic convention's Committee on Resolutions, proposed a constitutional amendment to preclude Supreme Court Justices from becoming candidates for public office within five years after their service on the bench. See *Stone Raps Hughes and Platforms*, N.Y. TIMES, June 13, 1916, at 1. Senator Charles S. Thomas of Colorado advocated an amendment to disqualify federal judges from eligibility for any elective federal office during their judicial term and for two years after the departure from the bench. See 51 CONG. REC. 11851 (1916).

in judicial power.<sup>59</sup>

The issue receded into the background of the presidential campaign after Wilson refused to permit the Democratic platform to condemn Hughes for his resignation. Although the American Federation of Labor attacked Hughes's judicial record, and workers in Indianapolis and Toledo heckled Hughes over the Court's ruling against secondary boycotts in *Loewe v. Lawlor*,<sup>60</sup> Hughes' judicial record was not a major campaign issue. The Democrats may have refrained in part from attacking Hughes because Alton B. Parker had resigned from the New York Court of Appeals in 1904 to accept the Democratic nomination for president.<sup>61</sup> More significantly, Hughes' irreproachable conduct during his final days on the bench and the widespread recognition that the G.O.P. had turned to Hughes as the one man who could reunite the party relieved Hughes of any significant stigma of impropriety.<sup>62</sup> These circumstances likewise spared the Court from any major attack. As *The Nation* observed, "No argument can ever be drawn from [Hughes'] career that the way to political preferment lies through the courts."<sup>63</sup> Professor Bickel concluded that the hazards that the Hughes candidacy presented to the Court were "negotiated with singular success and luck."<sup>64</sup>

### G. *The 1924 Election*

Judicial issues perhaps played a more significant role in the 1924 election campaign than in any other in the nation's history. The resurgence of hostility toward social and economic reform legislation by both state and federal courts during the previous six years had inspired a renewal of proposals among progressives and labor unions for curbing the courts. In particular, the Supreme Court's decisions striking

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59. See 51 CONG. REC. 11851 (1916).

60. See *The Judge in Politics*, *supra* note 57. In *Loewe v. Lawlor*, 208 U.S. 274 (1908), decided before Hughes became a Supreme Court Justice in 1910, the Court held that a secondary boycott by a labor union violated federal antitrust laws.

61. See ROSS, *supra* note 31, at 162.

62. See *id.*

63. *The Nomination of Hughes*, THE NATION, June 15, 1916, at 635.

64. 9 Alexander M. Bickel & Benno C. Schmidt, Jr., *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States*, in THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 397 (1984).

down the federal child labor laws<sup>65</sup> and a statute regulating wages for women in the District of Columbia<sup>66</sup> had convinced many reformers that some type of diminution of judicial power was needed in order to assure the success of the reform agenda. Among the many Court-curbing measures advocated by various politicians, academics, and commentators, two in particular received the most widespread attention. The first was Senator Robert M. LaFollette's proposal for allowing Congress to override U.S. Supreme Court decisions by a two-thirds vote.<sup>67</sup> The second measure was Senator William E. Borah's proposal to require concurrence of seven Justices to strike down federal legislation.<sup>68</sup>

After the 1924 Republican national convention rejected LaFollette's proposals to permit Congress to override Supreme Court decisions and to impose ten-year term limits on federal judges, LaFollette became an independent candidate for president. He received the endorsements of the Committee on Progressive Political Action ("CPPA"), the Socialist Party, and the American Federation of Labor.<sup>69</sup> Although the CPPA did not formally adopt LaFollette's specific remedies for curbing judicial power, the CPPA platform called generally for "[a]bolition of the tyranny and usurpation of the courts, including the practice of nullifying legislation in conflict with the political, social, or economic theories of the judges."<sup>70</sup> The CPPA also advocated the election of all federal judges for "limited terms."<sup>71</sup> LaFollette's formidable support among liberals, industrial workers, farmers, and ethnic Americans frightened the Republicans, who were jolted by polls during the summer of 1924 indicating that LaFollette might siphon enough electoral votes from the G.O.P. in the middle west to throw the election into the House of Representatives.<sup>72</sup> In an attempt to portray LaFollette as a dangerous radical who would undermine prosperity and precipitate social disorder, Republicans decided to make opposition to La-

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65. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1916).

66. See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

67. See ROSS, *supra* note 31, at 193-217.

68. See *id.* at 218-32.

69. See *id.* at 255-56.

70. 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 256.

71. *Id.*

72. See ROSS, *supra* note 31, at 259 n.28.

Follette's judicial proposals a centerpiece of their campaign.<sup>73</sup> Republican vice presidential candidate Charles G. Dawes set the tone in his acceptance speech at the G.O.P. convention in July 1924, alleging that "LaFollette, leading the army of extreme radicalism, has a platform demanding public ownership of railroads and attacking our courts which are a fundamental and constitutional safeguard of American citizenship."<sup>74</sup> Dawes, who campaigned far more than President Calvin Coolidge, continued to warn against LaFollette's proposal until election day.<sup>75</sup>

President Coolidge likewise emphasized the Court issue in two of his rare public appearances during the campaign. He declared early in September that the Court proposal was designed for "the confiscation of property and the destruction of liberty" and that people would "see their savings swept away, their homes devastated and their children perish from want and hunger."<sup>76</sup> Coolidge repeated these allegations in a major address later in September.<sup>77</sup> In a radio address ten

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73. *See id.* at 260-61.

74. Charles G. Dawes, Acceptance Speech before the G.O.P. National Convention (July 1924), in *Text of Dawes's Speech Accepting Nomination*, N.Y. TIMES, Aug. 20, 1924, at 2.

75. As Dawes stated in his autobiography:

In my speech of acceptance I announced the constitutional issue precipitated by Senator LaFollette as the dominant one. Chairman Butler was adverse to this course, feeling that the issue of economy should be the one to be stressed. I sent my speech before delivery to President Coolidge, who returned it without suggestion as to change, except that he substituted "an important issue" for the "predominant issue" as a caption to that portion of my address devoted to the LaFollette position on the Constitution. From the time of delivery of the acceptance speech . . . until the end of the campaign, during which I traveled fifteen thousand miles . . . and made one hundred and eight speeches, I endeavored to keep that issue in the minds of the people.

CHARLES G. DAWES, NOTES AS VICE PRESIDENT 1928-1929, at 19-20 (1935). Throughout the campaign, Dawes continued to make his accusations to large and enthusiastic crowds, and local Republican campaign managers and pro-Republican newspapers increasingly emphasized the judicial issue. *See* ROSS, *supra* note 31, at 262.

76. *Coolidge Assails LaFollette Views on Supreme Court*, N.Y. TIMES, Sept. 7, 1924, at 1.

77. *See* President Calvin Coolidge, Address delivered at the dedication of a monument to Lafayette (Sept. 6, 1924), available at <http://www.calvin-coolidge.org/pages/history/speeches/aspres/240906.html>; President Calvin Coolidge, Speech on the Anniversary of the First Continental Congress (Sept. 25, 1924), available at <http://www.calvin-coolidge.org/pages/history/speeches/aspres/240925.html>.

days before the election, Coolidge warned that LaFollette's proposal would "destroy the States, abolish the Presidential office, close the courts and make the will of Congress absolute."<sup>78</sup>

The Republican strategy of using the courts as a stick with which to attack LaFollette received hearty praise from Chief Justice Taft, who wrote to President Coolidge in September to commend the "wisdom and courage" of the Republican decision to "force consideration of the issue of the Constitution and the Court."<sup>79</sup> Democrats also sometimes warned against LaFollette's proposals in rhetoric that was scarcely less apocalyptic than that used by Republicans,<sup>80</sup> although Democrats also frequently accused Republicans of exploiting judicial issues in order to distract attention from scandals in the Harding Administration.<sup>81</sup>

Prominent members of the bar also attacked the court proposal. Hughes, for example, warned that the proposal would "denature the Supreme Court" and "destroy our system of government."<sup>82</sup> Many of New York's leading attorneys signed a statement alleging that the "LaFollette attack upon our Constitution and the Supreme Court is but the first step toward Socialism, Bolshevism and chaos" and that "[i]t would be the death knell to the stability and to the prosperity and happiness of millions of workers, honest Americans."<sup>83</sup>

As the campaign progressed, LaFollette appears to have recognized that he could not win many votes by attacking the courts. Although his proposals were very popular among many of his core constituents, he understood that they might offend more moderate voters and that Republican emphasis on the issue might scare even some of his loyal supporters. In particular, there was a danger that the proposal could erode his ardent support among Midwestern Roman Catholics and

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78. *Coolidge States Views on Issue in Last Big Speech*, N.Y. TIMES, Oct. 24, 1924, at 4.

79. Letter from William Howard Taft, Chief Justice of the United States, to Calvin Coolidge, President of the United States (Sept. 16, 1924) (on file with Papers of William Howard Taft, Manuscript Division, Library of Congress, Series 3, Reel 267).

80. *See id.* Reel 268-69.

81. *See ROSS, supra* note 31, at 272.

82. *Hughes in Chicago Promises Prosperity*, N.Y. TIMES, Oct. 29, 1924, at 8.

83. *Court Limitation Assailed by Bar*, N.Y. TIMES, Oct. 7, 1924, at 6. For other examples of attacks on the court plan by lawyers, see ROSS, *supra* note 31, at 273-74.

Lutherans, who looked to the federal courts for protection against ethnic and religious discrimination in the wake of the resurgent nativism that had followed the First World War. The Supreme Court's 1923 decision in *Meyer v. Nebraska*,<sup>84</sup> which nullified laws that prohibited the teaching of German in private and parochial schools, was widely hailed among ethnic Americans for striking against ethnic and religious prejudice.<sup>85</sup> *Meyer* also presaged judicial disapproval of a widespread movement to destroy parochial education by requiring all children to attend public school.<sup>86</sup> A federal district court's decision in March 1924 striking down Oregon's compulsory public education law<sup>87</sup> provided further evidence that the same power that courts could use to nullify popular social and economic regulatory legislation could also be used to protect personal liberties from majoritarian tyranny.

LaFollette's opponents exploited the popularity of these decisions in attacking LaFollette and made many implicit and explicit references to these decisions throughout the campaign. Accordingly, LaFollette attempted at first to ignore his proposals for curbing judicial power.<sup>88</sup> Nevertheless, when it became clear that his opponents had no intention of muting their attacks on his proposal, LaFollette began to address it. LaFollette offered his first and most thorough defense of his proposal at a Madison Square Garden rally on September 18. After attacking the "private monopoly system," which he wanted to make the centerpiece of his campaign, LaFollette alleged that the major parties were trying to divert discussion from "vital economic issues" by making "foolish and preposterous assertions" that Progressives sought "to weaken or impair" the federal courts.<sup>89</sup> Although LaFollette vowed to wage his campaign on economic issues, he explained that he would

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84. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

85. See WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927*, at 133 (1994).

86. See *id.* at 69-72, 171.

87. See *Soc'y of Sisters of the Holy Names of Jesus and Mary v. Pierce*, 296 F. 928 (D. Or. 1924), *aff'd*, 268 U.S. 510 (1925).

88. LaFollette did not mention the proposal in his first major campaign address, which he delivered to a national radio audience on Labor Day. See ROSS, *supra* note 31, at 267.

89. A transcript of LaFollette's Madison Square Garden address, together with transcripts of most of LaFollette's other 1924 campaign speeches, are in the LaFollette Family Papers, Manuscript Division, Library of Congress, Series B, Box 228.

grudgingly discuss the court issue in order to respond to the distortions of his opponents. After explaining that the people would have the opportunity to duly consider a constitutional amendment embodying his proposals, he discussed numerous cases in which the U.S. Supreme Court had invalidated reform measures. "Always these decisions of the Court are on the side of the wealthy and powerful and against the poor and weak," LaFollette declared.<sup>90</sup>

Although the crowds cheered LaFollette's initial volleys against the courts, LaFollette apparently began to bore his audience when he started discussing specific Supreme Court decisions, and hundreds of persons vacated the auditorium until LaFollette turned to other issues, with virtually no one left in the arena.<sup>91</sup> Although reaction to LaFollette's speech at Madison Square Garden confirmed the popularity of court-curbing among faithful Progressives, it also demonstrated that the public lacked patience for any extensive discussion of judicial issues. The lesson was not lost on LaFollette, who discussed his views on judicial reform in only half of his remaining speeches and never again in so much detail.<sup>92</sup>

Even after LaFollette addressed his proposal publicly he was hesitant to show full support for his position. Unable to shed what increasingly resembled a political albatross, LaFollette often seemed more anxious to assure his audiences of the difficulty of enacting a court-curbing amendment than to persuade them of the amendment's merits.<sup>93</sup> In addition to reminding voters of the obstacles faced by any constitutional amendment, he conceded that few members of Congress supported the proposal and that few other sympathizers were likely to be elected to Congress in 1924.<sup>94</sup> LaFollette even distanced himself from his own proposal by pointing out that the President has no formal role in the amendment process.<sup>95</sup>

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90. Senator Robert M. LaFollette, Address at a Campaign Rally in Madison Square Garden (Sept. 18, 1924) (on file with LaFollette Family Papers, *supra* note 89).

91. See *14,000 Pack Garden, Cheer La Follette in Attack on Court*, N.Y. TIMES, Sept. 19, 1924, at 1; Letter from Arthur Garfield Hays to Robert M. LaFollette, Jr. (Sept. 19, 1924) (on file with LaFollette Family Papers, *supra* note 89).

92. See ROSS, *supra* note 31, at 270-71.

93. See *id.* at 276.

94. See *id.* at 276-77.

95. See *id.* at 277.

LaFollette likewise refrained from any personal criticism of Chief Justice Taft or any other Justice,<sup>96</sup> although his campaign's handbook pointed out the irony that Taft served in such a powerful appointive position after the people had overwhelmingly defeated him for reelection to the presidency in 1912.<sup>97</sup> LaFollette's restraint is remarkable since Taft surely must have been a tempting target because he had received widespread vituperation a year earlier for accepting an annuity under Andrew Carnegie's will.<sup>98</sup> The few public attempts of LaFollette's supporters to criticize individual judges<sup>99</sup> inspired adverse editorial comment.<sup>100</sup> With only slight exaggeration, a prominent attorney who was a personal friend of Taft's remarked shortly before the election that LaFollette's forces "never mentioned the name of Taft from beginning to end."<sup>101</sup>

In his often rather tepid defenses of his court proposal, LaFollette argued that judicial review was not foreseen by the Framers, that judicial review of congressional legislation had not been frequently exercised until relatively recently, that Jefferson, Lincoln, and Theodore Roosevelt had criticized judicial review, and that the judiciary's lack of this power had not imperiled civil liberties in Great Britain.<sup>102</sup> In an appeal to ethnic voters who sent their children to parochial schools, he explained that his proposal would not have affected the outcome of *Meyer v. Nebraska* because it would not have im-

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96. See *id.* at 278-79. LaFollette's restraint came as a surprise and perhaps a disappointment to Taft, who predicted with an apparent combination of resignation and relish at the start of the campaign that LaFollette would indulge in ad hominem vituperation. See Letter from William Howard Taft to Pierce Butler (Aug. 19, 1924) (on file with Taft Papers, *supra* note 79); Letter from William Howard Taft to Henry W. Taft (Aug. 19, 1924) (on file with Taft Papers, *supra* note 79); Letter from William Howard Taft to Gus Karger (July 18, 1924) (on file with Taft Papers, *supra* note 79).

97. See ROBERT M. LAFOLLETTE, LEAFLET NO. 4, LAFOLLETTE AND THE PROGRESSIVES ON THE COURTS (on file with LaFollette Family Papers, *supra* note 89, Series B, Box 205). The handbook declared that "no one will contend that by vote of the people Chief Justice Taft could have been elected to this powerful office for life, but through a Presidential appointment it was possible for him to write the opinion which nullified the Child Labor law." *Id.*

98. See ROSS, *supra* note 31, at 234-40.

99. See, e.g., *LaFollette Group Defends Court Stand*, N.Y. TIMES, Sept. 30, 1924, at 3.

100. See ROSS, *supra* note 31, at 278-79.

101. Letter from Thomas W. Shelton to William Howard Taft (Nov. 1, 1924) (on file with Taft Papers, *supra* note 79, Reel 268).

102. See *id.* at 277.

paired the Supreme Court's power to review the constitutionality of state legislation.<sup>103</sup> LaFollette likewise disparaged the Republican argument that the Court was a temple of civil liberties. Recalling that neither the Supreme Court nor any other federal court "came to the rescue of the liberties of the people" when Congress enacted repressive legislation during the First World War, LaFollette declared that "the people themselves are sovereign and that it is unsafe for them to entrust their liberties in the hands of judges or any other officials appointed for life and responsible to no one."<sup>104</sup> According to LaFollette, "[i]n all the history of the world, no people has ever looked to the courts as the guardian of its liberties. The liberties of the people rest with the people."<sup>105</sup>

Although Coolidge won re-election in a landslide, LaFollette won more than one-sixth of the votes, carrying his home state of Wisconsin and running ahead of the Democrats in eleven other states. No third-party presidential candidate would poll so many votes again until 1992. Party loyalty and prosperity probably would have ensured Coolidge's victory even if the Republicans had not attacked LaFollette's court-curbing plan with such immense zeal. LaFollette's ability to win so many votes in the face of the onslaught against his court plan indicates that a remarkably large number of voters either approved of it or were unduly alarmed by it. The court proposals, however, probably cost LaFollette a significant number of votes and may have prevented him from carrying several midwestern states in which he polled nearly as many votes as Coolidge. A study of the 1924 campaign has concluded that "the Supreme Court issue, more than anything else, was responsible for the ease with which the Republicans convinced a large segment of the American voting population of the imminent danger to the Constitution."<sup>106</sup> Similarly, in the wake of the election, *The New Republic* stated that "the natural timidity of a wealthy nation in a poverty-stricken world was accentuated by a whipped-up panic over the sup-

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103. Senator Robert M. LaFollette, Speech in Omaha, Nebraska (transcript on file with LaFollette Family Papers, *supra* note 89).

104. *Id.*

105. *Id.*

106. KENNETH C. MACKAY, *THE PROGRESSIVE MOVEMENT OF 1924*, at 163 (Octagon Books 1966) (1947).

posed danger to the Supreme Court and the Constitution."<sup>107</sup> And the popular journalist Mark Sullivan wrote shortly after the election that "LaFollette suffered greatly through dramatizing himself in opposition to the Supreme Court."<sup>108</sup>

The 1924 campaign has provided an enduring lesson in the political hazards of criticizing the Court even when the Court is unpopular with large segments of the population. Never again has any major presidential candidate supported a proposal for curbing the Court's powers. Even in times when the Court's decisions have been widely unpopular, particularly 1936, 1964, and 1968, candidates have generally limited themselves to promising to nominate candidates who would overturn these decisions.

#### H. *The 1928 Election*

Judicial issues were not prominent in the 1928 campaign inasmuch as controversy over the Court subsided for several years after the 1924 election. Organized efforts to curtail judicial power diminished in part because of LaFollette's failure to ignite interest in Court-curbing and the Republicans' successful efforts to make Court-bashing seem unpatriotic, if not treasonous. Efforts to curb the Court also declined because the Court was more receptive toward economic reform legislation and it started to become a guardian of personal liberties.<sup>109</sup> Mark Sullivan reported that the Court "never was mentioned even faintly as even the most minor kind of an issue" during the 1928 presidential campaign.<sup>110</sup>

#### I. *The 1932 Election*

The Great Depression overshadowed all other issues in the 1932 election. The judiciary was not an issue even though economic suffering may have aggravated public discontent with the conservatism of the federal courts. The failure of the Supreme Court to emerge as an issue in this campaign is par-

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107. THE NEW REPUBLIC, Nov. 26, 1924, at 1.

108. Mark Sullivan, *Looking Back on LaFollette*, THE WORLD'S WORK, Jan. 1925, at 331.

109. See ROSS, *supra* note 31, at 285-90.

110. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1318 n.163 (2001) (quoting Mark Sullivan, *Public Esteem for Court Called Aid to Hughes*, N.Y. HERALD TRIB., Feb. 6, 1930, at 9).

ticularly notable since the bruising battles over President Hoover's nominations of John J. Parker and Charles Evans Hughes in 1930 had dramatically called attention to the President's ability to shape public policy through his appointment of Supreme Court Justices. Parker's nomination produced history's first large-scale mobilization of public interest groups in opposition to a Supreme Court nomination when civil rights organizations, labor unions, and assorted liberals persuaded the Senate to reject Parker. Although the American Civil Liberties Union's founder had contended in the wake of Parker's defeat that few persons perceived how significantly the President's selection of Justices influenced the "social life of future generations,"<sup>111</sup> the firestorm over the nomination demonstrated that many persons recognized the importance of the appointment power. In particular, Progressives who opposed Hughes' nomination to the Chief Justice-ship complained bitterly about the President's power to influence the Court's direction into the far distant future.

This fervor over the judicial nomination process that characterized the Hughes and Parker battles, however, did not find expression in the presidential campaign two and a half years later, perhaps because immediate obsession with the Depression displaced interest in the type of long-term reform legislation that the Court could sustain or nullify. Although it was virtually inevitable that the Court eventually would need to review the constitutionality of anti-Depression measures enacted during the next Administration, concern about how the Court would respond to activist legislation was subordinated to discussion of strategies for ending the Depression.

Aside from a platform pledge "for a comprehensive reform in judicial procedure to eliminate legal technicalities and to secure speedy and substantial justice, and the abolition of unjust injunctions," the Democratic platform was largely silent about judicial issues.<sup>112</sup> The Socialist Party's platform advocated abolition of the Court's power to review the constitutionality of federal legislation and an amendment

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111. Letter from Roger S. Baldwin to William E. Borah (May 13, 1930) (on file with Papers of William E. Borah, Manuscript Division, Library of Congress, Box 301).

112. See 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 339.

“to make constitutional amendments less cumbersome.”<sup>113</sup>

Facing almost certain defeat, the Republicans tried in vain to portray Roosevelt as a dangerous radical. Frustrated by the prudence of Roosevelt’s public pronouncements, Republicans were temporarily elated late in October when Roosevelt alleged that the G.O.P. controlled the Supreme Court since a majority of the Justices were Republican in their politics. Although Roosevelt’s remark was off-hand and not part of any general attack on the Court,<sup>114</sup> the G.O.P. seized on it as evidence of Roosevelt’s intention to subvert the Constitution. Denouncing Roosevelt’s allegation as “atrocious,” Hoover reminded voters that his most recent appointee to the Court was a Democrat, Benjamin Cardozo. Hoover declared that any suggestion of political influence over the Supreme Court was contrary to American tradition, and he asked whether his opponent “would expect the Court to be subservient to him and the Democratic Party.”<sup>115</sup> William Nelson Cromwell, a leader of the New York bar, urged Roosevelt to retract his remark, declaring that “[n]o greater harm can be done to our national institutions or to the cause of justice than to attempt to drag that court into the arena of politics.”<sup>116</sup> Although the *New York Times* admitted that Roosevelt’s statement was “needless and foolish,” the *Times* pointed out that the G.O.P. demigod Theodore Roosevelt had not hesitated to criticize the courts and dismissed Republican outrage as “highly artificial.”<sup>117</sup> The *Times* was probably accurate in its prediction that Roosevelt’s gaffe would “not have the slightest effect upon the presidential campaign.”<sup>118</sup> The furor

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113. *Id.* at 353. The platform also advocated amendments for the direct election of the President and Vice President and the initiative and referendum. *See id.* It further proposed a “worker’s rights amendment” empowering Congress to establish national systems of unemployment, health and accident insurance, abolish child labor, and nationalize major industries. *See id.*

114. Roosevelt had added this remark to a prepared address. *See* WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 83 (1995). Roosevelt later told James Byrnes, “What I said last night about the judiciary is true, and whatever is in a man’s heart is apt to come to his tongue – I shall not make any explanations or apology for it!” *Id.*

115. Hoover *In Direct Attack On Roosevelt Charges ‘New Deal’ Is Now A ‘Shuffle;’ Scores Remark On Supreme Court*, N.Y. TIMES, Oct. 29, 1932, at 1.

116. *Assails ‘Aspersions’ On Supreme Court*, N.Y. TIMES, Oct. 30, 1932, at 16.

117. *Id.*

118. Editorial, *Praying for a ‘Break,’* N.Y. TIMES, Oct. 28, 1932, at 18.

over Roosevelt's remark, however, provided another demonstration of the political dangers of criticizing the Court in election campaigns.

### J. *The 1936 Election*

The controversy over the Supreme Court's nullification of much New Deal legislation during 1935 and 1936<sup>119</sup> should have transformed the Court into a major election issue in 1936. Frustrated over the Court's hostility toward reform legislation, a number of Roosevelt's supporters urged the President and his advisors to make the Court an election issue.<sup>120</sup> Others voters, perhaps remembering how criticism of

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119. *See, e.g.*, *Schechter v. United States*, 295 U.S. 495 (1935) (invalidating part of the National Recovery Act); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (invalidating the Frazier-Lemke Emergency Farm Mortgage Act); *United States v. Butler*, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the Bituminous Coal Act); *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513 (1936) (invalidating the Municipal Bankruptcy Act).

120. *See, e.g.*, Letter from Norman Hapgood to Franklin D. Roosevelt (received by the White House on Feb. 24, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Hyde Park, New York, Folder 2278); Letter from Donald R. Richberg to Marvin H. McIntyre (June 16, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Box 165); Letter from William P. Zehner to Franklin D. Roosevelt (Apr. 24, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Official File 274, Box 2); Letter from Charles Belous to Franklin D. Roosevelt (Apr. 27, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Official File 274, Box 2); Letter from A.G. Drumm, Jr. to Franklin D. Roosevelt (May 29, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Official File 274, Box 2); Memorandum regarding letter from Daniel L. Smith (June 22, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Official File 274, Box 2). Exhorting Roosevelt to propose in his re-nomination speech a constitutional amendment that would guarantee the survival of New Deal legislation, one voter declared, "You can't side-step the issue." Letter from Earl R. Salley to Franklin D. Roosevelt (June 5, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Official File 274, Box 2). Complaining of "judicial dictatorship," another voter suggested that Roosevelt avoid charges of disrespect to the Court by quoting Justice Stone's dissents in a campaign against the Court. "The Supreme Court has taken enough rope to hang itself in public opinion," he contended. Letter from Paul Webb to Franklin D. Roosevelt (June 4, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Official File 41a, Box 54). Still another correspondent urged Roosevelt to make a statement unequivocally affirming his respect for the Court but announcing that the Democratic Party would use all available constitutional means to continue to pursue its reform agenda in the face of judicial opposition. *See* Memorandum regarding letter from Samuel J. Cohen (Jan. 25, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Official File 274,

the Court had hurt LaFollette in 1924, warned Roosevelt to avoid the issue until after he had secured a mandate in the election.<sup>121</sup> One voter, for example, urged the President to remain silent on judicial issues during the campaign in order to avoid supplying ammunition to the "constitution criers."<sup>122</sup> And a Brooklyn attorney believed that the constitutional convention that he advocated should be deferred to 1937 since "to discuss any particular constitutional amendment during the coming presidential campaign would be a tactical blunder and a hopeless undertaking from every standpoint."<sup>123</sup>

The Democrats chose to follow this more prudent course. Although there is considerable evidence that Roosevelt knew before the 1936 election that he would propose some type of measure after the election to circumvent the Court's hostility toward the New Deal,<sup>124</sup> Roosevelt refrained from any broadsides against the Court during the campaign, limiting himself to discreet hints that Court reform might be part of his post-election agenda.<sup>125</sup> As Professor Leuchtenberg has observed, Roosevelt believed that an election year "was not the propitious moment to give the opposition, which was bereft of issues, an opportunity to stand by the flag."<sup>126</sup> Roosevelt, Leuchtenberg explains, "wanted the campaign to center not on the Constitution but on the many achievements of the New Deal and the past iniquities of Herbert Hoover."<sup>127</sup> Accordingly, the Democratic platform was circumspect, vowing cautiously and rather enigmatically that the party would seek a constitutional amendment to clarify the power of Congress and the state legislatures to enact laws to safeguard economic security if the nation's economic problems could not effectively be solved "through legislation within the Constitu-

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Box 2).

121. See Memorandum regarding letter from Frank J. Burns (June 18, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Office File 274, Box 2).

122. Memorandum concerning letter from Jacob Hayman (Feb. 24, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Official File 274, Box 2).

123. Letter from F.R. Serri to Franklin D. Roosevelt (on file with Presidential Personal File, Franklin D. Roosevelt Library, Official File 274, Box 2).

124. See LEUCHTENBERG, *supra* note 114, at 98-114.

125. See STEPHENSON, *supra* note 1, at 149-50.

126. LEUCHTENBERG, *supra* note 114, at 98.

127. *Id.* at 107.

tion."<sup>128</sup>

Democratic reticence about judicial issues did not entirely discourage Republicans from warning that victorious Democrats would tamper with the Court. Early in 1936, Republican Senator William E. Borah of Idaho attempted to make judicial independence and constitutional integrity an issue in his campaign for the G.O.P. presidential nomination. Borah emphasized that the courts protected personal liberties as well as property rights, and he warned that abridgement of judicial powers would lead to despotism.<sup>129</sup>

Republican plans to exploit Democratic criticism of the Court were frustrated, however, in June 1936, when the Court struck down a New York minimum wage law in *Morehead v. New York ex rel. Tipaldo*.<sup>130</sup> *Morehead* created conflict between the Republican Party's advocacy of states' rights and its defenses of the Court.<sup>131</sup> Decided on the eve of the Republican National Convention, *Morehead* may have forced G.O.P. strategists to mute the importance of judicial issues.<sup>132</sup> Leading Republicans, including the party's presidential nominee, Kansas Governor Alfred Landon, called for a constitutional amendment to permit state maximum hours laws, and the Republican platform supported state minimum wages,<sup>133</sup> which the platform somehow contended could be enacted "within the Constitution as it now stands."<sup>134</sup> According to Professor Lasser, "[t]he Republican Party was now as opposed to the Court as the Democratic Party, or at least so it

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128. 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 362. Democratic leaders resisted advice to advocate specific Court-curbing measures, such as the seven-to-two vote for invalidation of legislation that Senator Borah had proposed in 1922. See LEUCHTENBERG, *supra* note 114, at 106.

129. See Senator William E. Borah, Address to Brooklyn Republicans, in *Text of Senator William E. Borah's Address to Brooklyn Republicans*, N.Y. TIMES, Jan. 29, 1936, at 13; Senator William E. Borah, Address on the Constitution and Entangling Alliances, in *Text of Senator Borah's Address on "The Constitution and Entangling Alliances"*, N.Y. TIMES, Feb. 23, 1936, at 32; Senator William E. Borah, Address Opening Campaign in Illinois, in *Text of Senator Borah's Address Opening Campaign in His Native State of Illinois*, N.Y. TIMES, Mar. 22, 1936, at 40.

130. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

131. See LASSER, *supra* note 11, at 142. As Professor Lasser points out, "two positions which until *Morehead* had been mutually reinforcing . . . were now suddenly in conflict." *Id.*

132. See *id.*

133. See *id.* at 143.

134. 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 367.

seemed, and any chance of campaigning as the party of the Court and of the Constitution was shattered."<sup>135</sup>

The 1936 Republican campaign, however, did not abandon all efforts to stigmatize the Democrats for their criticism of the Court and their experimentation with the Constitution. The G.O.P. platform pledged to "resist all attempts to impair the authority of the Supreme Court" inasmuch as "[t]here can be no individual liberty without an independent judiciary."<sup>136</sup> Robert A. Taft, the son of the late President and Chief Justice, predicted that Roosevelt, if reelected, would probably have the opportunity to appoint a majority of the Justices, who would reject "fixed principles of constitutional law" and simply "construe the Constitution as the executive wants it construed."<sup>137</sup> This, Taft alleged, presented "greater dangers to the Constitution than any which it has ever faced."<sup>138</sup>

Three months after his landslide re-election, Roosevelt announced his Court-packing plan, which failed resound-

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135. LASSER, *supra* note 11, at 142.

136. 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 366.

137. Robert A. Taft, *Sidestepping the Constitution*, REVIEW OF REVIEWS, Sept. 1936, at 37.

138. *Id.* A few days before the election, a Salt Lake City newspaper urged its readers to vote for Landon because Roosevelt had endangered the Constitution by advocating unconstitutional legislation and failing to promise that he would "not continue to carry out the principles of his earlier legislation which the Supreme Court had declared unconstitutional." Editorial, *The Constitution*, THE DESERET NEWS, Oct. 31, 1936 (clipping in Presidential Personal File, Franklin D. Roosevelt Library, Official File, Box 2). The editorial reportedly caused more than 1500 Mormons to cancel their subscriptions. See Letter from William H. Hornibrook to James A. Farley (Nov. 2, 1936) (on file with Presidential Personal File, Franklin D. Roosevelt Library, Official File, Box 2). Meanwhile, Republican vice presidential nominee Frank Knox suggested that Roosevelt might have plans for "assaulting the Supreme Court." *Calls Roosevelt to Bare Wage Aim*, N.Y. TIMES, Oct. 16, 1936, at 18. Former President Hoover in an election-eve address presciently asked whether the President intended to "stuff the court." *Hoover 'Rejected' New Deal Ideas; Held they would Shackle Liberty*, N.Y. TIMES, Oct. 31, 1936, at 1; Herbert Hoover, Address Warning of New Deal 'Shackles on Liberty, in *The Text of Hoover's Denver Address Warning of New Deal 'Shackles on Liberty*, N.Y. TIMES, Oct. 31, 1936, at 4. Similarly, Landon accused Roosevelt of deliberately attempting to "break down the confidence of our people in the independence of the Supreme Court" and of regarding the Court "as minor barrier to be circumvented if it can't be hurdled." LASSER, *supra* note 11, at 145 (quoting N.Y. TIMES, Oct. 24, 1936, at 8 and Oct. 22, 1936, at 21). As Professor Lasser points out, however, "[s]ince Landon could charge Roosevelt with no specific act of defiance against the Court, and since Roosevelt claimed to support the Constitution fully, these charges appeared to be made more in desperation at the end of a difficult campaign than anything else." LASSER, *supra* note 11, at 145.

ingly<sup>139</sup> despite the unprecedented size of Roosevelt's landslide in the 1936 election. Although one scholar has argued that Roosevelt ought to have advocated Court reform during the campaign so that he could have claimed a mandate for it after he won the election,<sup>140</sup> he aptly concedes that "[f]or Roosevelt to attack the Supreme Court in the 1936 campaign would have been risky," since the issue could have backfired and "made his reelection so narrow that he could not persuasively claim a mandate for Court reform afterward."<sup>141</sup> Such an attack would have seemed particularly dangerous at the time, since not even the most optimistic Democrats foresaw the size of Roosevelt's landslide, and at least one major poll forecast his defeat.<sup>142</sup>

The reluctance of Roosevelt to make the Court an issue in 1936 provides a prime example of the hesitation of presidential candidates to criticize the Court even when the Court is a subject of major controversy. The recognition of Democrats during the 1936 campaign that any attack on the Court could provoke hostility from voters foreshadowed the negative public reaction to Roosevelt's Court-packing proposal during the following year. Roosevelt could have avoided much embarrassment if he had been as circumspect in addressing judicial issues after the 1936 campaign as he was during that campaign, although his plan arguably was successful to the extent that it may have influenced the Court's decision-making process.

#### K. *The 1940 Election*

The unpopularity of Roosevelt's Court-packing plan even among many ardent New Deal Democrats had the potential to provide a potent issue for Republicans in the 1940 election. The widespread opinion that Roosevelt had overstepped the boundaries of his power in trying to tamper with the Court may have helped to elect more Republicans to Congress in the 1938 mid-term elections.<sup>143</sup> By the autumn of 1940, however,

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139. See LEUCHTENBERG, *supra* note 114, at 148-54.

140. See Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 POL. SCI. Q. 267, 288 (1988).

141. *Id.* at 289.

142. See LEUCHTENBERG, *supra* note 114, at 107.

143. See DONALD BRUCE JOHNSON, *THE REPUBLICAN PARTY AND WENDELL WILLKIE* 30 (1960).

Roosevelt's Court-packing plan had been dead for three and a half years, and the Court's deference toward New Deal legislation had removed any chance that Roosevelt would attack the Court again. Republicans therefore could no longer easily allege that the Democrats threatened the Court's integrity. Moreover, it would have been pointless as well as hypocritical for Republicans to propose their own Court-curbing legislation since only a stronger Court could resist reform legislation. Although Republicans might have promised voters that a G.O.P. President would appoint Justices who would renew the resistance to liberal legislation, Roosevelt's appointment of five liberal Justices to the Court seemed to assure that the Court would continue to approve reform legislation. Furthermore, public support for such liberal legislation had become so widespread by 1940 that the Republican strategy began to focus more on administration of the regulatory state rather than on its curtailment.

Although judicial issues thus were not prominent during the 1940 election campaign, Republicans continued to warn that the New Deal was disturbing the balance of powers by concentrating undue power in the federal government, particularly the presidency. Roosevelt's bid for an unprecedented third term provided Republicans with an especially potent example of this alleged threat to constitutional government. The Republican platform called for an amendment providing that no person should serve as President for more than two terms.<sup>144</sup>

As part of their warnings about the threat to the balance of powers, Republicans emphasized the success of Roosevelt's efforts to appoint judges who were sympathetic to the New Deal. In a *Saturday Evening Post* article in March 1940, Wendell L. Willkie, a utility attorney who later became the G.O.P. nominee, suggested that Roosevelt's Supreme Court appointees, who comprised a majority of the Court, were little more than Roosevelt's puppets. Complaining that the Court had "uprooted and overturned some of the oldest guideposts of our constitutional law," Willkie contended that the Court's "astonishing emancipation of legislative power from judicial

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144. See 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 394. In modified form, this amendment was enacted in 1951 as the Twenty Second Amendment. Ironically, its principal impact has been to bar third terms by the popular Republican presidents Dwight D. Eisenhower and Ronald Reagan.

restraint" would impede economic stability by creating an "utter inability . . . to predict what precedents will be knocked down next."<sup>145</sup> The article provoked an angry response from Attorney General (and later Justice) Robert H. Jackson, who decried "this sudden attack upon the Supreme Court by spokesmen for the public utility interests" and condemned Willkie's allegations of political influence on the justices as "grossly inaccurate."<sup>146</sup> After winning the nomination, Willkie continued to warn that Roosevelt's appointment of five new Supreme Court Justices greatly aggrandized Roosevelt's power since the new Justices were subservient to the President.

As part of their warnings about the threat to judicial independence, Republicans sometimes reminded voters of the Court-packing plan. But while Roosevelt's proposal had damaged Roosevelt politically in 1937, the memories of most voters are short and Republicans probably recognized that there was little hope of rekindling passions over a furor that had burned itself out three years earlier. Willkie referred to the Court-packing plan in a number of his public addresses, but did not emphasize it and generally tried to link it to the broader issues of his campaign. In a speech in San Francisco in September, for example, Willkie alleged that the controversy over the Court had contributed to the eruption of the war in Europe. The "totally unexpected and unnecessary controversy about the Supreme Court split America in two," Willkie declared.<sup>147</sup> "Congress became preoccupied with the defense of the Constitution. While Hitler's power increased from day to day, we presented to the world the spectacle of a great people, the greatest of all democracies, torn asunder by a broil over one of our most fundamental principles."<sup>148</sup> Willkie likewise used the intense opposition encountered by the Court-packing plan to underscore the dangers of Roosevelt's successful packing of the Court through deaths and retirements. Recalling that Roosevelt "attacked the Supreme

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145. Wendell L. Willkie, *The Court Is Now His*, SATURDAY EVENING POST, Mar. 9, 1940, at 29, 71, 76.

146. *Hits Willkie Article on High Court Rulings*, N.Y. TIMES, Apr. 10, 1940, at 46.

147. *Willkie Charges New Deal Policies Helped Bring War*, N.Y. TIMES, Sept. 22, 1940, at 1.

148. *Id.*

Court—the chief remaining obstacle between him and virtually unlimited power,” Willkie expressed satisfaction that “the people turned back this frontal attack upon the court,” but he declared that “time and mortality have given Mr. Roosevelt his way.”<sup>149</sup> Likewise, the Republican platform alleged that “the Administration has sought the subjection of the Judiciary to Executive discipline and domination.”<sup>150</sup>

Although the issue of judicial independence probably had little direct impact on the outcome of the 1940 election, the related issue of aggrandizement of presidential power almost certainly cost Roosevelt votes. The 1940 presidential campaign therefore provides an example of how judicial issues often become blurred with other constitutional and political questions.

#### L. *The 1944 Election*

Although Roosevelt's bid for an unprecedented fourth term in 1944 resurrected many of the same constitutional concerns that had surrounded his third-term candidacy in 1940, the issue of separation of powers was less prominent. Once voters had shattered the two-term tradition, there was little reason to suppose that masses of voters would have any inherent objection to yet another term.<sup>151</sup> Republican nominee Thomas E. Dewey nevertheless emphasized the fourth term issue indirectly by insisting that the Roosevelt Administration had grown tired and corrupt after eleven years.<sup>152</sup> In a

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149. Wendell L. Willkie, Address at the Herald Tribune Forum, in *Text of Wendell L. Willkie's Address at the Herald Tribune Forum*, N.Y. TIMES, Oct. 24, 1940, at 16.

150. 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 389. In addition to decrying Roosevelt's appointment of five Justices during the previous three years, Republicans also pointed out that Roosevelt had succeeded in packing the lower federal courts. By the 1940 election, Roosevelt had named thirty-six of the fifty-six circuit judges and seventy-nine of the 161 district court judges during his two terms. Former Republican Senator George Wharton Pepper of Pennsylvania called attention to these statistics on the eve of the 1940 election, and the *New York Times* declared that “it is highly undesirable that all new men be chosen by one President.” Editorial, *Judges and the Third Term*, N.Y. TIMES, Nov. 2, 1940, at 14.

151. Moreover, Republicans may have recognized the problem with emphasizing the danger of dictatorship when the United States was in the middle of a war to crush dictators abroad.

152. See Thomas E. Dewey, Address in Chicago Pledging Honesty in Government, in *The Text of Gov. Dewey's Address in Chicago Pledging Honesty in Government*, N.Y. TIMES, Oct. 26, 1944, at 13.

speech near the end of the campaign, for example, he reminded voters of Roosevelt's attempt to obtain "an obedient Supreme Court" through the Court-packing plan.<sup>153</sup> In a more direct warning about the concentration of power in Roosevelt's hands, Dewey went on to declare that "time and mortality and twelve years in office have enabled Mr. Roosevelt to pack the courts with New Deal appointees. The very preservation of our liberty demands that this practice be stopped—and that's another reason why it's time for a change."<sup>154</sup>

### M. *The 1948, 1952, 1956, and 1960 Elections*

Judicial issues were not prominent in presidential campaigns from 1948 through 1960, despite growing constitutional controversies, particularly those involving desegregation.

In 1948, hostility among some Southern Democrats toward the increasingly liberal policies of the Democratic Party and the Truman Administration on racial issues led to the formation of the States' Rights Party.<sup>155</sup> This party's platform complained that the executive branch of government was "promoting the gradual but certain growth of a totalitarian state by domination and control of a politically minded Supreme Court."<sup>156</sup> In particular, the platform criticized (although not specifically by name) the Court's decisions requiring desegregation of law schools<sup>157</sup> and participation by non-whites in primary elections;<sup>158</sup> barring the enforcement of racially restrictive covenants;<sup>159</sup> prohibiting religious instruction on public school premises;<sup>160</sup> and extending federal jurisdiction over submerged oil-bearing lands in California.<sup>161</sup> Nevertheless, judicial issues do not appear to have been particularly prominent during the campaign, and do not appear

153. *Id.*

154. *Id.*

155. Thurmond's States' Rights Party carried four Southern States and won one-fifth of the vote in the states of the Old Confederacy. See KARI FREDERICKSON, *THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932-1968*, at 184 (2001).

156. 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 467.

157. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948).

158. See *Smith v. Allwright*, 321 U.S. 649 (1944).

159. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

160. See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

161. See *United States v. California*, 332 U.S. 19 (1947).

to have influenced the election's outcome.<sup>162</sup>

After being virtually ignored in 1952, judicial issues arose briefly in politics during early 1956, in a much-publicized but ultimately insignificant flap over Vice President Richard Nixon's apparent effort to claim *Brown v. Board of Education*<sup>163</sup> as a Republican achievement. In extolling the accomplishments of the Eisenhower Administration at a Republican Club dinner in New York City on February 13, 1956, Nixon declared that "speaking for a unanimous Supreme Court, a great Republican Chief Justice, Earl Warren, has ordered an end to racial segregation in the nation's schools."<sup>164</sup> Nixon's effort to win political credit for the Republican Party for the *Brown* decision embarrassed many Republicans, provided grist for the segregationist mill of Southern Democrats, and provoked sharp rebukes from the press.<sup>165</sup> Senators John Stennis of Mississippi and Olin Johnston of South Carolina chortled that Nixon's remark acknowledged and confirmed that *Brown* was a political decision.<sup>166</sup>

The controversy over Nixon's speech was badly timed for Nixon, whose prospects for re-nomination were clouded during the winter of 1956. Although Eisenhower officially declined to comment directly on Nixon's remark, he stated in a

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162. See, e.g., KARABELL, *supra* note 2.

163. 347 U.S. 483 (1954).

164. Richard Nixon, Address to the Republican Club Dinner (Feb. 13, 1956), in *Text of Nixon's Address to the Republican Club Dinner Here*, N.Y. TIMES, Feb. 14, 1956, at 18. Professor Lasser has pointed out that

What is most striking about this incident is that Nixon would want to invoke the chief justice's name and his decision in *Brown* in support of the Republican Party. Nixon's support of Warren and *Brown* is surprising only in retrospect, however; at the time, neither Warren nor *Brown* was in disrepute except among extremist Southern Democrats.

LASSER, *supra* note 11, at 167.

165. For example, the *New York Times* warned that statements such as Nixon's "feed the fires of the die-hards; weaken the authority and the prestige of the court; reinforce the will to resist; heighten emotions that are already dangerously high; and enhance the crudest kind of political partisanship." Editorial, *Bad Taste and Bad History*, N.Y. TIMES, Feb. 16, 1956, at 28. Adlai Stevenson denounced Nixon for "callously violat[ing] the cherished independence of the Supreme Court" and warned against cynical politicians who work to gain votes by pitting angry men against each other." *Stevenson Scores Nixon on Tactics*, N.Y. TIMES, Feb. 18, 1956, at 10. Meanwhile, Carmine G. De Sapio, New York Secretary of State and a leader of Tammany Hall Democrats, accused Nixon of making "reckless political capital of racial prejudice." *De Sapio Attacks Nixon on 'Rights'*, N.Y. TIMES, Feb. 20, 1956, at 26.

166. See 102 CONG. REC. 2556 (1956) (remarks of Sen. Stennis); *id.* at 3705 (remarks of Sen. Johnston).

televised speech that he would never apply “a political designation” to any member of the Supreme Court.<sup>167</sup> Nixon’s indiscretion may have contributed to Eisenhower’s initial unwillingness to endorse Nixon’s re-nomination and helped to propel the “dump Nixon” movement of early 1956. Although Stennis contended that Nixon’s remark “put the Chief Justice and the decision right in the middle of the forthcoming political campaign,”<sup>168</sup> the incident was soon nearly forgotten. The Democratic platform condemned “the efforts by the Republican Party to make it appear that this tribunal [the Court] is a part of the Republican Party,”<sup>169</sup> but judicial issues played little part in the presidential campaign. Meanwhile, Eisenhower rejected language in an initial draft of the Republican platform that gave the Eisenhower Administration credit for *Brown*.<sup>170</sup>

The 1956 Republican platform rather backhandedly endorsed the desegregation decisions, stating that the party “accepted” the original *Brown* decision and “concurred” in the Court’s later decision<sup>171</sup> that desegregation should be implemented with “all deliberate speed.”<sup>172</sup> The platform also condemned the use of force or violence to oppose desegregation and declared that racial “progress must be encouraged and the work of the courts supported in every legal manner by all branches of the Federal Government.”<sup>173</sup>

The 1956 Democratic platform likewise called for an end to racial discrimination and rejected “all proposals for the use of force to interfere with the orderly determination of these matters by the courts.”<sup>174</sup> With regard to *Brown*, the Demo-

167. See W.H. Lawrence, *2d Spot in Doubt: Foes of Vice President Now May Push Drive to Block Him*, N.Y. TIMES, Mar. 1, 1956, at 1.

168. 102 CONG. REC. 2556 (1956).

169. 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 542.

170. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 62 (2000). According to Professor Powe, Eisenhower personally vetoed the draft of the platform on the official ground that the executive branch should not take credit for what the co-equal judicial branch did and possibly because he believed the decision a huge mistake and therefore wanted no association with it. See *id.*

171. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

172. 1 NATIONAL PARTY PLATFORMS, *supra* note 15, at 554. The platform declared that “[t]he implementation order of the Supreme Court recognizes the complex and acutely emotional problems created by its decision in certain sections of our country where racial patterns have been developed in accordance with prior and longstanding decisions of the same tribunal.” *Id.*

173. *Id.*

174. *Id.* at 542.

cratic platform was studiously ambiguous, stating the obvious point that "[r]ecent decisions of the Supreme Court . . . relating to segregation in public schools and elsewhere have brought consequences of vast importance to our Nation as a whole and especially to communities directly affected."<sup>175</sup> In a bow toward opponents of desegregation who claimed that the Court overstepped itself in *Brown*, the platform "emphatically" reaffirmed the party's "support of the historic principle that ours is a government of laws and not men," and it expressed its recognition that the Court was "one of three Constitutional and coordinate branches of the Federal Government."<sup>176</sup> As Professor Powe has observed, "[t]he Democratic platform, reflecting the racial split within the party between its northern wing and its often solid southern base, tried to have it every possible way."<sup>177</sup>

The Supreme Court had another connection with the 1956 election insofar as Eisenhower nominated William J. Brennan, a Roman Catholic Democrat, to the Court in October in an effort to reach out to Catholics and Democrats in his bid for reelection.<sup>178</sup>

Judicial issues likewise played little role in the 1960 election despite the growing intensity of the civil rights movement, with which the Court was closely associated, and the furor over the Court's decisions on subversion during 1956-57.<sup>179</sup> Although the 1960 Republican platform reminded voters that the Eisenhower Administration had "supported the position of the Negro school children before the Supreme Court" in *Brown*, and it declared that "the Supreme Court school decision should be carried out in accordance with the mandate of the Court," Democrats generally preferred to continue to avoid mentioning the Court in the context of presidential politics.<sup>180</sup> The absence of judicial issues in the 1960 campaign may partly reflect the tendency of the Court after 1958 to avoid highly controversial decisions.<sup>181</sup>

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175. *Id.*

176. *Id.*

177. POWE, *supra* note 170.

178. See ABRAHAM, *supra* note 37, at 262-63.

179. See PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969*, at 322-33 (1972).

180. 2 NATIONAL PARTY PLATFORMS, *supra* note 15, at 618.

181. See WALTER F. MURPHY, *CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 237-39* (1962); POWE, *supra* note 170, at

### N. *The 1964 Campaign*

In 1964, the Supreme Court became a major issue in a presidential campaign for the first time since 1924. A spate of controversial U.S. Supreme Court decisions between 1962 and 1964 on such sensitive subjects as religion in the schools, criminal rights, and reapportionment<sup>182</sup> had provoked intense hostility among political conservatives. These decisions greatly aggravated animosities created during the previous decade by the Court's decisions on desegregation, criminal justice, and protection of Communists. In the midst of such controversy, the Court's emergence as an election issue was almost inevitable. As an irate Alabama citizen warned Justice Douglas in 1963, "there is a day of reckoning coming and it may well start with next year's elections when many of us never thought that it was important for our wives and sons and daughters to register and vote will now insist that they do so."<sup>183</sup>

Alabama Governor George C. Wallace energetically interjected the Court into his campaign for the Democratic presidential nomination in 1964, denouncing the Court for its decisions on desegregation, school prayer and Bible reading, reapportionment, and criminal justice. Although Wallace had no chance of wresting the nomination from President Johnson, his surprisingly large vote tallies in many non-Southern states, particularly Wisconsin, demonstrated that public attacks on the Court might win votes. Wallace continued to excoriate the courts in speeches throughout the nation during 1964 even after he had abandoned his presidential bid.<sup>184</sup> In

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182. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (forbidding prayer in public school); *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (forbidding use of the Bible for devotional exercises in public schools); *Baker v. Carr*, 369 U.S. 186 (1962) (holding that reapportionment was a justiciable issue); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (requiring reapportionment of congressional districts); *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring reapportionment of both houses of state legislatures); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (invalidating confession obtained after police investigation in which accused was not permitted to consult lawyer and had not been informed of his rights).

183. Letter from Scott Davis to William O. Douglas (Aug. 9, 1963) (on file with William O. Douglas Papers, Manuscript Division, Library of Congress, Box 382).

184. See Governor George C. Wallace, *Various Speeches* (1964) (transcripts available in Reel 1 of Papers of George C. Wallace, State Archives, Montgomery, Alabama).

typical remarks in Richmond in June, for example, Wallace declared that

[w]ith the power in the United States Supreme Court to construe the Constitution in a manner to negate limitations upon the power of the federal government, we are confronted with the cold hard fact that the people are not sovereign over their government any longer and that we, in fact, are bordering on an entirely different form of government. It is judicial oligarchy pure and simple. It has been accomplished by revolution.<sup>185</sup>

Discontent over reapportionment decisions found expression in the 1964 Republican platform, which called for "a Constitutional amendment, as well as legislation, enabling states having bicameral legislatures to apportion one House on bases of their choosing, including factors other than population."<sup>186</sup> The platform also responded to the Court's school prayer decision, proposing an amendment "permitting those individuals and groups who choose to do so to exercise their religion freely in public places," provided that the state did not prepare or prescribe religious exercises, or coerce participation.<sup>187</sup>

In criticizing the Supreme Court in several dozen speeches during the 1964 campaign, Goldwater probably spoke more harshly about the Court than any previous major party candidate. Attacks on the Court blended well with the broader themes of his campaign. The Court's activism provided an example of the dangerous concentration of federal power against which he crusaded. The reapportionment decisions particularly provided fresh and potent illustrations of the erosion of states' rights about which he complained so bitterly. He also linked the Court's decisions on criminal procedure and school prayer to the moral decay about which he so frequently warned.<sup>188</sup> As columnist Anthony Lewis observed

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185. Governor George C. Wallace, Speech at the Alabama State Fair Grounds (June 27, 1964) (transcript available in Reel 1 of Papers of George C. Wallace, State Archives, Montgomery, Alabama).

186. 2 NATIONAL PARTY PLATFORMS, *supra* note 15, at 686.

187. *See id.* at 683. A Roman Catholic seminarian proposed early in 1964 that Goldwater's interjection of the prayer issue into the campaign could "produce a vast good will toward" the Senator since "support for the prayer amendment knows no party or religious lines." Russell Kirk, *Organizing Against the Supreme Court*, NATIONAL REVIEW, May 19, 1964, at 406.

188. Barry M. Goldwater, Speech Before the Committee On Commerce,

with some exaggeration at mid-campaign, Goldwater “has seemed to be running against the nine justices instead of Lyndon B. Johnson.”<sup>189</sup>

Goldwater fired his first volley in Idaho on September 10, savaging the reapportionment decisions. Although Goldwater tacitly acknowledged that the Constitution provides that no state shall be deprived of its equal suffrage in the Senate without its consent, he predicted that the Court’s decisions would lead to apportionment of the Senate on the basis of population.<sup>190</sup> Alleging that reapportionment decisions would “have a more dangerous effect than anything that’s happened throughout the course of our Republic,” Goldwater warned that

it’s going to destroy the representative vote of the small States, populationwise. It’s going to destroy the suburban vote . . . the farmer, the miner, the forester’s vote, and place it all in the concentration of boss-controlled cities, mostly in the East . . . where we find crime on the streets.<sup>191</sup>

Speaking later in the day in another sparsely populated state, Montana, Goldwater reiterated this warning and blasted the Court for “sticking its judicial nose” into reapportionment questions.<sup>192</sup>

On the following day, Goldwater delivered a more measured but no less pungent attack on the Court in an address to the American Political Science Association in Chicago. Decrying the Court’s departure from original intent in the reapportionment and school prayer decisions as an exercise of “raw and naked power,” he alleged that “of all three branches of Government today’s Supreme Court is the least faithful to the constitutional tradition of limited government, and to the principle of legitimacy in the exercise of power.”<sup>193</sup> Although Goldwater conceded “that law must keep up with the chang-

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United States Senate, 89th Cong. 1st Sess., in *The Speeches, Remarks, Press Conferences, and Related Papers of Senator Barry M. Goldwater, July 16 Through November 4, 1964*, in 3 CAMPAIGN ‘64, at 170 [hereinafter “Goldwater Speeches”].

189. Anthony Lewis, *Campaign: The Supreme Court Key Issue*, N.Y. TIMES, Oct. 11, 1964, at 8E.

190. See *Goldwater Speeches*, supra note 188, at 170.

191. *Id.*

192. *Id.* at 176.

193. *Id.* at 191.

ing times," he averred that "the job of keeping the law up to date should be in the hands of the legislatures, the Congress and the common law courts, not just in the hands of the nine appointed Justices."<sup>194</sup> As in later speeches, he likened the Court's alleged usurpation of power to the dictatorial tendencies of the "power-wielding, arm-twisting" Johnson.<sup>195</sup> Although Goldwater conceded that many members of his audience might approve of the results of the Court's decisions, he declared that "to a constitutionalist, it is at least as important that the use of power be legitimate than that it be beneficial."<sup>196</sup>

Although Goldwater's attacks on the Court's decisions were part of his broader criticism of excessive government and abuse of power, Goldwater also criticized the Court's decisions expanding the rights of criminal defendants. In one speech, for example, Goldwater alleged that the criminal procedure decisions had "reduced the policeman's job to an almost impossible one" and had "actually made it safer for you to be a criminal than to be a law-abiding citizen."<sup>197</sup> While these criticisms may seem inconsistent with Goldwater's essential libertarianism, they were consistent with his strong belief in states' rights. As Goldwater explained in another speech, "We don't want a Federal police in this country. We don't need one."<sup>198</sup>

Like earlier presidential candidates who had criticized the judiciary, Goldwater found that attacks on the courts were not the most effective means of stirring an audience. One campaign organizer reported to national headquarters "with a sob in his voice" that Goldwater's discussion of constitutional law bored and confused a Charlotte audience that had expected "blood and guts" from Goldwater after Strom Thurmond "got the crowd all fired up." The organizer remarked that "even the press remarked afterwards that an opportunity had been missed."<sup>199</sup>

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194. *Id.* at 192.

195. *Id.* at 190.

196. *Goldwater Speeches*, *supra* note 188, at 190.

197. *Id.* at 370.

198. *Id.* at 397.

199. Memorandum from Pat Ryder to Denison Kitchel, Dean Burch, John Grenier, Wayne Hood, and Sam Caliborne (Sept. 23, 1964) (on file with Goldwater Papers, Arizona Historical Foundation, Hayden Library, Arizona State University, Tempe, Arizona, Box W-8).

Since the courts so often have been sacrosanct in presidential campaigns, Goldwater's remarks about the courts played into the hands of his opponents, who were attempting to portray him as a dangerous radical. Goldwater's willingness to criticize the courts was characteristic of Goldwater's almost reckless bluntness throughout the 1964 campaign. In contrast with the circumspection of most presidential candidates, who try to position themselves as moderates, Goldwater refused to compromise his conservative creed.<sup>200</sup>

Like LaFollette's attacks on the Court in 1924, Goldwater's criticisms of the Court provoked predictable expressions of outrage. One of the most strident came from Emmanuel Celler, the chair of the Committee on the Judiciary of the U.S. House of Representatives, who castigated Goldwater for his "violent demagoguery" and for using the "Court as a political football."<sup>201</sup> Like LaFollette's critics four decades earlier, Celler warned that attacks on the judiciary could have revolutionary consequences, leading to fascism or communism.<sup>202</sup> Celler alleged that Goldwater's "emotional attack on the Court can only incite disrespect for law and order. While he claims to oppose lawlessness, his irresponsible action is actually inciting it."<sup>203</sup>

As Goldwater continued to criticize the Court, many prominent attorneys echoed Celler's complaint in terms that were reminiscent of the elite bar's attacks on LaFollette in 1924. On October 11, fifty lawyers, including members of both parties, twelve present or former law school deans, and five former ABA presidents, issued a statement deploring Goldwater's "attack upon the ultimate guardian of American liberty."<sup>204</sup> Contending that Goldwater's criticisms "overpass

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200. See RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* 429-30 (2001).

201. Press Release, Emmanuel Celler, *Celler Defends Supreme Court Against Goldwater Charges* (Sept. 13, 1964) (on file with Emmanuel Celler Papers, Manuscript Division, Library of Congress, Box 298).

202. See *id.* Celler argued that "one of the first – and surest – steps to totalitarianism is taking away the independence of the courts of a nation. That is what Hitler and Mussolini did. And that is what Fascist dictators have done in our own time." *Id.*

203. *Id.* Celler contended that judicial independence "is a cherished value that true conservatives have historically sought to preserve, not destroy." *Id.* Accordingly, Celler alleged that Goldwater's criticism of the Court provided "striking proof that he is a radical, not a conservative, on public matters." *Id.*

204. Anthony Lewis, *Goldwater Stand on Court Decried*, N.Y. TIMES, Oct. 12,

the limits of comment appropriate in presidential candidate," the statement alleged that Goldwater's "attacks are not based on reasoned analysis of the Court's opinion's [sic]" but rather upon "catch phrases and slogans."<sup>205</sup>

Some of Goldwater's critics suggested that Goldwater's criticisms of the Court were intended to bolster his support among segregationists who were embittered by the Court's decisions on race. Although Goldwater scrupulously refrained from criticizing *Brown* or any other desegregation decision, Southern audiences who applauded Goldwater's criticism of the Court for interjecting itself into social and political issues "left no doubt in reporters' minds that they believed that Goldwater disapproved of the Supreme Court's school desegregation decisions and its other rulings protecting the civil rights of Negroes."<sup>206</sup>

Johnson responded to Goldwater's criticisms of the Court by loftily declaring that he did not regard the Court as an appropriate election issue.<sup>207</sup> Johnson's refusal to use Goldwater's criticisms of the Court to portray Goldwater as a dangerous radical, in contrast to Coolidge's dire warnings about LaFollette in 1924, may suggest that Johnson feared that Goldwater was striking a chord in his criticism of the Court. It is more likely, however, that Johnson's silence was simply consistent with his strategy of ignoring his opponent, leaving surrogates to portray Goldwater as a dangerous radical.

Responding to attacks on Goldwater for his criticisms of the courts, many conservatives rallied to Goldwater's defense, pointing to the Court itself as the cause of the criticism. The *Wall Street Journal* argued that the Court had made itself an election issue by interjecting itself into so many political controversies in a manner that many Americans believed ex-

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1964, at 24.

205. *Id.*

206. Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and Supreme Court: The Goldwater Campaign*, 32 PUB. OPIN. Q. 31, 33 (1968). Murphy and Tanenhaus point out that Goldwater "took great pains to avoid any explicit attack on decisions affecting the rights of Negroes, but he did say that he opposed transporting students to schools outside their own neighborhoods merely to achieve racial balance in classes." *Id.* Even though Goldwater avoided any specific criticisms of the federal courts' decisions on race, many of Goldwater's staunchest supporters were segregationists and Goldwater had won much support by voting against the Civil Rights Act of 1964.

207. *See id.*

ceeded its authority.<sup>208</sup> The *Journal* declared that “[t]he people . . . pick the issues on which they measure candidates. And any politician should know that he ignores the public only at his own peril.”<sup>209</sup> Similarly, a New Jersey man told Celler that the Court had provoked Goldwater’s criticism “by its own actions. The Supreme Court interjects itself into politics!”<sup>210</sup>

In addition to criticizing judicial decisions, Goldwater repeatedly reminded his audiences that the President had the power to appoint federal judges. He emphasized that many major decisions were based on five-to-four votes, thereby implying that as few as one appointment might be enough to transform the Court. In Evansville, Goldwater warned that Johnson might appoint “more capricious people” to the federal courts,<sup>211</sup> and in Knoxville he warned that “the makeup of the Supreme Court” alone was reason to be “very, very worried about who is the President in the next four or eight years.”<sup>212</sup> Goldwater averred that presidential appointments “must consider the need to redress constitutional interpretation in favor of the public.”<sup>213</sup> He promised to appoint judges “who will support the Constitution, not scoff at it.”<sup>214</sup>

208. Editorial, *Boundaries of the Battlefield*, WALL ST. J., Sept. 18, 1964, at 8.  
209. *Id.*

210. Letter from Earl Bamgaezi to Emanuel Celler (Sept. 14, 1964) (on file with Emmanuel Celler Papers, Manuscript Division, Library of Congress, Box 298). In response to Celler’s contention that Goldwater had engaged in demagoguery, the writer accused Celler of demagoguery in ignoring the political opinions of the majority of people. *See id.*

211. *See Goldwater Speeches*, *supra* note 188, at 271.

212. *Id.* at 232. Goldwater asked his audience to

[j]ust think . . . what would happen if appointments were made on a judicial basis: men who knew the law, respect the law, respect the Constitution . . . . [I]f those kinds of appointments can be made . . . [p]rogress will be hurried up, because only . . . under our Constitution can freedom be protected and preserved and if it’s slowly to be destroyed by judgments not based upon it, if it’s slowly to be destroyed by the centralizing of vast powers in the executive branch of Government, if it’s slowly to be destroyed by taking away from the people the rights that are theirs . . . then we are not long for the exercise and enjoyment of freedom in this country.

*Id.*

213. *Id.* at 500.

214. *Id.* at 665. Goldwater’s criticisms of the Court were gleefully amplified by many of his supporters. Speaking at a Goldwater rally on Halloween, an Arkansas Supreme Court justice won laughter and applause by declaring that “every U.S. Supreme Court decision day is a new Halloween.” *Goldwater Speeches*, *supra* note 188, at 957 (remarks of Jim Johnson). Predicting that the

Like LaFollette and other presidential candidates who have criticized the Court, Goldwater did not personally attack the Chief Justice, even when his more ardent supporters encouraged him to do so. Addressing a conservative audience in a small Arizona town early in his campaign for the nomination, Goldwater was asked to comment on the loyalty of Earl Warren. "I think he's a very loyal man," Goldwater declared, amid silence.<sup>215</sup> Although Goldwater acknowledged that Warren's opinions were too leftist for his taste, he emphasized that the Chief Justice was not "un-American."<sup>216</sup>

Although Goldwater's sharp criticisms of the Court probably had little impact on the election, Goldwater's willingness to speak harshly about this revered institution may have contributed to the public perception of Goldwater as a dangerous radical that helped Johnson win a landslide victory. Goldwater's defeat therefore could serve as another object lesson in the perils of criticizing the Court during a presidential campaign. In contrast to LaFollette's defeat in 1924, however, Goldwater's defeat did not chill future discussions of the Court in presidential campaigns. Perhaps emboldened by Goldwater's defeat, the Court during the next few years continued to render decisions that made it even more controversial and invited criticism by candidates in the next presidential election.

#### O. *The 1968 Election*

Judicial issues may have influenced the outcome of the 1968 election more than any other election in the nation's history. Although the Vietnam War probably was the dominant issue, the federal courts were at the heart of a maelstrom of controversy that included a broad range of social issues that affected the election, particularly crime and race. The Supreme Court's 1966 decision in *Miranda v. Arizona*,<sup>217</sup> expanding the rights of criminal defendants, provoked espe-

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next President would make at least four Supreme Court appointments during the next four years, Governor James G. Byrnes of South Carolina, a former U.S. Supreme Court Justice, warned that if the new Justices "follow the present Court in making law, instead of interpreting law, the Supreme Court will absolutely destroy this Republic under which we have enjoyed such freedom." *Id.* at 962.

215. *Goldwater Takes Turn to Left*, N.Y. TIMES, Feb. 15, 1964, at 11.

216. *Id.*

217. *Miranda v. Arizona*, 384 U.S. 436 (1966).

cially intense criticism.<sup>218</sup> Both Richard Nixon, the Republican candidate, and George Wallace, the American Independent candidate who polled more votes than any third-party candidate since LaFollette in 1924, frequently criticized the Warren Court's activism and promised to nominate more conservative judges. Both Nixon and Wallace reiterated Goldwater's criticisms of the courts in 1964, with Nixon more oblique than Goldwater and Wallace more blatant. As in other campaigns, judicial issues were inextricably linked with other issues. Professor Lasser has observed that "it would be a mistake to treat the law-and-order issue in 1968 as primarily a Supreme Court issue" since political violence such as race riots and antiwar demonstrations may have worried voters more than common crime.<sup>219</sup> According to Lasser, "[t]he Court was brought into the picture only because of its high visibility as a national symbol and because, for candidates like Wallace, being against the Court on crime, like being against the Court on racial issues, was good politics."<sup>220</sup>

Wallace showed clear distaste for the Court and Warren in particular. Wallace alleged that Warren had "done more to destroy constitutional government in this country than any one man."<sup>221</sup> Like Southern Democrats in previous elections, Wallace reminded voters that Earl Warren was a Republican.<sup>222</sup> In a New York City speech shortly before the election, Wallace declared, "We don't have a sick society, we have a sick Supreme Court," and he decried "perverted decisions" that prohibited classroom prayer while permitting distribution of "obscene pornography."<sup>223</sup> Wallace saved his most vehement criticism for the Court's decision on criminal rights, particularly *Miranda*.

Wallace's American Independent Party platform also sharply criticized the Court. In particular it advocated that Supreme Court and Court of Appeals judges face periodic re-

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218. See LEWIS CHESTER ET AL., *AN AMERICAN MELODRAMA: THE PRESIDENTIAL CAMPAIGN OF 1968*, at 230-31 (1969).

219. See LASSER, *supra* note 11, at 196.

220. *Id.*

221. Walter Rugaber, *Wallace Woos Mississippi; Scores Warren Career*, N.Y. TIMES, June 22, 1968, at 17:2.

222. *See id.*

223. DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 367 (1995).

confirmation by the Senate, and that district judges be subjected to periodic retention elections that would result in the appointment of a new judge if the electorate voted against retention of the judge.<sup>224</sup> The platform also castigated the Supreme Court for excessive activism,<sup>225</sup> particularly in the area of law enforcement.<sup>226</sup>

Campaigning for the Republican nomination, Nixon denounced *Miranda* and advocated legislation to allow a judge and jury to decide whether a confession was voluntary.<sup>227</sup> As Professor Ambrose has observed, Nixon during the primaries "made law and order his central theme, and played it hard to enthusiastic audiences who greeted his punch line with enthusiastic applause: 'Some of our courts have gone too far in weakening the peace forces as against the criminal forces.'<sup>228</sup> During the autumn campaign, Nixon promised to appoint judges who would "be strict constructionists who saw their duty as interpreting and not making law. They would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social forces and political viewpoints on the American people."<sup>229</sup> Many liberals, however, predicted that Nixon's judicial appointments would be more liberal than his rhetoric

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224. 2 NATIONAL PARTY PLATFORMS, *supra* note 15, at 702. The platform declared that "[t]he members of the Federal judiciary, feeling secure in their knowledge that their appointment is for life, have far exceeded their constitutional authority, which is limited to interpreting or construing the law." *Id.*

225. *See id.* The platform alleged that "the Federal judiciary, primarily the Supreme Court, transgress repeatedly upon the prerogatives of the Congress and exceed its authority by enacting judicial legislation, in the forms of decisions based upon political and sociological considerations, which never would have been enacted by the Congress." *Id.*

226. *See id.* The platform charged that the courts, "in their solicitude for the criminal and lawless element of our society," had "shackle[d] the police and other law enforcement agencies" and thereby "have made it increasingly difficult to protect the law-abiding citizen from crime and criminals." *Id.* According to the platform, "[t]his is one of the principal reasons for the turmoil and near revolutionary conditions which prevail in our country today." *Id.* Echoing the platform, Wallace alleged in a speech in September that the Court had "taken over our lives" and he vowed to put "it in its place" by carrying out his platform to require periodic reconfirmation of Justices. *See* REVIEW OF THE NEWS, Oct. 2, 1968, at 1.

227. *See* 2 STEPHEN E. AMBROSE, NIXON: THE TRIUMPH OF A POLITICIAN 1962-1972, at 154 (1989).

228. *Id.*

229. *See* STEPHENSON, *supra* note 1, at 181. Nixon pointedly also promised to appoint judges who were mindful of the rights of crime victims. *See id.*

suggested because Nixon was more liberal than his reputation.<sup>230</sup>

Democratic nominee Hubert H. Humphrey defended the Court, expressing his belief that the "Court in these very critical years has served the national interest extraordinarily well."<sup>231</sup> In particular, Humphrey contended that the Court's decisions had "not impaired law enforcement; they have merely placed upon the police and the attorneys, county attorneys, district attorneys and others . . . a greater understanding of statutory and constitutional law."<sup>232</sup> Humphrey also warned that no President could "manage" the Supreme Court.<sup>233</sup>

Earl Warren's announcement of his resignation as Chief Justice in June enhanced the Court's importance as an election issue because there was uncertainty at first about whether the Senate would confirm Johnson's nomination of Abe Fortas to succeed Warren, or whether the next President would nominate the Chief Justice.<sup>234</sup> When the nomination died in the Senate in September, the stakes of the election increased with the certainty that the new President would select the next Chief Justice. Since Hugo Black was eighty-three years old, the next President also seemed likely to make at least one other appointment.

#### P. *The 1972 Election*

The intensity of public discontent with the Court began to wane along with the diminution of activism by the Court after the retirement of Warren in 1969. In 1972, the Nixon campaign boasted that Nixon's appointments of Warren E. Burger, Harry Blackmun, Lewis Powell, and William H. Rehnquist had fulfilled Nixon's 1968 campaign promise to appoint conservatives to the Court. Pointing to decreases in the crime rate, the G.O.P. platform cited the appointment of "judges whose respect for the rights of the accused is balanced

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230. See James Reston, *Washington: The Next Chief Justice*, N.Y. TIMES, June 22, 1968, at 12E.

231. *Excerpts From the Debate Among Three Candidates Before California Delegation*, N.Y. TIMES, Aug. 28, 1968, at 34.

232. *Id.*

233. See Max Frankel, *Humphrey Scores 'The Same Nixon,'* N.Y. TIMES, Sept. 14, 1968, at 1.

234. See BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 305-544 (1988).

by an appreciation of the legitimate needs of law enforcement" as one of many ways in which the Nixon Administration had helped to win "the war on crime."<sup>235</sup> Meanwhile, the American Party, the remnant of Wallace's movement, which received only one percent of the vote in 1972, called for the election of federal district judges and the quadrennial reconfirmation of federal appellate judges.<sup>236</sup> Although the 1972 election was held only two months before the Court's decision in *Roe v. Wade*,<sup>237</sup> abortion played no part in the campaign — perhaps the classic example of the difficulty of predicting what judicial issues will figure prominently in the future.

### Q. *The 1976 Election*

Growing recognition of the Supreme Court appointment process<sup>238</sup> manifested itself in the appearance of judicial issues in the 1976 election. Although judicial issues were not prominent in this campaign, their emergence during a time when the Court was not the subject of any intense controversy marked the beginning of the permanent presence of judicial issues in presidential campaigns.

In an apparent effort to appeal to conservatives, Democratic nominee Jimmy Carter remarked in September that the Warren Court had gone "too far" in protecting the legal rights of criminal defendants, although he did not mention any decisions by name, and he praised the Burger Court for restoring what he described as more balance.<sup>239</sup> Carter's more liberal running mate, Walter Mondale, expressed public disagreement with Carter, defending the Warren Court's devotion to individual liberties.<sup>240</sup> During the third presidential debate, both candidates praised the Court in different ways for its recent modification of *Miranda*.<sup>241</sup> Asked about pro-

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235. JOHNSON, *supra* note 111, at 868-69. The platform also pointed to the Supreme Court appointments of "distinguished lawyers of firm judicial temperament and fidelity to the Constitution." *Id.* at 869.

236. *See id.* at 770.

237. *Roe v. Wade*, 410 U.S. 959 (1973).

238. This was reflected in the unprecedented detail with which senators questioned John Paul Stevens during his 1975 confirmation hearings. *Nomination of John Paul Stevens to be Justice of the Supreme Court: Hearings Before the Senate Comm. On the Judiciary, 94th Cong.*, 27, 31, 45, 46, 56-57, 77 (1975).

239. *See* Linda Charlton, *Mondale Recalls Role in Cases on Defendant Rights*, N.Y. TIMES, Sept. 30, 1976, at 32.

240. *See id.*

241. *See Transcript of Final Debate Between 2 Presidential Candidates*, N.Y.

spective Supreme Court appointments, Carter promised to institute a merit-based selection procedure similar to one that he implemented as governor of Georgia, while Ford expressed pride in his appointment of Stevens and described him as the model for any future appointments.<sup>242</sup>

#### R. *The 1980 Election*

The 1980 election campaign was the first in which the impact of judicial appointments on the right to abortion was a prominent issue. The Republican platform, which endorsed a constitutional amendment to limit abortion, seemed to make abortion a litmus test for judicial selection insofar as it called for the "appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent life."<sup>243</sup> In its discussion of abortion, the platform also declared, "We protest the Supreme Court's intrusion into the family structure through its denial of the parents' obligation and right to guide their minor children."<sup>244</sup> This language provoked widespread criticism,<sup>245</sup> and the ABA voted overwhelmingly at its annual convention to oppose judicial selection "on the basis of particular political or ideological philosophies."<sup>246</sup> An organization called Americans Concerned for the Judiciary placed advertisements that depicted nine Justices with Reagan's face and warned that "this GOP litmus test would destroy the independent federal judiciary as we know

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TIMES, Oct. 23, 1976, at 10. Carter praised the Burger Court for reaffirming various liberal Warren Court decisions on reapportionment and criminal justice. Ford stated that *Miranda*

made it very, very difficult for the police . . . to do what they could to make certain that the victim of a crime was protected and that those that commit crimes were properly handled and sent to jail. The *Miranda* case, the Burger Court is gradually changing, and I'm pleased to see . . . some steps being made by the Burger Court to modify the so-called *Miranda* decision.

*Id.*

242. *See id.*

243. DONALD BRUCE JOHNSON, NATIONAL PARTY PLATFORMS OF 1980: SUPPLEMENT TO NATIONAL PARTY PLATFORMS, 1840-1976, at 203 (1982). As Professor Stephenson has remarked, "[t]he meaning of that . . . pledge was unmistakable: one's stand on *Roe v. Wade* was to be litmus test for appointments to the federal courts." STEPHENSON, *supra* note 1, at 202.

244. JOHNSON, *supra* note 243, at 183.

245. *See, e.g.*, Editorial, *The Reagan Court*, N.Y. TIMES, Oct. 1, 1980, at A26.

246. Linda Greenhouse, *Bar Panel Opposes G.O.P.'s Plank for Judges Who Support Abortion*, N.Y. TIMES, Aug. 8, 1980, at A20.

it."<sup>247</sup>

In response to such intense criticism of the platform's language, Reagan announced early in October that he would not select judges on the basis of their opinions on any single issue.<sup>248</sup> Reagan's critics carefully scrutinized his appointments to the California courts during his eight years as governor as part of a broad effort to determine whether Reagan would fill the courts with ideologues. However, even many of Reagan's opponents concluded that Reagan had based his appointments largely on merit rather than on ideology or cronyism, even though Reagan's appointees tended to be very conservative.<sup>249</sup>

Reagan later promised to select a woman to fill "among the first Supreme Court vacancies in my administration."<sup>250</sup> Reagan's pledge was widely regarded as an effort to increase his support among women, many of whom were antagonized by his opposition to the proposed equal rights amendment and his bellicose rhetoric on foreign policy issues.<sup>251</sup> In response, Carter and other Democrats accused Reagan of pandering to women voters and pointed to Carter's own record of appointing women to lower federal judgeships in record numbers.<sup>252</sup>

Moreover, Carter emphasized his judicial appointments record in an effort to shore up his support among liberals.<sup>253</sup> Although Carter boasted of the unprecedented number of women and racial minorities that he appointed, and pointed out that he named more lawyers rated as "well qualified" by the ABA than either Nixon or Ford, his critics alleged that Carter had failed to fulfill his 1976 pledge to appoint judges

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247. *Reagan and the Courts: The Class of '81?*, N.Y. TIMES, Nov. 2, 1980, at 8E.

248. See Wallace Turner, *Reagan Says He Would Not Use Single-Issue Test to Pick Judges*, N.Y. TIMES, Oct. 2, 1980, at 1.

249. See *id.* See also Editorial, *The Reagan Court, Cont.*, N.Y. TIMES, Oct. 2, 1980, at A34.

250. Douglas E. Kneeland, *Reagan Pledges Woman on Court; Carter Challenges Foe on Economy: The Republican Defends Stance on Equal Rights and War Accusations*, N.Y. TIMES, Oct. 15, 1980, at 1.

251. See *id.*

252. See *id.* Although Carter said that he would be "honored" to nominate a woman to the Court, he maintained that he would base his court appointments strictly on merit. See *id.*

253. See Stuart Taylor, Jr., *Carter Judge Selections Praised, But Critics Discern Partisanship*, N.Y. TIMES, Oct. 3, 1980, at A1.

strictly on the basis of merit, yielding too often to partisanship and patronage.<sup>254</sup> On the eve of the election, a group of prominent attorneys issued a statement alleging that Carter's appointments were unduly partisan and expressing confidence that Reagan would "nominate judges of the highest caliber."<sup>255</sup>

The importance of judicial issues in the campaign may have been particularly prominent because five Justices were over the age of seventy, and the Court was closely divided between liberals and conservatives.<sup>256</sup>

### S. *The 1984 Election*

In 1984, the Court emerged as more of an election issue than at any time since 1968. Although Republicans said little about the Court, Democratic nominee Walter Mondale emphasized the importance of judicial appointments throughout his campaign. While the Court itself was not the focus of any particular controversy, the advanced age of many Justices – five were between the ages of seventy-six and seventy-eight – strongly suggested that vacancies would occur during the next four years.<sup>257</sup>

With the Court tenuously balanced between liberals and conservatives the next President had the potential to decisively shift the Court in one direction or another. Since the older members of the Court tended to be more liberal than the younger ones, liberals seemed more worried than conservatives about the election's impact on the Court. Many liberals feared that a "Reagan Court" would re-consider decades of decisions that had expanded personal liberties,<sup>258</sup> particularly

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254. *See id.*

255. *Ronald Reagan Will Take Partisan Politics out of Judicial Selection: Statement by Leading Members of the Bar*, N.Y. TIMES, Oct. 28, 1989, at A20 (paid advertisement).

256. *See Taylor, supra* note 253, at A20.

257. During the 1984 campaign, Chief Justice Burger was seventy-seven years old; Brennan was seventy-eight; Powell was seventy-seven; Marshall was seventy-six; and Blackmun was seventy-six. Of these, only Burger and Powell retired during Reagan's second term.

258. *See Stuart Taylor, Jr., Whoever Is Elected, Potential Is Great for Change in High Court's Course*, N.Y. TIMES, Oct. 21, 1984, at 30. As Democratic Senator Paul Tsongas of Massachusetts wrote a week before the election,

Everyone is aware of how the aging process is overtaking some of the more progressive and more centrist of the Brethren. In the next four years three, four, perhaps five vacancies will almost certainly occur on

since constitutionally-charged issues such as abortion, school prayer, and criminal prosecutions were personally so important to Reagan.<sup>259</sup>

Commentators of all political stripes, however, tended to agree that there was a stark contrast between the types of Court appointments that the two candidates were likely to make, and that the Court therefore should be a major campaign issue.<sup>260</sup> Indeed, Reagan and Mondale seemed to have fundamental differences in their conceptions of the role of law, with Reagan viewing it as a means of maintaining economic rights and defending "traditional values" and Mondale seeing it as an agent for social change.<sup>261</sup>

In his campaign, Mondale focused on the effect that Reagan would have on the Court. His warnings that Reagan appointees could turn the Court farther to the right were consistent with his focus on appealing to highly committed Democrats who might worry about the impact of the Court on such issues as religious liberty and the rights of women and racial minorities. Mondale charged that "the Reagan concept of justice is technically narrow, ideologically twisted and spiritually empty," in contrast to the vision of "the Earl Warrens" of the Court who had "helped move our nation to the highest levels of political and personal freedom and decency."<sup>262</sup>

Democrats repeatedly warned that Reagan would appoint right-wing Justices who would debase personal freedom. In support of this argument, they often reminded voters of a

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the nine-member court. Reagan, free in a second term from re-election considerations, will follow his basic instincts and his ideology. And when he applies these to Supreme Court appointments, we will witness a profound shift in that institution.

Paul Tsongas, Editorial, *Shaping the Future for Our Children*, SEATTLE TIMES, Nov. 1, 1984, 1984 WL 2588349.

259. See David S. Broder, *High Court Hangs in Balance*, SAN DIEGO UNION-TRIB., Oct. 19, 1984.

260. See James J. Kilpatrick, *Appointing Federal Judges*, SEATTLE TIMES, Oct. 22, 1984, 1984 WL 2587741. See also Broder, *supra* note 259. Broder remarked that he could not "think of any area of public policy where the intentions of Reagan and . . . Mondale are clearer or where their differences are more stark or striking." *Id.*

261. See Broder, *supra* note 259. Running as an unabashed liberal, Mondale vowed to raise taxes and to increase federal spending to help the poor and other disadvantaged groups.

262. Don Davis, *Mondale Grabs Rays for Upbeat Speech*, SAN DIEGO UNION-TRIB., Oct. 28, 1984.

February 1984 comment by conservative activist Jerry Falwell that “in Ronald Reagan’s next five years in office we will get at least two more appointments to the Supreme Court.”<sup>263</sup> Democrats seized on this as evidence that Reagan would permit Falwell personally to pick two Justices,<sup>264</sup> an allegation that Falwell repeatedly denied.<sup>265</sup> Mondale warned, “If you pull their lever, you’ll be handing over the Supreme Court to Jerry Falwell, who wants to run the most private questions of your life.”<sup>266</sup>

Democratic warnings that Reagan would radicalize the Court during his second term may have lost much of their power to alarm, however, since Reagan’s only Court appointment during his first term had been the moderate Sandra Day O’Connor. Moreover, Reagan’s appointment of the first woman Justice may have diminished the impact of Mondale’s suggestion that the Court would turn back the clock on women’s rights.

The Republican platform applauded “Reagan’s fine record of judicial appointments” and reaffirmed “support for the appointment of judges at all levels of the judiciary who support traditional family values and the sanctity of innocent human life.” The platform castigated the “elitist and unresponsive Federal judiciary” and promised that Reagan would continue to appoint federal judges “who share our commitment to judicial restraint.”<sup>267</sup>

As in past and future elections, various commentators

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263. Kathy Sawyer & Maralee Schwartz, *Selectivity, Revisions Cloud Facts*, WASH. POST, Oct. 12, 1984, 1984 WL 2011513.

264. *See id.*

265. *See Abortions Will Be Banned, Falwell Says*, DALLAS MORNING NEWS, Oct. 11, 1984, 1984 WL 2305999. For example, Geraldine Ferraro stated during her debate with Bush that she heard that “Falwell has been told that he will pick two of our Supreme Court justices.” Sawyer & Schwartz, *supra* note 263.

266. *Mondale’s Whipping Boy*, TIME, Oct. 22, 1984, 1984 WL 2059880. One of Mondale’s television commercials alleged that Reagan and Falwell would require that “[a]ll new Supreme Court Justices must rule abortion is a crime even in the case of rape and incest,” even though Falwell may have favored abortion for rape or incest. *Id.* As Mondale declared in a California speech shortly before the election in which the Court was his main topic, Reagan’s supporters “would seize our temple of liberty and turn it over to judges who pass the approval of the Jerry Falwells of our time. If Mr. Reagan gets four more years, the far right will get five more justices.” Davis, *supra* note 262. Looking up from his prepared remarks, Mondale admonished, “Don’t let ‘em have it. Don’t let ‘em have it.” *Id.*

267. Taylor, *supra* note 258.

pointed out that judicial performance is difficult to predict. Dismissing Mondale's warnings about Reagan appointments as "sheer demagoguery," one newspaper pointed out that "[a]lthough the White House can influence the long-range course of the high court through a philosophic selection of nominees, precise and immediate results are unpredictable."<sup>268</sup>

Justice Rehnquist made the same point in a speech at the University of Minnesota Law School two weeks before the election. "History teaches us," Rehnquist declared, "that even a 'strong' President determined to leave his mark on the Court – a President such as Lincoln or Franklin Roosevelt – is apt to be only partially successful. Neither the President nor his appointees can foresee what issues will come before the Court during the tenure of the appointees."<sup>269</sup> Rehnquist explained that the Court is "far more dominated by centrifugal forces, pushing towards individuality and independence, than it is by centripetal forces pulling for hierarchical ordering and institutional unity."<sup>270</sup> Public scrutiny and professional criticism encourage individuality rather than team loyalty, Rehnquist contended. Moreover, he pointed out lifetime tenure encourages independence and he made the less obvious argument that the appointment of Justices "one at a time" eliminates the danger that a Justice (unlike members of Congress) will enter office with cohorts who will form a bloc and create pressure for conformity.<sup>271</sup>

Even though Rehnquist did not comment directly on the election campaign, the political relevance of his arguments was patent, and the spectacle of a Justice commenting on a politically-charged issue on the eve of an election was, in the words of one legal journalist, "particularly striking."<sup>272</sup> Denouncing this "blatant intrusion into partisan politics," legal scholar Herman Schwartz warned that "[t]his injudicious activism may well presage the Court we will get if Ronald Reagan appoints a few more Justices like Justice

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268. Editorial, *Shaping the Court*, SAN DIEGO UNION-TIRB., Nov. 3, 1984.

269. *Rehnquist on Justices*, N.Y. TIMES, Oct. 20, 1984, at 9.

270. *Id.*

271. *See id.*

272. Linda Greenhouse, *Candid Look at High Court Finds That Presidents Can't Pack Bench*, N.Y. TIMES, Oct. 20, 1984, at 1.

Rehnquist.<sup>273</sup> Meanwhile, a *New York Times* editorial suggested that Rehnquist's delivery of "such a speech in the midst of a presidential campaign" discredited Rehnquist's argument that Justices stand above partisan politics.<sup>274</sup>

Rehnquist was not the only Justice who made comments during the campaign that seemed to have the 1984 election in mind. Speaking at the Cosmos Club in Washington in September, Blackmun described the Court as "moving to the right where it wants to go by hook or by crook."<sup>275</sup> A month earlier, Stevens had publicly chastised his conservative colleagues for "enthusiastic attempts to codify the law instead of merely performing the judicial task of deciding the cases that come before them" in recent decisions limiting affirmative action and the rights of criminal defendants.<sup>276</sup> The comments of Blackmun and Stevens may have encouraged Mondale to make the Court more of an election issue.

As in other elections, however, there is little evidence that judicial issues actually swayed many votes in 1984.<sup>277</sup> The increased focus on Supreme Court appointments presaged the upcoming controversy over Robert Bork's nomination to the Court.

### T. *The 1988 Election*

The controversy over Reagan's nomination of Rehnquist to the Chief Justiceship in 1986 and the firestorm over the nomination of Bork in 1987 called such sharp attention to the importance of Supreme Court appointments that one would have expected the Court to emerge as a significant issue in

273. Herman Schwartz, *Rehnquist's Partisan Intrusion*, N.Y. TIMES, Oct. 26, 1984, at 35. Schwartz also argued that "despite a few well-publicized exceptions, Presidents rarely have been disappointed with the voting records of the people they appoint." *Id.*

274. See Editorial, *Justice Rehnquist's Assurances*, N.Y. TIMES, Oct. 23, 1984, at A32.

275. *High Court Seen Moving to Right*, N.Y. TIMES, Sept. 21, 1984, at B3.

276. See Stuart Taylor, Jr., *Justice Stevens Is Sharply Critical of Supreme Court Conservatives*, N.Y. TIMES, Aug. 5, 1984, at 1.

277. Professor Stephenson has written that

[i]n contrast to the election of 1968, the Supreme Court and social issues, as conspicuous in the campaign as they were, did not measurably affect the outcome of the election of 1984. Reagan's popularity was sufficiently great as to have defeated Mondale had social issues such as abortion not energized some of Reagan's ardent supporters. Many voters picked Reagan in spite of, not because of, his stand on abortion.

STEPHENSON, *supra* note 1, at 209.

the 1988 election,<sup>278</sup> especially since the Court's membership remained highly geriatric. Yet judicial issues were not prominent in the 1988 campaign. The relative obscurity of judicial issues in the campaign in the wake of the Bork controversy puzzled many observers.<sup>279</sup> Other commentators pointed out that the bitterly fought Bork nomination may have discouraged discussion of judicial issues because it demonstrated that the Court could be a political tinderbox.<sup>280</sup> As Bork himself remarked, the presidential candidates "may not know which way it will cut."<sup>281</sup> Dukakis particularly had reason to avoid the issue since it could have involved him in discussion of issues such as abortion, civil rights, and criminal justice that he needed to avoid if he was to shake off Bush's efforts to tag him as a dangerous liberal.<sup>282</sup> Some observers concluded that court issues were not prominent in the campaign because both candidates were so moderate that that they would appoint similar types of judges.<sup>283</sup> Other observers argued just the opposite—that there was no issue on which the candidates differed more widely.<sup>284</sup>

Although the Court was dividing five-to-four in favor of conservatives in many cases, Bush appeared to have more opportunity than Dukakis to influence the Supreme Court's direction because the three oldest Justices, Brennan, Marshall, and Blackmun, all who were more than eighty by the end of Reagan's term, were the Court's most liberal members.

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278. In particular, the televising of Bork's confirmation hearings made many Americans much more cognizant of judicial issues.

279. See Bob Dart, *Bush Likely Would Influence Court More Than Dukakis*, ATLANTA J.-CONST., Oct. 19, 1988, 1988 WL 6004294. Schwartz contended that "Bush has moved far to the right on social issues. He has promised these people the sun, the moon, and the stars." *Id.*

280. See Rita Ciolli, *Unaddressed Issue: High Court's Future*, NEWSDAY, Oct. 17, 1988, 1988 WL 2984072. Senator Hatch, for example, explained that "both sides are a little afraid. Bush saw what happened to Bob Bork, and Dukakis knows he would be vulnerable, too." *Id.* Similarly, James McClellan, the President of the conservative Center for Judicial Studies, described the judicial issue as "the burning ember underneath the political fire that neither side wants to stoke." *Id.*

281. John Omicinski, *GNS Spotlight*, Sept. 28, 1988.

282. See Ciolli, *supra* note 280 (quoting Arthur Krop, President of People for the American Way).

283. See Omicinski, *supra* note 281 (quoting George Washington University Law Prof. John Morgan).

284. See Adam Pertman, *Election Key to High Court Balance*, BOSTON GLOBE, Sept. 18, 1988, 1988 WL 4632696.

Unless departures occurred among the Court's younger members, Democrats therefore could only realistically hope for the Court to retain its balance, while Republicans could hope to move the Court decisively in a conservative direction.<sup>285</sup> In a speech to federal court of appeals judges in July 1988, Blackmun predicted that judicial issues would make the election "a very significant one" and that "the court could be become very conservative into the 21<sup>st</sup> century" if Bush won.<sup>286</sup> Similarly, Bush was expected to have more opportunity than Dukakis to influence the lower federal courts because many of the Carter appointees were expected to retire.<sup>287</sup>

Judicial experts were divided on the extent to which Bush would try to replace liberal Justices with conservatives. One legal scholar, Herman Schwartz, warned that Bush would placate the right wing of his party by giving them "more Bob Borks."<sup>288</sup> Other scholars, however, predicted that Bush's judicial appointments would reflect what they regarded as his essential moderation.<sup>289</sup> Moreover, some observers pointed out that the likelihood that Bush would face a Democratic Senate would diminish the chances that Bush would appoint ultra-conservatives to the Court.<sup>290</sup>

Dukakis emphasized judicial issues primarily in his appeals to women and African-Americans. He warned that Bush might appoint Justices who would overturn *Roe*,<sup>291</sup> a prediction that was not unwarranted since the Republican platform called for "the appointment of justices at all levels of the judiciary who respect traditional values and the sanctity of innocent human life." Both candidates promised that they would not use an abortion litmus test in appointing judges.<sup>292</sup> Bush made this pledge notwithstanding the Republican platform's advocacy of the appointment of pro-life judges. Assuring a predominately black audience near the end of the campaign that judicial appointments would be a key part of

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285. *See id.*

286. Ciolli, *supra* note 280.

287. *See id.*

288. Dart, *supra* note 279.

289. *See id.* (quoting A.E. Dick Howard and Burt Neuborne).

290. *See* Dart, *supra* note 279; *Hatch Flays Dukakis Judicial Record*, ASSOCIATED PRESS, Oct. 18, 1988, 1988 WL 2694133.

291. *See* Kevin Sack, *Both Candidates Focus on Luring Swing Democrats*, ATLANTA CONST., Nov. 1, 1988, 1988 WL 6006509.

292. *See* Dart, *supra* note 279.

his effort to revitalize civil rights activism, Dukakis promised to "choose people like Thurgood Marshall . . . not Robert Bork, for our nation's courts."<sup>293</sup> Dukakis also criticized Reagan for appointing too few women and minorities to the federal bench and pointed with pride to his record of appointing significant numbers of women and minorities to the Massachusetts courts.<sup>294</sup>

Meanwhile, Republicans warned that Dukakis would appoint leftist judges. A week before the election, Bush promised to "appoint moderate persons of conservative views" and alleged that Dukakis "would appoint doctrinaire liberals."<sup>295</sup> In a number of speeches, Bush charged that Dukakis nominees would be unduly lenient with criminals. Similarly, Reagan publicly alleged that Dukakis would nominate liberal activists who were soft on crime.<sup>296</sup>

Dukakis's judicial appointments as Governor of Massachusetts provided insights into the type of persons he might appoint to the federal bench. In contrast with Bush, who had never made a judicial appointment, Dukakis as Governor had appointed 127 Massachusetts judges, including two members of the Supreme Judicial Court of Massachusetts.<sup>297</sup> During the brief discussion of judicial issues in the second of the three debates, Dukakis explained that he had appointed judges on the basis of "independence and integrity and intelligence" rather than ideological criteria, a point he reiterated later in the campaign.<sup>298</sup> Some of Dukakis's opponents alleged that he had appointed liberal activists,<sup>299</sup> while studies of Dukakis's judicial appointments characterized them as highly

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293. Dennis Bell, *Rivals Differ on Rights Remedies*, NEWSDAY, Oct. 25, 1988, at 21, 1988 WL 2985882..

294. See Pertman, *supra* note 284. Five percent of Reagan's judicial nominees were members of racial minority groups, compared with eleven percent of Dukakis's. See *id.* Nine percent of Reagan's nominees were women, compared with eighteen percent of Dukakis's. See *id.*

295. Jerome R. Watson, *Bush vows early summit*, CHI. SUN-TIMES, Nov. 2, 1988, 1988 WL 4690973.

296. See *Duke Rips Bush's 'Lies,'* CHI. SUN-TIMES, Oct. 22, 1988, 1988 WL 4689125.

297. See Ciolli, *supra* note 280; Dart, *supra* note 279.

298. See Ciolli, *supra* note 280.

299. Senator Orrin Hatch of Utah claimed that the judges, Paul Liacos and Ruth Abrams, had pursued the "ACLU social agenda." See *Hatch Flays Dukakis Judicial Record*, *supra* note 290.

competent and generally moderate to liberal.<sup>300</sup> Dukakis drew widespread praise for instituting a judicial merit selection process early in his first term, which he had followed during all three of his terms,<sup>301</sup> and for the time and attention that he had devoted to reviewing judicial candidates.<sup>302</sup> Dukakis was expected to restore Carter's practice of receiving non-binding recommendations from a nominating commission, a practice that Reagan had abandoned.<sup>303</sup>

Bush's repeated attacks on Dukakis for his membership in the ACLU naturally made civil rights activists leery about the sort of judges that Bush would nominate.<sup>304</sup> In a speech late in September, Bush asked whether Dukakis would consult the ACLU in making judicial appointments.<sup>305</sup> Bush's persistent advocacy of flag salutes in schools and his frequent attacks on Dukakis for vetoing a statute requiring teachers to lead such salutes helped to confirm liberal suspicions that Bush's judicial nominees would be hostile toward civil liberties,<sup>306</sup> although this fear overlooked the often gaping disparity between campaign rhetoric and presidential performance.

In an observation that could be applied to most presidential campaigns, one commentator stated that "[n]either candidate has discussed in detail his vision of the court; the legal philosophy and the qualifications he would expect of a nominee, or the selection process he would use in choosing one. Instead, each has used references to the court to bolster campaign themes."<sup>307</sup> The candidates discussed judicial issues only in the second of the three debates, in which Bush promised to try to spare the nation from a liberal majority "that is

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300. See William J. Choyke, *Dukakis' Appointments to Judiciary Win Praise*, DALLAS MORNING NEWS, Sept. 24, 1988, at 1A, 1988 WL 5327773.

301. See *id.* Dukakis appointed a Judicial Nominating Council, which investigated applicants for judgeships and recommended three to the governor for each post. The governor's choice, in turn, was confirmed by an elected nine-member Executive Council. See *id.*

302. See Jonathan Groner, *Dukakis and Judges: Micro-management*, AM. LAW., Sept. 1988, at 109-13.

303. See *id.* at 113.

304. See Bell, *supra* note 293, at 21.

305. See *Bush Hints ACLU Might Pack Dukakis High Court*, COURIER-J., Sept. 30, 1988, 1988 WL 3302380.

306. See Nat Hentoff, *What Kind of Justices Would They Name?*, WASH. POST, Sept. 17, 1988, at A23, 1988 WL 2029480.

307. Ciolli, *supra* note 280.

going to legislate from the bench."<sup>308</sup> When Bush defended Reagan's judicial nominees, including Bork, as "outstanding," Dukakis retorted that if Bush "thinks that Robert Bork was an outstanding appointment, that is a very good reason for voting" Democratic.<sup>309</sup> Some liberals expressed regret that Dukakis failed to make more of an issue out of the judiciary during the campaign,<sup>310</sup> and various conservatives expressed the same disappointment about Bush.<sup>311</sup>

#### U. *The 1992 Election*

Judicial issues in the 1992 campaign were aptly described as "the dog that didn't bark."<sup>312</sup> Yet Clarence Thomas's controversial Supreme Court nomination had transfixed and polarized the nation for several days only a year earlier.<sup>313</sup> One might have expected judicial issues to attain a new salience in the 1992 campaign. In particular, the Court's close division on key issues, notably abortion, should have made judicial issues prominent. The importance of judicial issues, however, remained what one commentator called "the best kept secret" of the campaign.<sup>314</sup> As in so many other campaigns, political observers expressed dismay that voters seemed to lack awareness of the election's importance in shaping the federal judiciary.<sup>315</sup> But an exit poll conducted by major television networks indicated that more than one-third of voters said that judicial issues were very important to them in selecting a candidate.<sup>316</sup> This suggests that it was the candidates, rather than the voters, who tended to neglect judicial issues in 1992. Paradoxically, the massive attention that the

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308. *Id.*

309. *See id.*

310. *See* Jacqueline Trescott, *The Voting Struggle: Marking 20 Years of Ballot Rights Battles*, WASH. POST, Sept. 27, 1988, at C02, 1988 WL 2027377 (quoting Joseph Rauh, Jr.).

311. *See* Pertman, *supra* note 284.

312. *Silence on the Court*, CHRISTIAN SCI. MONITOR, Sept. 25, 1992, at 20, 1992 WL 9870885.

313. *See, e.g.*, Abraham, *supra* note 37, at 309-13.

314. *See* Timothy M. Phelps, *Next President Could Alter Balance of Supreme Court*, HOUSTON CHRON., Nov. 1, 1992, at 22, 1992 WL 11455029.

315. *See, e.g.*, Marianne Means, *Voters Will Decide Supreme Court's Direction*, S.F. EXAM'R, Oct. 16, 1992, at A23, 1992 WL 7588951; Editorial, *The Forgotten Issue: The Ideological Soul of the Supreme Court Is at Stake*, DES MOINES REG., Oct. 19, 1992.

316. *See* Jill Lawrence, *Exit Polls Found Jobs, the Economy Top Concerns*, THE COURIER-J. (Louisville, Ky.), Nov. 4, 1992, 1992 WL 7864892.

Court attracted during the Thomas nomination may have made all three of the major candidates shy about discussing the Court since the nation remained deeply divided over Thomas.<sup>317</sup> Bush particularly had reason for reticence about the Court since Anita Hill's charges against Thomas had both embarrassed the Bush Administration and had made many women voters hostile toward Bush's nomination of Thomas,<sup>318</sup> while many conservatives were disappointed over Bush's nomination of the increasingly liberal David Souter. Clinton may have avoided the issue after he apparently offended even many pro-choice voters early in the campaign by promising to appoint only Justices who would uphold *Roe v. Wade*.<sup>319</sup>

Moreover, as in all elections, discussion of the judiciary could require the candidates to address controversial issues that they would rather avoid. As Nan Aron, Executive Director of the Alliance for Justice, a liberal coalition of public interest lawyers, explained, "[t]here is a fear that once a candidate begins to talk about the court and the makeup of the federal bench, that candidate will be forced into taking positions on issues, particularly social issues such as prayer in school [or] desegregation."<sup>320</sup> Clinton especially wanted to avoid these issues in order to escape the stigmatic "liberal" tag that Bush had so effectively pinned on Dukakis. Discussion of judicial issues might have snared both major candi-

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317. As one editorial observed, "the Supreme Court poses dangers for both candidates, and they may feel that silence is the best policy." *Silence on the Court*, *supra* note 312. Similarly, another commentator remarked that "[n]either President Bush nor Gov. Bill Clinton reminds voters that major constitutional rights depend on the outcome of this election. They have their reasons, but it is a curious omission." Means, *supra* note 315.

318. As one Democrat explained, "[t]he court is bad news for George Bush. He cannot get up and defend his record when a majority of people now say they believe Anita Hill over Justice Thomas. That nomination engenders ridicule in some quarters of the public." Phelps, *supra* note 314.

319. As one editorial explained, "[e]ven many pro-choice voters are uncomfortable with such an overt declaration of a 'litmus test' for Supreme Court nominees. Clinton's pledge invites accusations of hypocrisy, since for 12 years Democrats have decried purported conservative litmus tests for judicial appointments." *Silence on the Court*, *supra* note 312. See also Phelps, *supra* note 314. Despite the criticism, Clinton continued to defend the litmus test throughout the campaign, pointing out that the GOP platform also advocated an abortion litmus test. See '92 Presidential - Clinton: Talks on Litmus Test; Details Restrictions in NJ, 4 ABORTION REP. (Am. Pol. Network), Oct. 30, 1992, at 18, WESTLAW, Citation 10/30/92 APN-AB 18 (providing partial transcript of *Prime Time Live*, ABC television broadcast, Oct. 29, 1992).

320. Phelps, *supra* note 314.

dates into a discussion of abortion, a topic that both had particular reason to avoid in order to appeal to voters beyond their core constituencies.<sup>321</sup>

The Court also might have receded into the background because economic issues dominated the campaign.<sup>322</sup> Voters in 1992 seemed more concerned about their jobs and their investments than about law-related issues such as crime or constitutional liberties. No one could deny, however, that the next President was likely to make appointments to the Court. Although the resignations of Brennan and Marshall during Bush's first term reduced the average age of the Justices from its unusually high 1988 level, the eighty-three year old Blackmun seemed likely to resign during the next four years and there also was widespread speculation concerning fairly imminent departures by seventy-five year old White, seventy-two year old Stevens, or sixty-eight year old Rehnquist.<sup>323</sup> Inasmuch as the oldest member of the Court was probably its most liberal, the re-election of Bush appeared more likely to affect the Court than Clinton's election since the replacement of Blackmun by a Bush appointee would be likely to make the Court more conservative and could create an anti-abortion majority. Expressing the fear of many liberals, columnist William Raspberry declared that the Court "is bent so far to the right already that leaving it to Bush to name one or two more justices would constitute a judicial and political disaster far into the next century."<sup>324</sup> The *Chicago Tribune* spoke for many conservatives in warning that Clinton was likely to nominate

justices who are eager to pick up where the activist courts of the 1960s and 1970s left off and to restore the liberal decisions that the Rehnquist Court has either narrowed or reversed. Racial quotas would be subject to less scrutiny;

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321. As one commentator explained, both candidates' "supporters and detractors are locked in on that issue [abortion]. Both men need to expand their base to voters for whom that issue is not paramount." Means, *supra* note 315.

322. See Phelps, *supra* note 314 (discussing Bush advisor James W. Cicconi's view that economic issues were the focus of the campaign).

323. See, e.g., Editorial, *Voting for Justices*, ST. PETERSBURG TIMES, Oct. 7, 1992, at 10A, 1992 WL 10990875; Joan Biskupic, *New Term Poses Test for Alliance at Center of Conservative Court*, WASH. POST, Oct. 4, 1992, at A12, 1992 WL 2163684.

324. William Raspberry, *Remember Judicial Appointments*, WASH. POST, Oct. 30, 1992, at A27, 1992 WL 2159135.

police and prosecutors would face new obstacles in obtaining convictions; appeals for the expansion of established constitutional rights would get a sympathetic hearing.<sup>325</sup>

Judicial issues arose most prominently in connection with abortion, with Democrats warning that the appointment of new Supreme Court Justices by Republicans could result in the rejection of *Roe v. Wade*.<sup>326</sup> In Democratic vice presidential nominee Albert Gore's debate with vice presidential candidate J. Danforth Quayle, for example, Gore alleged that Republicans "want to stack the Supreme Court with justices who will take away the right to privacy."<sup>327</sup> As one commentator concluded shortly before the election, "[a]bortion seemed to be the only legal issue mobilizing voters."<sup>328</sup> Raspberry aptly pointed out that abortion had "become a proxy" for other controversial issues, including free speech, church-state separation, privacy, and racial and gender issues.<sup>329</sup>

The Court therefore may indirectly have affected a substantial number of votes since the widespread defection of women voters from Bush was attributable in part to disillusionment over the Thomas nomination and concern about the GOP's increasingly hard-line position on abortion and gender discrimination issues. The Court's preservation of *Roe v. Wade* by a bare majority of five-to-four in its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>330</sup> may have attracted women voters to Clinton since it demonstrated the fragility of abortion rights. Blackmun's concurring opinion dramatically called attention to his fear that his successor would cast a decisive vote to overturn *Roe* when his

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325. Editorial, *Bush's Winning Judicial Philosophy*, CHI. TRIB., Oct. 9, 1992, at 22, 1992 WL 4527698.

326. See, e.g., *Abortion Rights Group Targets Republicans, Independents in Mailing Blitz*, ASSOCIATED PRESS POL. SERVICE, Oct. 6, 1992, 1992 WL 5144704.

327. *Campaign '92: Transcript of the Vice Presidential Debate (Part II)*, WASH. POST, Oct. 14, 1992, at A17, 1992 WL 2161874. Gore repeatedly refused to respond to Quayle's question about whether he supported the ruling in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), upholding a twenty-four hour waiting period for an abortion. See *Campaign '92: Transcript of the Vice Presidential Debate (Part II)*, *supra*.

328. Richard Carelli, *Presidential Legacy May Be Written in Courts*, FORT-WORTH STAR-TELEGRAM, Oct. 29, 1992, at 6, 1992 WL 10813588.

329. See Raspberry, *supra* note 324.

330. *Casey*, 505 U.S. at 833.

advancing years forced him to leave the Court: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."<sup>331</sup> The National Abortion Rights Action League emphasized the closeness of the *Casey* vote in its multimillion-dollar campaign to elect Clinton.<sup>332</sup> On the other hand, *Casey* perhaps detracted from Democratic warnings about the dire need for a Democrat to nominate Justices insofar as the joint opinion in *Casey*, to the surprise of many commentators, included three Justices appointed by Republican presidents – Sandra Day O'Connor, Anthony Kennedy, and David Souter.

While Democrats primarily used the Court issue in connection with abortion, Republicans used it in connection with crime. As Bush told an Ohio rally shortly before the election, "I don't want some left-wing judges appointed to the Supreme Court who don't care about the victims of crime and spend all their time worrying about the criminals."<sup>333</sup> Addressing a Fraternal Order of Police convention, Bush received much applause when he warned that Clinton would appoint federal judges "far more sympathetic to criminal rights than those of victims."<sup>334</sup>

Appearing on *MTV* in June, Clinton spooked conservatives by remarking that New York Governor Mario Cuomo "would make a good Supreme Court justice." Republicans eagerly seized upon this remark as an example of Clinton's intention to turn the Court to the left. Bush frequently derided Clinton's remark about Cuomo, predicting that Cuomo's appointment to the Court would generate "disaster."<sup>335</sup> As a senior advisor to Bush remarked, Clinton's mention of Cuomo as his "beau ideal" for the Court was tantamount to an-

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331. *Id.* at 943.

332. See *Abortion Rights Group Targets Republicans, Independents In Mail- ing Blitz*, *supra* note 326.

333. Bruce Alpert, *Bush Heralds Good Economic News*, NEW ORLEANS TIMES-PICAYUNE, Oct. 28, 1992, at A1, 1992 WL 4858115.

334. Bill Sloat & Vindu P. Goel, *FOP Makes Bush's Day*, PLAIN DEALER (Cleveland, Ohio), Oct. 10, 1992, 1992 WL 4300731.

335. James Gerstanzang, *Bush Greeted by Applause – and Challenges*, L.A. TIMES, Oct. 30, 1992, at 1, 1992 WL 2845412. Bush's references to the prospect of Cuomo's appointment encouraged otherwise lethargic crowds to boo Clinton. See Martin Kasindorf, *He's Closing in Bush, Gaining in Polls, Takes Battle to Midwest*, NEWSDAY, Oct. 29, 1992, at 7, 1992 WL 7563674.

nouncing that he was "not serious about a tough criminal justice system or the death penalty."<sup>336</sup> Similarly, conservative commentator Thomas Sowell averred that "[c]riminals will have another friend on the high court if Clinton follows through by putting Cuomo there."<sup>337</sup> Hillary Clinton's involvement as a lawyer in social causes exacerbated fears that Clinton would nominate liberal judges.<sup>338</sup>

Liberals likewise recognized the election's significance for the lower federal bench. As an ACLU officer remarked, "[w]hoever is president the next four years will be able to change dramatically the dynamics of the federal courts."<sup>339</sup> Approximately one hundred federal judgeships were vacant during the campaign.<sup>340</sup> Liberals warned that Reagan and Bush appointees, who already constituted 534 of the 837 federal judges, could compose ninety percent of the federal judiciary if Bush won a second term.<sup>341</sup> Pointing out that lower federal judges have vast power to alter the legal landscape, particularly since the Supreme Court had reduced its caseload, liberals alleged that lower federal judges appointed by Bush and Reagan had eroded the libertarian decisions of the Warren Court despite their professed abhorrence of judicial activism.<sup>342</sup> Critics also faulted Bush for failing to nominate more racial minorities to the bench, contrasting the five percent appointed by Bush with the twenty-two percent appointed by Carter.<sup>343</sup> One commentator noted with dismay that none of the three candidates during any of the three de-

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336. Phelps, *supra* note 314.

337. Thomas Sowell, *Candidates and Role of Judges*, KANSAS CITY STAR, Oct. 30, 1992, 1992 WL 3874205.

338. Phelps, *supra* note 314. In contrast to Dukakis's appointment of numerous Massachusetts judges, Clinton's record as Governor of Arkansas provided little opportunity for predicting what type of judges he would select, because Arkansas judges are elected, and the sixty judges appointed by Clinton served only interim terms. See Marshall Ingwerson, *Next President's Impact on Courts Will Be Powerful*, CHRISTIAN SCI. MONITOR, Oct. 2, 1992, at 1, 1992 WL 9871076.

339. Carelli, *supra* note 328 (quoting Steven Shapiro).

340. See *id.*

341. See Tony Mauro, *High Stakes in the Lower Courts*, S.F. CHRON., Sept. 20, 1992, 1992 WL 6281105.

342. As one critic charged, "the Reagan and Bush judiciary has attacked precedent with gusto and made leaps in interpretation no passive judge would feel comfortable making," particularly in cases involving criminal procedure. Mauro, *supra* note 341.

343. See *id.* See also *The Forgotten Issue*, *supra* note 315.

bates said a word about how they would use lower federal court appointments to influence the law.<sup>344</sup>

### V. *The 1996 Election*

As one commentator aptly remarked, the Supreme Court was “possibly the most consequential – and the most neglected – issue in the 1996 campaign.”<sup>345</sup> Anecdotal evidence suggests, however, that some individual voters viewed the Court issue as decisive.<sup>346</sup> Various newspapers also cited the Court as a major reason for their endorsement of one candidate or the other.<sup>347</sup>

During his successful campaign for the Republican nomination, Robert Dole briefly tried, but failed, to transform the courts into an election issue. In a major address in April, Dole warned that Clinton’s re-election could produce the most liberal court since the Warren era. “We could lock in liberal judicial activism for the next generation,” Dole declared.<sup>348</sup> “The social landscape could be dramatically changed.”<sup>349</sup> Dole promised to exclude the American Bar Association from the judicial selection process and to replace it with a “nonpartisan integrity panel” composed of police, prosecutors, crime vic-

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344. See Carelli, *supra* note 328. Conservatives expressed frustration that judicial issues were not emphasized. See Cal Thomas, *Court Should Be Top Election Issue*, DALLAS MORNING NEWS, Oct. 11, 1992, 1992 WL 10763424. Bork warned that Clinton would make “a lot of very liberal appointments and they will go sailing through the Democrat-controlled Senate,” which would tilt what he described as “a very liberal activist court” even farther to the left. Eric Houston, *Bork Sees Battle for Court Control*, SEATTLE POST-INTELLIGENCER, Oct. 3, 1992 WL 4816299. See also Matt Campbell, *Clinton Edge on Supreme Court: Bork Predicts Democrat Would Name 3*, KANSAS CITY STAR, Oct. 31 1992, 1992 WL 6475365.

345. Richard Berke, *High Court Is Missing Issue in Campaign*, Oct. 20, 1996, STATE-J. REG. (from New York Times News Service editorial), 1996 WL 13471266.

346. Some voters said that the Court issue convinced them to vote for Dole. See Maria Saporta, *Economy, Ethics Weigh Heavily as Execs Choose Clinton or Dole*, ATLANTA J. & CONST., Oct. 16, 1996, 1996 WL 8236661. See also *My Choice '96*, STATE-J. REG., Oct. 14, 1996 (letter to editor), 1996 WL 13470642.

347. See Editorial, *Both on Record and for the Future, Voters Should Re-Elect Clinton*, BUFFALO NEWS, Oct. 20, 1996, 1996 WL 5874271; Editorial, *Four More Years for Flawed Clinton*, CHI. SUN-TIMES, Oct. 20, 1996, 1996 WL 6768992.

348. Harvey Berkman & Claudia MacLachlan, *Don't Judge a Book . . .*, NAT'L L. REV., Oct. 21, 1996, at A1.

349. *Id.* Dole explained that he had voted for all but three of Clinton’s 187 judicial nominees, including both of his Supreme Court nominees, “out of deference to a president’s constitutional prerogative.” *Id.*

tims, legal scholars, and representatives of various legal and professional organizations. “Originally founded to ensure competence and integrity in the bar, the ABA has become nothing more than another blatantly partisan liberal advocacy group.”<sup>350</sup>

Dole directed particular criticism at the law enforcement decisions of Clinton’s appointees. “A startling number of Mr. Clinton’s lower-court judges have demonstrated an outright hostility to law enforcement,” Dole alleged.<sup>351</sup> On the floor of the Senate, Dole alleged that Clinton’s nominees “are attempting to stamp their own brand of liberalism on America”<sup>352</sup> and that “[t]he President may talk a good game on crime, but the real-life actions of Clinton judges . . . often don’t match the President’s tough-on-crime rhetoric.”<sup>353</sup> Dole’s warning, however, appeared to have little resonance with voters, and Dole quickly reduced judicial issues to a minor role in his campaign.

Some commentators believed that Dole’s efforts to make judicial appointments into a major election issue failed because Clinton’s court appointments were generally moderate.<sup>354</sup> Indeed, many liberals expressed disappointment during the presidential campaign that Clinton’s nominees to the federal courts had been so conservative.<sup>355</sup> Although Clinton’s judicial nominees rankled conservatives—as one conservative activist complained, Clinton only had “backed away from radicals and settled for liberals”<sup>356</sup>—Clinton’s nominees did not offend the temper of the general public. Commenting on the unimportance of judicial issues in the campaign, a political scientist observed that “[i]f Clinton had appointed the liberal equivalents of Thomas and . . . Scalia, then he might have scared the Republicans. But the main criticism of Breyer was that he had too many holdings in Lloyd’s of Lon-

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350. *Id.*

351. *Id.*

352. 142 CONG. REC. S8440 (1996).

353. *Id.* at S9359.

354. See Berkman & MacLachlan, *supra* note 348.

355. See Nat Hentoff, *Bill Clinton’s Judges: Clinton’s Nominees are Less Liberal than Ford’s and Nixon’s*, VILLAGE VOICE, Oct. 29, 1996, 1996 WL 11170465.

356. Berkman & MacLachlan, *supra* note 348 (quoting Thomas L. Jipping, Director of the Judicial Selection Monitoring Project at the Free Congress Foundation).

don.<sup>357</sup>

Another observer attributed the low profile of judicial issues to the absence of "recent dramas to draw public attention to the [C]ourt's work or its members," in contrast to 1992, when memories of the controversial Thomas nomination remained fresh, or 1988, when the fight over the Bork nomination was recent.<sup>358</sup> The deputy manager of Clinton's campaign ascribed public apathy about the Court to the prominence of economic issues among voters.<sup>359</sup>

Clinton apparently did not emphasize the Court issue because he perceived that warnings that Republicans would fill the bench with conservatives would call undue attention to the liberalism of his own appointments and encourage Republicans to renew the Court issue. Additionally, since Clinton was far ahead in the polls, he did not need to energize core constituents such as feminists or gays who might have responded to the Court issue.<sup>360</sup> Conservatives also may have had less interest in the Court because they had despaired of overturning *Roe v. Wade* and had turned their attention to legislative remedies such as bans on late-term abortions.<sup>361</sup> Rather than making any sustained effort to emphasize judicial issues, Democrats and Republicans alike limited themselves to sporadic, if often spirited, references to the courts.<sup>362</sup>

Although the candidates hesitated to embrace the Court as an election issue, African-American voters emphasized its importance. As one black columnist explained, "[t]he fact that whoever is President during the next four years will have the opportunity to appoint at least two new members to a Supreme Court that has made five-to-four decisions against affirmative action and redistricting is as urgent a reason as African Americans need to defeat ultraconservative . . . Dole."<sup>363</sup> An African-American woman who was a Clinton

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357. *Id.* (quoting Robert A. Carp of the University of Houston).

358. *See* Berke, *supra* note 345.

359. *See id.* (citing Ann Lewis).

360. *See id.*

361. *See id.*

362. Addressing the Democratic National Convention, New York Governor Mario Cuomo shouted, "The Republicans are the real threat to the Supreme Court, don't you forget that!" *Id.* In his vice presidential acceptance speech at the same convention, Gore warned that Republicans "want a president who will appoint the next three justices of the Supreme Court so they can control all three branches of government and take away a woman's right to choose." *Id.*

363. Walter Farrell, *A Massive Black Vote for President Clinton Is a Matter of*

delegate to the Democratic National Convention declared in a newspaper column, “[T]he make-up of the Supreme Court is near and dear to the basic human rights I value. A Dole presidency would guarantee an end to a woman’s right to choose and civil rights protections.”<sup>364</sup>

Wrongly forecasting that resignations would occur during the next four years, some Republicans and conservatives tried to revive Dole’s early attempt to make the courts an election issue. Speaker of the House Newt Gingrich stated in October that the principal difference between the candidates was in the type of persons they would nominate to the Supreme Court, and he predicted that “the next president is going to decide the shape of the Supreme Court for a generation.”<sup>365</sup> Similarly, Elizabeth Dole, in campaigning for her husband, warned that the next President might appoint as many as three Justices.<sup>366</sup> And, campaigning for Republican senatorial candidates, Senate Judiciary Committee Chair Orrin Hatch of Utah emphasized that continued Republican control of the Senate would help to prevent Clinton from making left-wing appointments to the federal courts.<sup>367</sup> Despite such campaigning, Dole himself continued not to emphasize the court issue.<sup>368</sup>

As Clinton had no opportunity to make any appointment to the Court during his second term, the lack of prominence of

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*Survival For African Americans?*, JACKSONVILLE FREE PRESS, Oct. 23, 1996, 1996 WL 16628720.

364. Barbara Lee, *Democrats Must Put Money Where Mouths Are*, OAKLAND POST, Sept. 4, 1996, 1996 WL 15809565.

365. Gil Klein, *Election the Swing Vote; Choice of President to Set Makeup of Supreme Court*, ROCKY MOUNTAIN NEWS, Oct. 20, 1996, 1996 WL 12352343. As one conservative warned, “[i]f Clinton is reelected, there is virtual certainty that liberal judicial activism will dominate the Supreme Court – and, therefore, American law and society – for decades to come.” David Wagner, *Will the Voices of Reason Be Audible After Election?*, INSIGHT MAG., Nov. 11, 1996, 1996 WL 11224970 (published before election).

366. Dennis Gale, *Elizabeth Dole Boosts Campaigns of Her Husband and Pressler*, ASSOCIATED PRESS POL. SERVICE, Oct. 27, 1996, 1996 WL 5418264.

367. See C. David Kotok, *Republican: Senate Must Check Clinton*, OMAHA WORLD-HERALD, Oct. 21, 1996, 1996 WL 6035765.

368. See Martin Mawyer, *Dole’s Lost Army of Christian Soldiers*, WASH. POST, Oct. 13, 1996, at C-4. After Dole’s final debate with Clinton, conservative columnist Cal Thomas faulted Dole for failing to talk about “what liberal Supreme Court justices will do to further undermine the value and fabric of life.” Cal Thomas, *Dole Uses Jabs Instead of Knockout Punch*, BUFF. NEWS, Oct. 21, 1996, 1996 WL 5874684. Many conservatives expressed irritation that Dole did not emphasize the Court issue. See *id.*

judicial issues in the 1996 campaign was prophetic. Since, however, Clinton continued to reshape the lower federal bench, more voters of both parties perhaps ought to have heeded Dole's warning early in the campaign that the election's outcome could have a significant impact on the federal courts.

### X. *The 2000 Election*

Judicial issues were more prominent in the 2000 election than in any election since 1968. One newspaper editorial aptly described the Court as "a relatively quiet but powerful issue in this year's presidential race."<sup>369</sup> Many newspaper editorials endorsing Gore cited the Supreme Court as a reason for their choice.<sup>370</sup> The salience of judicial issues probably reflected the paucity of other significant issues,<sup>371</sup> the growing public recognition of the Court's importance, and the possibility of several vacancies on the Court during the next presidential term since Chief Justice Rehnquist was seventy-six, Stevens was eighty, and O'Connor was seventy. Additionally, the close five-to-four votes in favor of conservative positions in many cases made the importance of appointments seem especially compelling. Moreover, the dearth of foreign policy issues resulted in greater focus on domestic issues that could have been affected by judicial decisions. Judicial issues also

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369. Editorial, *Tweaking the Court*, MINN. DAILY, Oct. 24, 2000, 2000 WL 28356265.

370. For example, *The Boston Globe* explained that

a Bush court, composed of what he calls "strict constructionists," would set back the clock for women's reproductive freedom, environmental and consumer protection, and civil rights by dismissing federal solutions in favor of an uneven system tied to the whim of each state. The impact of these court appointments – and hundreds of others in lower federal and appeals courts – will echo long after Gore and Bush are writing their memoirs.

*Gore for President*, BOSTON GLOBE, Nov. 3, 2000, 2000 WL 3349070. See also, e.g., *Vote for Gore-Lieberman Ticket*, SUN-SENTINEL (Fort Lauderdale, Fla.), Oct. 29, 2000, at 4H, 2000 WL 28986999; *Election Choices*, MORNING STAR (Wilmington, N.C.), Oct. 31, 2000, 2000 WL 27834526.

371. Celinda Lake, a Democratic pollster, explained in September that the Supreme Court was becoming a prominent issue because "people have no idea what to make this election about. They don't know what the major distinction is between the candidates. They're having a really hard time figuring out what issue they're supposed to vote on. And that's elevating the importance of [the judicial issue], too." *All Things Considered* (National Public Radio broadcast, Sept. 5, 2000), 2000 WL 21471860 (transcript).

may have become more prominent because there may have been a widespread assumption that Congress would remain so closely divided that the next President could not promote any major legislation. In the absence of major legislation, the courts would make important policy decisions. Pollsters were surprised to find that many voters understood that the election could shift the balance of the Court.<sup>372</sup>

As in the previous several elections, liberals and Democrats emphasized the importance of judicial issues. Warnings about the significance of the election became even more apocalyptic in 2000 than in other recent elections. "Wake up, America," Helen Thomas exhorted in her syndicated column shortly before the election. "If . . . Bush wins . . . an ultraconservative majority will dominate the . . . Court for years to come . . . . All I can say is 'cry the beloved country' if Bush-appointed conservatives prevail on the high bench."<sup>373</sup> Similarly, journalist Tom Wicker warned that "[t]hree more Scalia and Thomas style votes would transform what's now a back-and-forth Court into a conservative bastion that could last for generations . . . ."<sup>374</sup> Jesse Jackson declared that the election "may be the supreme issue, because it's not about the next four years, it's about the next forty years."<sup>375</sup> And the Maine attorney who revealed Bush's 1976 arrest for driving while intoxicated declared, "I see Bush as a dangerous candidate . . . and someone who would appoint Clarence Thomas a chief justice of the Supreme Court [sic]."<sup>376</sup>

Democratic candidate Albert Gore, Jr. amplified this theme in many of his campaign speeches. In tightly-contested Michigan nine days before the election, Gore declared that

The Supreme Court is at stake. There are going to be

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372. See *id.* (remark of Democratic pollster Celinda Lake).

373. Helen Thomas, *The Supremes: They're What the Election is All About*, MILWAUKEE J. SENTINEL, Nov. 4, 2000, 2000 WL 26093860.

374. Tom Wicker, *Up for Grabs: The Supreme Court and the Election*, NATION, Oct. 9, 2000, at 11.

375. Laurie Asseo, *Clinton: High Court at Pivotal Point*, AP ONLINE, Oct. 24, 2000, 2000 WL 28615299. Jackson warned that Bush's Court appointments could lead to "a radical reversal on the rights of women and workers and consumer class lawsuits." *Wire Service Report*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 25, 2000, at A4, 2000 WL 3950825.

376. Bob Kemper & Stephen J. Hedges, *Bush Charges 'Dirty Politics' in DUI Flap He Says He Learned from '76 Arrest*, CHI. TRIB., Nov. 4, 2000, 2000 WL 3729054.

three, maybe four . . . maybe even five justices of the Supreme Court appointed by the next president . . . Think about civil rights. Think about women's rights. Think about human rights. Think about antitrust law. Think about Federalism. All of these issues are on the ballot . . .

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Gore made similarly dramatic warnings in other speeches.<sup>378</sup> In Knoxville a few days before the election, Gore alleged that Bush had pledged to move the Court "to the extreme right wing."<sup>379</sup> Despite Gore's frequent references to judicial issues, some liberals urged Gore to issue even more pitched warnings about the election's effects on the composition of the judiciary.<sup>380</sup>

In his efforts to assist Gore, President Clinton also took up the judicial issue. Speaking on radio a few days before the election, Clinton reminded listeners of "all these appointments to the Supreme Court and the other courts that are

377. *Gore in His Own Words*, N.Y. TIMES NEWS SERV., Oct. 30, 2000.

378. Speaking at a labor union meeting in October, Gore declared that [t]he Supreme Court is on the ballot November 7, because the next president will appoint two or three perhaps even four justices out of nine, a majority that will interpret our Constitution for the next thirty to forty years. The cases now pending before the court, the controversies that have been decided but will be revisited, those that have been decided by a five to four margin . . . include civil rights, labor rights, equal rights, women's rights, federalism, the future of individual liberties. These issues could be determined for several decades into the future, and some rights that are now taken for granted could be lost overnight.

Vice President Al Gore Jr., Remarks at the Service Employees International Union Meeting (Oct. 21, 2000), 2000 WL 1563606 (F.D.C.H.) (transcript). Similarly Gore declared in his discussion of the Court in Madison a few days later that "[w]omen's rights are at stake. Disability rights are at stake. Civil rights are at stake. Labor rights are at stake. Individual rights are at stake. Federalism is at stake." Vice President Al Gore Jr., Remarks at a Campaign Event (Oct. 26, 2000), 2000 WL 1594422 (F.D.C.H.) (transcript). See also Vice President Al Gore Jr., Remarks at Rally Held in Green Bay, Wis. (Oct. 30, 2000), 2000 WL 1612378 (F.D.C.H.) (transcript).

379. Sandra Sobieraj, *Gore Hits Bush's Social Security*, AP ONLINE, Nov. 3, 2000, 2000 WL 29037473. Similarly, Gore warned in Green Bay a few days before the election that "[t]he Supreme Court is at risk here. Equal rights and women's rights and civil rights and disability rights and federalism and anti-trust law and the basic interpretation of our constitution for the next thirty - forty years is very much on the ballot this fall." Katherine Q. Seelye, *Gore, Trying to Fend Off Nader, Pledges to Push Campaign Finance Reform*, N.Y. TIMES NEWS SERV., Oct. 31, 2000.

380. Judy Mann, *A Watershed Election for Women's Rights*, WASH. POST, Oct. 27, 2000, at C11, 2000 WL 25424884.

going to come up.”<sup>381</sup> Addressing an Arkansas audience on the eve of the election, Clinton alleged that the judicial issue was “a big deal” in the election because there was a five-to-four majority on the Court “that is determined to limit the ability of our national government to protect and advance the civil rights and basic public health, safety and welfare of the United States.”<sup>382</sup> At a forum sponsored by the People for the American Way two weeks before the election, President Clinton expressed his belief that “[v]irtually no Americans, outside those who follow the day-to-day decisions of the Supreme Court, understand just how many of our . . . rights are at stake by virtue of the possibility of different Supreme Court appointments.”<sup>383</sup>

As in other recent elections, Democrats warned in particular that the election could determine the continuation of abortion rights. In his acceptance speech at the Democratic National Convention, Gore declared, “Let there be no doubt. I will protect and defend a woman’s right to choose. The last thing this country needs is a Supreme Court that overturns *Roe v. Wade*.”<sup>384</sup> The National Abortion Rights Action League aired television ads in closely contested states warning that “[a]s president, George Bush would reverse the Court with anti-choice justices Scalia and Thomas in control.”<sup>385</sup>

On the eve of the election, a poll indicated that sixty percent of voters believed that Bush was unlikely to appoint Justices who would keep abortion legal, while seventy percent believed that Gore would appoint Justices who would protect abortion rights.<sup>386</sup> Gary Bauer, a pro-life activist who was an

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381. Interview of the President by April Ryan, American Urban Radio (Nov. 1, 2000), in U.S. NEWSWIRE, Nov. 2, 2000, 2000 WL 26850803.

382. President William J. Clinton, Remarks by the President to Arkansas Civic Leaders Luncheon (Nov. 5, 2000), in U.S. NEWSWIRE, Nov. 5, 2000, 2000 WL 26850894. Clinton contended that “[t]he Supreme Court is to the right of the Republican Congress already.” *Id.*

383. President William J. Clinton, Remarks at a People for the American Way Reception (Oct. 24, 2000), in 36 WKLY. COMPILATION OF PRESIDENTIAL DOC., 2000 WL 13131826.

384. Vice President Al Gore Jr., Acceptance Speech at Democratic National Convention (Aug. 17, 2000), 2000 WL 1161104 (F.D.C.H.) (transcript).

385. David Callender, *Pro-Choicers: Not Nader*, CAPITAL TIMES, Oct. 28, 2000, at 2A, 2000 WL 24293428. Some observers feared that this strategy may have backfired by drawing more attention to Nader. See Matthew Cooper, *Just Mad About Nader*, TIME, Nov. 6, 2000, 2000 WL 28889173.

386. See Richard L. Berke & Janet Elder, *Undecided Voters Hold Key to Election, Poll Indicates*, N.Y. TIMES NEWS SERV., Nov. 6, 2000, 2000 WL-NYT

unsuccessful candidate for the Republican nomination, was one of the few notable conservatives who openly agreed with liberals that Bush's election was likely to lead to the overturning of *Roe*.<sup>387</sup> Bauer also predicted that if Bush were elected and were careful in his appointments, "we could see in relatively short order the court moving in a much strongly traditional direction on a number of . . . very important matters."<sup>388</sup>

Various commentators pointed out, however, that *Roe* appeared to have a solid majority of six Justices on the Court, even though fewer Justices tended to oppose state regulations of procedures that limited abortion,<sup>389</sup> and that other issues, particularly affirmative action and federalism, were more likely to be affected by a change of Court personnel.<sup>390</sup> As Jeffrey Rosen pointed out, the remarks by the candidates about the Court during their first debate repeated "slogans from old debates that may not turn out to be central during the next four years."<sup>391</sup> Even Gore supporters who warned that Bush's election could result in the Court's rejection of *Roe* acknowledged that Congress also had an important role in protecting abortion rights.<sup>392</sup> Similarly, as an NYU student remarked during the election campaign, "abortion rights are not necessarily controlled only by a few progressive judges, but by mass social movements and feminist activism."<sup>393</sup> In observing that Gore's warnings about Republican Court appointments did not seem to resonate with many younger voters, some Gore supporters contended that younger women were

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387. Speaking on NBC's *Today* show late in October, Bauer predicted that Bush's appointment of more than one Justice to the Court would result in the reversal of *Roe* and the return of the abortion issue to the states. See Charles Lane, *Clinton Presses Bench Question*, WASH. POST, Oct. 25, 2000, at A12, 2000 WL 25424233.

388. *All Things Considered*, *supra* note 371.

389. See Gil Klein, *Next President Could Change the Ideology of Supreme Court*, WINSTON-SALEM J., Nov. 2, 2000, 2000 WL 27229891 (quoting A.E. Dick Howard); Steven B. Presser, *How Bush Would Fix the Supremes*, CHI. TRIB., Nov. 5, 2000, 2000 WL 3729660.

390. See, e.g., Jeffrey Rosen, *The Next Court*, N.Y. TIMES, Oct. 22, 2000, (magazine), at 74.

391. *Id.*

392. See Judi Dutcher, *Issue of Choice at Stake in Election*, STAR-TRIB., Nov. 4, 2000, 2000 WL 6996144.

393. Chris Choi, Editorial, *Whoever Wins the Election, No Reason to Go Kill Yourself*, WASH. SQUARE NEWS, Nov. 7, 2000, 2000 WL 29107057.

less worried that *Roe* would be overturned because they were too young to remember a time when abortion was illegal.<sup>394</sup>

Next to abortion, discussions of the courts arose most often in connection with racial issues, particularly affirmative action. Bush's praise of Thomas especially bothered some African-American voters. Speaking at a Gore rally in Los Angeles, a black clergyman alleged that Thomas had "done more damage to the cause of African-Americans than all the justices who have come before him."<sup>395</sup> In a speech at an African-American church in Pittsburgh on the Sunday before the election, Gore suggested that Bush would appoint racist Supreme Court Justices. Gore declared that when Bush "says he'll appoint strict constructionists to the Supreme Court, I often think of the strictly constructed meaning that was applied when the Constitution was written – how some people were considered three-fifths of a human being."<sup>396</sup> Although Gore's remark was ambiguous and essentially incoherent, commentators from a broad spectrum criticized Gore's remark for its apparent unfairness,<sup>397</sup> and efforts by Gore supporters to defend it fell flat.<sup>398</sup> Many attributed it to Gore's desperation in

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394. See Michael M. Phillips, *Spoiler Fears Open a Generation Gap in the Nader Camp*, WALL ST. J., Nov. 3, 2000, 2000 WL-WSJ 26615618.

395. Celi Connolly & Mike Allen, *Bush Rests As Gore Barnstorms in Michigan*, WASH. POST, Oct. 30, 2000, at A17, 2000 WL 25425148. Referring to Thomas's nomination by Bush's father, he added that "the branch does not fall far from the tree." *Id.*

396. Naftali Bendavid, *Gore Sticks to Social Security Theme, Unleashes Emotional Attack on Bush*, CHI. TRIB., Nov. 5, 2000, 2000 WL 3729615.

397. National Public Radio commentator Mara Liasson believed that Gore's statement was "hyperbole, and it's over the line." *Fox News Sunday* (Fox News radio broadcast, Nov. 5, 2000), 2000 WL 2650039 (transcript). One editorial declared that

Gore is leveling a charge at Mr. Bush that is so outrageous it becomes ridiculous; namely, that Mr. Bush would seek out – and find – a bench full of vacuum-packed, mint-condition 18th Century jurists. Meanwhile, the vice president seems to have forgotten a few little things even the strictest constructionist would never overlook – namely, the 13th Amendment . . . which, of course, abolished slavery, not to mention the 14th and 15th Amendments, which endowed all citizens with equality under the law and voting rights.

Editorial, *Gore on Good and Evil*, WASH. TIMES, Nov. 7, 2000, at A14, 2000 WL 4169153.

398. On CBS's *Face the Nation*, Bob Schieffer asked Gore campaign chairman William Daley if it was not "a stretch" for Gore to suggest that "Bush would appoint people to the Supreme Court who think African-Americans are not quite whole, that they're just three-fifths of a human being." *Face the Nation* (CBS television broadcast, Nov. 5, 2000), 2000 WL 8427846 (transcript). Daley re-

attempting to energize black voters on the eve of the election.<sup>399</sup>

As in previous elections, Republicans were more laconic about judicial issues. Speaking in Kansas City shortly before the election, Bush stated only, "I'm for a Supreme Court that reflects our values in this country."<sup>400</sup> Although Republicans boasted that Bush, unlike Gore, did not make abortion issues a litmus test for Supreme Court nominees,<sup>401</sup> this argument may have backfired insofar as it called attention to Gore's apparent commitment to preserving abortion rights. Some commentators speculated that Bush tried to ignore the issue because he recognized that the prospect of judicial nullification of *Roe v. Wade* would cost him votes.<sup>402</sup>

Conservatives tried to minimize the election's effect on judicial appointments. Bruce Fein, for example, declared shortly before the election that "rumors of an apocalyptic change in Supreme Court decisions . . . seem vastly exaggerated," regardless of the election's outcome.<sup>403</sup> Various commentators pointed out that there was no certainty that any Justices would retire during the next presidential term,<sup>404</sup>

plied that Bush

[s]hould explain what he means by strict constructionist in today's times. And those people who hear that phrase and think back to when people who used the phrase . . . looked at . . . many . . . Americans in a different way than they did the majority, then you have an obligation to explain that and be very direct about it, or don't use phrases about it.

*Id.*

399. Mara Liasson explained that "[Gore] said it in a context where he wants to get African-Americans to go to the polls. . . . They've never been as enthusiastic about him as they are about Bill Clinton. That's why he said it." *Fox News Sunday*, *supra* note 397.

400. Scott Canon, *Balance of High Court May Hinge on Election*, KANSAS CITY STAR, Oct. 30, 2000, at A1, 2000 WL 7748488.

401. See Jeff Mize, *GOP Governors Rallying for Bush*, THE COLUMBIAN (Vancouver, Wash.), Oct. 24, 2000, at C5, 2000 WL 24842010 (quoting Rhode Island Governor Lincoln Almond, a pro-choice Republican).

402. As Nina Totenberg explained,

Republican pollsters concede privately that the possibility of overturning *Roe v. Wade* can do nothing but harm Bush in the election. This is probably why Bush rarely, if ever, mentions the Supreme Court in his appearances, and has said he will have no rule that his nominees must oppose the *Roe v. Wade* decision, or any other decision of the court.

*All Things Considered*, *supra* note 371.

403. Bruce Fein, *Presidents and Justices*, WASH. TIMES, Oct. 24, 2000, at A14, 2000 WL 4168045.

404. See, e.g., *id.* As Fein stated, "none of the Justices hinted at retirement.

that political realities would encourage either Bush or Gore to appoint centrist Justices,<sup>405</sup> and that the Court's fidelity to precedent, as demonstrated by its decisions reaffirming *Roe* and *Miranda*, militated against radical change regardless of the Court's personnel.<sup>406</sup> However, some conservatives warned about the prospect of Court appointments by a Democratic president.<sup>407</sup> Speaking at a Republican rally in Pennsylvania, one G.O.P. operative warned that a Gore Court "would shred the Constitution."<sup>408</sup> Shortly before the election, a dozen conservative Roman Catholic lawyers in the District of Columbia issued a five page document entitled *Supreme Consequences*, which analyzed abortion, morality, and parental rights issues that the Court was likely to hear in coming years.<sup>409</sup> The report warned that "[t]he liberal judicial activists whom Al Gore would appoint to the Supreme Court would run roughshod over core Catholic values and over laws consistent with these values."<sup>410</sup> Oklahoma Governor Frank Keating warned that Gore's election could tip the Court's balance on such controversial issues as abortion, prayer in schools, and the exclusion of gays from the Boy Scouts. Warning that the Court would ban student-initiated prayer before football games if Gore appointed a Justice, Keating de-

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None [were] medically ailing. Their mental faculties [were] uniformly acute. Since Supreme Court appointments are for life, no vacancies appear[ed] on the horizon." *Id.*

405. *See id.*

406. *See id.*

407. Next to abortion and race, gun control may have been the most significant subject in which judicial issues played a role in the 2000 election. A National Rifle Association flier declared: "Fact: If elected, Gore will pack the U.S. Supreme Court with . . . anti-gun activists who will agree with the Gore Department of Justice that you have no right to own any firearm." Canon, *supra* note 400. The actor and NRA activist Charlton Heston alleged that Gore's opportunity "to appoint as many as four U.S. Supreme Court justices" would give Gore "the power to hammer your gun rights into oblivion." *Morning Edition* (National Public Radio broadcast, Oct. 24, 2000), 2000 WL 21481989 (transcript).

408. Jack Roberts, *Cheney Fires up Party Faithful*, INTELLIGENCER J. (Lancaster, Pa.), Nov. 4, 2000, at A1, 2000 WL 3823538.

409. Larry Witham, *Catholic Bishops Urge Pro-life Voting*, WASH. TIMES, Nov. 5, 2000, at C3, 2000 WL 4168964.

410. *Id.* C. Boyden Gray, White House counsel to President Bush, declared that "[o]ne thing you can be sure of is that there will be a philosophical difference in the way the two candidates go about choosing judges." Laurie Asseo, *Clinton: High Court at Pivotal Point*, AP ONLINE, Oct. 24, 2000, 2000 WL 28615299.

clared that “[y]ou can say goodbye to prayer in school for all purposes, forever, and that’s not America.”<sup>411</sup>

Voters may have responded favorably to Republican efforts to use the Court to win votes. A poll conducted in Wisconsin shortly before the election showed that voters preferred Bush to make Supreme Court appointments by a margin of forty-seven to thirty-seven percent.<sup>412</sup>

Meanwhile, some centrists expressed fear about the judicial appointments of both major candidates. As journalist Stuart Taylor, Jr. explained, the Court’s

lunge to the left would be almost as worrisome as a lurch to the right, at least to those of us who want to see our grandchildren grow up in a nation focused more on individual merit than on racial proportionality, and who don’t want a nationwide, court-imposed ban on tuition vouchers for students at religious schools, and who think the Court’s four more-liberal members go too far when they argue for abandoning any effort to enforce the Constitution’s outer limits on the regulatory authority of Congress.<sup>413</sup>

The candidates discussed federal judicial appointments briefly in the first of their three debates. Although both denied that they would apply any litmus test to candidates on abortion or any other issue,<sup>414</sup> Bush vowed to nominate “strict constructionists,”<sup>415</sup> while Gore expressed his preference for judges who would interpret the Constitution “as a document

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411. Tom Murse, *Reject Gore’s ‘Politics of Division,’ Ridge Tells 200 at Rally in Lititz*, LANCASTER NEW ERA (Lancaster, Pa.), Nov. 2, 2000, at B1, 2000 WL 3823180. Keating added that “[t]o suggest, which Breyer and Ginsburg would and a Gore appointment will . . . , that the Boy Scouts will be forced to accept gay Boy Scouts is simply not mainstream value [in] America.” *Id.*

412. See Alex J. Borsuk, *Bush Gains Edge in State*, MILWAUKEE J. SENTINEL, Nov. 1, 2000, 2000 WL 26093272.

413. Stuart Taylor, Jr., *Election 2000: The Case for Partisan Gridlock*, NAT’L J., Oct. 28, 2000, at 3382, 2000 WL 25041755.

414. Although Bush flatly declared, “I am pro-life,” he explained, “Voters should assume that I have no litmus test on that issue [abortion] or any other issue.” *Governor George W. Bush and Vice President Al Gore Participate in Presidential Debate Commission Debate* (Oct. 3, 2000), 2000 WL 1466168 (F.D.C.H.) (corrected copy). Bush added, “The voters will know I’ll put competent judges on the bench, people who will strictly interpret the Constitution and will not use the bench to write social policy.” *Id.* Gore agreed that “it’s wrong to use a litmus test.” *Id.*

415. *Id.* Bush expressed his conviction that “judges ought not to take the place of the legislative branch of government, that they’re appointed for life and ought to look at the Constitution as sacred.” *Id.*

that grows with our country and our history"<sup>416</sup> and predicted that any judge that he appointed would favor the retention of *Roe v. Wade*.<sup>417</sup> Gore accused Bush of using the phrase "strict constructionist" as "code words . . . for saying that the governor would appoint people who would overturn *Roe v. Wade*," particularly since Bush had named Scalia and Thomas "as benchmarks for who would be appointed."<sup>418</sup> Bush pointed to his record of Texas judicial appointments as evidence that he would appoint highly qualified persons to the federal bench.<sup>419</sup>

Despite Bush's praise for Scalia and Thomas, Bush appeared generally to have appointed moderates to the Texas Supreme Court. The President of the Texas Bar Association contended that Bush had "appointed people with good strong judicial credentials who tended to be conservative but not doctrinaire."<sup>420</sup> Some observers pointed out, however, that Bush's appointments to the Texas court were not the ideal laboratory for predicting his federal appointments because the Texas Supreme Court hears only civil appeals and because national political considerations might be very different.<sup>421</sup>

As in previous elections, the Supreme Court was the focus of most discussions of judicial issues. Some commentators emphasized the importance of discussing the vast impact of the lower federal court appointments. Some argued that lower federal judges were more powerful than ever because the Supreme Court has accepted fewer cases during recent years.<sup>422</sup> Herman Schwartz emphasized that while the Supreme Court hears only about seventy-five cases per year, the courts of appeal decide 25,000 to 30,000 cases annually: "for all but a tiny fraction of cases, they are the courts of last re-

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416. *Id.*

417. Gore stated that "[i]t'd be very likely that they'd uphold *Roe v. Wade*." *Id.*

418. *Id.*

419. Bush stated that "I've named four Supreme Court judges in . . . Texas, and I would ask the people to check out their qualifications, their deliberations. They're good, solid men and women who have made good, solid judgments on behalf of the people of Texas." *Id.*

420. Harriet Chiang, *Election Could Shape Supreme Court for Years to Come*, S.F. CHRON., Oct. 24, 2000, at A4, 2000 WL 649896 (quoting Lynn Liberato).

421. *See id.* (quoting Anthony Champagne, a political scientist at the University of Texas at Dallas).

422. *See Wicker, supra* note 374, at 11, 12, 16.

sort."<sup>423</sup> Some liberals expressed doubt that Gore would nominate judges who were sufficiently liberal because they doubted Gore's commitment to liberalism.<sup>424</sup> Other liberals predicted that the political realities of the confirmation process would moderate Gore's judicial appointments.<sup>425</sup>

Gore supporters used the Court appointments issue to warn Nader supporters that draining votes from Gore would help to elect Bush. A coalition of liberal activists who traversed five closely contested states during the final ten days of the campaign to discourage voting for Nader emphasized that Bush's judicial appointments could adversely affect environmental protection, abortion rights, and gay rights.<sup>426</sup> Reminding a Seattle audience that liberals who snubbed Hubert H. Humphrey in 1968 helped to elect Richard Nixon, the President of the Sierra Club declared that "[t]oday the dead hand of . . . Nixon is still writing Supreme Court decisions in the body of Chief Justice William Rehnquist."<sup>427</sup> Similarly, the President of People for the American Way warned Nader supporters that history would judge Nader harshly, despite Nader's otherwise distinguished career, "if he gives the Supreme Court to the right wing."<sup>428</sup> Gay activists likewise used judicial appointments as a means of discouraging votes for Nader.<sup>429</sup> And even many of Nader's environmentalist constituents feared that Bush's Supreme Court appointments could lead to judicial decisions that weakened federal envi-

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423. Herman Schwartz, *More Than Abortion Ruling at Stake in Presidential Election*, L.A. TIMES, Nov. 5, 2000, at M-2, 2000 WL 25914652.

424. See Patricia J. Williams, *Getting Out the Vote*, NATION, Oct. 30, 2000, at 11, 2000 WL 17719046. For example, Bob Wing, editor of *ColorLines* magazine, expressed wariness about the prospects of Gore's judicial appointments because of Gore's association with the centrist Democratic Leadership Council. See *id.*

425. For example, Nan Aron of the Alliance for Justice predicted that Gore would follow Clinton in "trying to win favor both from Republicans and Democrats." Asseo, *supra* note 410.

426. See James Dao, *Democrats Ask Nader to Back Gore in Swing States*, N.Y. TIMES, Oct. 31, 2000, at A20.

427. Sam Howe Verhovek, *5-State Tour Seeks to Shift Nader Voters to Gore Camp*, Oct. 30, 2000, at A17.

428. Dao, *supra* note 426.

429. For example, Elizabeth Birch, Executive Director of the Human Rights Campaign, declared that "[w]hatever value Nader brings to the public discourse, it pales compared to handing the federal government and Supreme Court over to George Bush." James Dao, *Gore Allies Swarm to Block Nader Vote*, THE COMMERCIAL APPEAL MEMPHIS, Oct. 25, 2000, at A8, 2000 WL 27939106.

ronmental legislation.<sup>430</sup> Likewise, one Nader supporter, a law school dean, contended that Gore's supporters tended to "overestimate the Court's role as an active progressive power and fail to see its essential commitment to maintaining a center (whether center-right or center-left). It is movements in society that motivate the Court to move."<sup>431</sup>

Nader denounced Democratic warnings about abortion as "a scare tactic."<sup>432</sup> Nader contended that Republicans did not really favor overturning *Roe* because this would "shatter the party."<sup>433</sup> Nine days before the election, Nader pointed out that reversal of *Roe* would not end abortion but rather merely permit the states to decide the issue,<sup>434</sup> a remark over which he soon expressed regret.<sup>435</sup> This statement outraged many Gore supporters, who pointed out that return of the issue to the states would permit states to ban abortion even though it would also allow them to keep it legal.<sup>436</sup>

Nader also emphasized the negligible effect a Democratic President would have on judicial appointments. In a rally in Madison, Wisconsin, Nader pointed out that the Senate approved Scalia's nomination by a vote of ninety-eight to zero, and that Thomas received the votes of eleven Democratic senators. "Now they've got the temerity to lecture me about the Supreme Court?," Nader mockingly asked.<sup>437</sup> Nader also alleged that "the corporate Democratic judges" appointed by Clinton to the federal bench had assisted the Clinton Administration in its contraction of civil rights and civil liberties in such areas as habeas corpus, search and seizures, and deportation proceedings.<sup>438</sup> Nader also complained that the Clinton

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430. See Melissa Henneberger, *Nader Sees a Bright Side to a Bush Victory*, N.Y. TIMES, Nov. 1, 2000, at A29.

431. Williams, *supra* note 424 (quoting Peter Gabel, President, New College School of Law).

432. Henneberger, *supra* note 430.

433. Jeff Mapes, *Lieberman Asks Nader Supporters to Vote for Gore*, PORTLAND OREGONIAN, Oct. 28, 2000, at A04.

434. *Nader Scoffs at Impact of Taking Votes From Gore*, CHI. TRIB., Oct. 30, 2000, at 8, 2000 WL 3727298.

435. See Henneberger, *supra* note 430.

436. See, e.g., Katha Pollitt, *Don't Blame Ralph*, NATION, Nov. 20, 2000, 2000 WL 17719120 (claiming that there were "at least fourteen states ready to criminalize abortion the minute they get the go-ahead").

437. Mark Sherman, *Democrats Try to Stem Nader Tide*, ATLANTA CONST., Nov. 2, 2000, at A1, 2000 WL 5484558.

438. See Ralph Nader, NATION, Nov. 13, 2000, at 2, 2000 WL 17719078 (letter to editor in issue published before the election).

Administration had withdrawn controversial nominations in response to Republican pressure, dropping worthy candidates "like a hot potato."<sup>439</sup> Nader predicted that Gore would not appoint "anyone remotely so visionary or brave as" Brennan or Marshall, and "[n]ot even anyone so progressive as Justice David Souter."<sup>440</sup> Assuming that the Republicans would continue to control the Senate, Nader argued that Orrin Hatch, the chair of the Senate Judiciary Committee, "has a veto on any nominations that come from a Democratic presidency."<sup>441</sup> Meanwhile, Nader reminded voters that the liberal Justices "Warren, Brennan, Blackmun, Stevens and Souter were Republican nominees," adding wryly that "a lot of Democrats think those justices were not so bad."<sup>442</sup>

In an apparent response to Nader, Gore warned that while "there are some people who actually say it doesn't make any difference who appoints the next three justices of the Supreme Court," this was "a luxury of indifference and ironic detachment and cynicism" that "those whose rights and lives are on the line . . . cannot afford."<sup>443</sup>

### III. CONCLUSION

Judicial issues rarely have played a prominent role in

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439. *Id.* The only examples that Nader provided were the nominations of Peter Edelman to the Court of Appeals and Lani Guinier to serve as Chief Enforcement Officer of the Civil Rights Division of the Department of Justice. *See id.*

440. *Id.*

441. Ralph Nader, News Conference at the National Press Club (Oct. 25, 2000), 2000 WL 1586163 (F.D.C.H.) (transcript).

442. *Id.* In discussing his own criteria for Supreme Court appointments, Nader emphasized judicial temperament, a sense of injustice, and a sense of history. *See* Ralph Nader, News Briefing at the National Press Club (July 18, 2000), 2000 WL 986946 (F.D.C.H.) (transcript). Nader believed that "judicial temperament keeps the mind of the judge open." *Id.* He also believed that judges should comprehend injustice because "if you don't have a sense of injustice, you can't have a sense of justice." *Id.* A sense of history, he contended, was "extremely important in days when history is being lobotomized from our consciousness." *Id.* As one Nader supporter argued, "[m]aintaining a woman's right to choose is an incredibly important issue, but it's not the only issue involved in this election. Is that one issue more important than the Democratic Party's neglect of organized labor, welfare, the environment, social justice, gay rights, civil rights, and the poor?" Ryan Nickum, *Being True to Yourself*, THE DAILY (University of Washington), Nov. 7, 2000, 2000 WL 29107119.

443. Vice President Al Gore Jr., Remarks at Campaign Event in Madison, Wisconsin (Oct. 26, 2000), 2000 WL 1594422 (F.D.C.H.) (transcript).

presidential campaigns and elections.<sup>444</sup> As an editorial remarked during the 1992 campaign, “the court has never been a hot-button issue with most voters.”<sup>445</sup> Professor Lasser has found that even when judicial issues “have surfaced in presidential elections, they have been largely tangential to the main concerns of the candidates and the voters.”<sup>446</sup> Although judicial appointments may be the major legacy of many Presidents, most voters have traditionally shown little awareness that they are helping to select Supreme Court Justices as well as a President. Public apathy about judicial issues, however, is yielding to a more sophisticated appreciation of the connection between the presidential election and Supreme Court decisions. After emerging sporadically as a significant issue in several campaigns between 1800 and 1968, judicial issues have become a regular feature of campaigns during the past two decades.

Growing public awareness of judicial issues seems likely to ensure that judicial issues will continue to have at least a regular role in future presidential elections. The improvement of media coverage of elections and heightened interest in the Supreme Court appointment process have made voters much more aware of the connection between their presidential votes and the selection of federal judges, particularly Supreme Court Justices. In 2000, thirty-six percent of voters in a *Newsweek* poll indicated that they regarded the Supreme Court as a “very important” election issue.<sup>447</sup> Moreover, voters appear to have a growing awareness of the manner in which judicial selection affects a wide range of social and economic

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444. National Public Radio commentator Nina Totenberg observed, It seems a journalistic exercise repeated at least once a decade; cover stories in the news magazines, major pieces on TV and radio, all warning the voters that the ballot they cast for president could well determine the direction of the Supreme Court for the next thirty or forty years. And how does the public react? It doesn't. When the exit polls are tabulated after the election, it turns out that the Supreme Court had absolutely no effect as an election issue.

*All Things Considered*, *supra* note 371.

445. *Silence on the Court*, *supra* note 312. See also William G. Ross, *Fighting Over the Court: It's Tough to Make the Supreme Court into an Election Issue*, LEGAL TIMES, Oct. 9, 2000, at 75, 77.

446. LASSER, *supra* note 11, at 266.

447. See *The Supreme Question*, NEWSWEEK, July 10, 2000, at 20, 21. Although *Newsweek* seemed surprised that so few voters regarded the Court as a significant issue, this figure seems high considering the generally low profile of the Court in presidential elections. See *id.*

issues. The highly publicized brawls over the 1987 Bork nomination and the 1991 Thomas nomination helped to stimulate greater public awareness of the Court, as have improved news coverage of judicial issues and the growing ubiquity of legal issues in American life. Although few voters may pay careful attention to judicial issues or even know the names of most of the Justices, voters seem to have at least an inchoate understanding that the Court can affect such highly charged issues as abortion, affirmative action, school vouchers, school prayer, and violence against women. Many voters in recent elections also seem to have recognized that one or more Supreme Court appointments could be imminent because of the high average age of the Justices. If, as some commentators believe, judicial appointments have become more political during recent years, it is natural that the courts become a more prominent campaign issue.

Judicial issues may also be attaining more importance in political campaigns because voters believe that they can better perceive a correlation between the political positions of the candidates and the performance of the judges they will appoint. Voters today may have greater confidence that their vote may influence the Supreme Court insofar as the increased scrutiny of candidates for all levels of judgeships by the President, the Senate, the news media, and public interest groups has reduced the traditional risk that judges will defy the expectations of the Presidents who appointed them. As journalist Nina Totenberg has pointed out, "[I]n an era when potential nominees are scrutinized with legal magnifying glasses, the guessing is a lot more reliable than it used to be."<sup>448</sup>

Of course, the process is far from flawless. There will always be a substantial degree of risk of unpredictability in judicial performance.<sup>449</sup> As Professor Bickel once observed, "[Y]ou fire an arrow into a far-distant future when you appoint a Justice."<sup>450</sup> During the 2000 campaign, Nader sup-

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448. *All Things Considered*, *supra* note 371.

449. See, e.g., Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 *YALE L.J.* 1283, 1291-1301 (1986); Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 *AKRON L. REV.* 115, 138 (1993).

450. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE* 79

porters used the unpredictability of the appointments process as a justification for not supporting Gore when Gore supporters warned that the diversion of votes from Gore could help to elect a Republican who would perpetuate conservative control of the Supreme Court.<sup>451</sup> Despite, however, the celebrated examples of Justices such as Warren, Brennan, Blackmun, and Souter, who may have defied the expectations of the Presidents who appointed them, the performance of most Justices is broadly consistent with the political predilections of the President by whom they were appointed. It would be difficult to suppose, for example, that the Court would not have been more liberal if Democrats had served as President during the terms of Richard Nixon, Ronald Reagan, and George Bush.

Notwithstanding the growing appreciation that presidential elections profoundly affect the Supreme Court, general public ignorance about such issues prevents judicial issues from attaining the level of salience in presidential elections that they probably deserve. As one commentator has observed, “[V]oters who struggle to name their representative in Congress are certainly not about to base their presidential vote on a potential Supreme Court vacancy.”<sup>452</sup> Even when voters perceive the importance of judicial issues, many of the most significant and most divisive issues that confront the courts are too abstruse for most voters to grasp.

For example, few voters are likely to comprehend the subtleties of the Supreme Court’s recent division over profound issues of federalism. Even those voters who, for instance, knew during the 2000 campaign about the Court’s recent five-to-four votes nullifying significant provisions of the federal Violence Against Women Act<sup>453</sup> and the Brady Hand-

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(7th ed., 1998) (citing *Judgment on a Justice*, TIME, May 23, 1969, at 24).

451. See Jacob M. Appel, NATION, Nov. 13, 2000 (letter to editor in issue published before the election). Mr. Appel cited Warren, Brennan, Blackmun, O’Connor, and Souter as examples of Justices who were more liberal than the Republican Presidents who appointed them had expected, and Reed, Vinson, Burton, Minton, Clark, and White as examples of Justices who were more conservative than the Democrats who appointed them might have anticipated. See *id.*

452. Berke, *supra* note 345. Mr. Berke quoted University of Houston political scientist Robert A. Carp as stating, “The Court is an amorphous blob to most Americans. More people know who Judge Wapner is than Chief Justice Rehnquist.” *Id.*

453. See *United States v. Morrison*, 529 U.S. 598 (2000).

gun Violence Protection Act<sup>454</sup> were unlikely to fathom the Court's complex interpretation in those decisions of the Commerce Clause and other aspects of federalism.

Complex judicial issues would be difficult for candidates to explain to voters even if American presidential contests were designed to permit serious discussion of public issues. Unfortunately, the quality of discourse in presidential campaigns has declined so much that virtually no issues are discussed by any political party in any detail or with much nuance. Since even relatively simple issues are over-simplified in presidential campaigns, more complex judicial issues naturally are beyond serious public debate.<sup>455</sup> As one commentator observed during the 1992 campaign, voters and candidates were "tempted to shrug the subject [of the Court] off as arcane in a campaign of erupting bimbos and waving flags."<sup>456</sup>

The difficulty of conducting any serious discussion about judicial issues amidst the hoopla of a presidential contest may also help to explain why discussion of judicial issues in campaigns has tended to be one-sided. There never has been a campaign in which both major parties have emphasized judicial issues. Normally one party uses it as a stick with which to assail its opponent, while the other party has reason to try to avoid it or at least has no cause to highlight it. Moreover, discussions of judicial issues in presidential campaigns tend to focus on a small number of salient issues rather than broad issues that might come before the federal courts. For example, one study has indicated that Goldwater's criticisms of the Supreme Court for its decisions on reapportionment and criminal justice had far less resonance with voters than did his discussion of the school prayer decision because voters were much more aware of the latter than the former.<sup>457</sup>

During recent years, abortion may have become a more salient judicial issue in presidential campaigns than such is-

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454. See *United States v. Printz*, 521 U.S. 898 (1997).

455. In an ironic twist, the nature of judicial decision-making may contribute to such superficiality. As Professor Stephenson has pointed out, "because the legal process seems almost invariably to characterize even the most complex problems as if they consisted only of two sides – one for, the other against – what the Court says and does may in turn make it easier for parties and candidates to sharpen and clarify opposing positions." STEPHENSON, *supra* note 1, at 22.

456. *The Forgotten Issue*, *supra* note 315.

457. See Murphy & Tanenhaus, *supra* note 206, at 35.

sues as affirmative action or states' rights because more voters are aware of the Court's position on abortion and because the constitutionality of abortion may constitute such a stark and emotional issue. Moreover, abortion may serve as a symbolic issue that provides a reliable guide to how a candidate might stand on an array of other issues.<sup>458</sup> Nevertheless, it is strange that other judicial issues receive so much less attention. During the 2000 campaign, for example, it is odd that the Court's recent decisions on handguns and violence against women received so much less attention than did *Roe*. Even though few voters were likely to comprehend the technical constitutional issues that the gun control and domestic violence decisions involved, these decisions were not necessarily more complex than *Roe*, and the Court's nullification of part of the handgun and the domestic violence laws in five-to-four votes should have provided a dramatic illustration of the importance of upcoming Court appointments.

Paradoxically, the difficulty of discussing complex judicial issues in the context of a presidential election may help to raise the profile of judicial issues in campaigns to the extent that candidates try to bring these issues alive through the use of extravagant rhetoric. Perceiving that judicial issues are too subtle and complex for thorough discussion, candidates and their surrogates sometimes reduce judicial issues to soundbites, warning that their opponents will transform the Court into a den of dangerous radicals – loony left or radical right, depending upon which party is sounding the alarm.

It is ironic that an institution so dignified as the Supreme Court has so often provided the target of histrionic campaign rhetoric. Not since 1924, when voters left Madison Square Garden in droves while LaFollette offered serious analysis of specific Supreme Court decisions has any candidate tried to lecture campaign audiences on the niceties of the law. Afraid that they will speak over the heads of voters, presidential candidates often over-simplify judicial issues and use overwrought verbiage in an effort to kindle attention for issues that otherwise might bore or confuse voters. Such treatment

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458. See Raspberry, *supra* note 324. On the eve of the 1992 election, Raspberry explained that he would base his vote largely on whether a candidate would appoint pro-choice Justices because he regarded this as "the litmus test for determining whether a nominee is on the moderate-to-liberal side of scale or on the conservative-to-hard-right side." *Id.*

of judicial issues cheapens discourse about the Court and can undermine public respect for the judiciary by making the Court seem like nothing more than a political institution. Moreover, superficial criticism of the Court that is politically motivated may inhibit more responsible critics from voicing concerns about any of the Court's decisions.<sup>459</sup>

Similarly, some critics have complained that the Court is not a proper campaign subject because judges cannot publicly defend themselves and that unfair allegations about the courts that could undermine public faith in the judiciary will therefore go unanswered.<sup>460</sup> But while the Court cannot easily defend itself,<sup>461</sup> it has other articulate champions, particularly the candidates and spokespersons of the party that opposes the Court's critics, who often relish the opportunity to defend the Court against the alleged radicalism of those who would dare criticize it.

Moreover, judicial issues may have less prominence than they deserve because the Court itself today is not a subject of unusual controversy, in contrast to past elections such as 1896 and 1924 when the judiciary emerged as a major issue. Since the present Court is difficult to label as "liberal" or "conservative," the general direction of the Court no longer

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459. As Anthony Lewis remarked during the 1964 campaign,

One sad thing about the charges of Senator Goldwater, observers feel, is that they tend to make more precise and scholarly criticism of the Court difficult. There are law professors who feel deeply that the Court is wrong on specifics, and they may hesitate to say so now for fear of being lumped together with other less informed critics.

Lewis, *supra* note 189.

460. See, e.g., Celler, *supra* note 201.

461. In discussing attacks on the Court during election campaigns, Professor Stephenson has pointed out that

the Supreme Court is ill-equipped to defend itself in the court of public opinion. Traditionally, justices speak through their published opinions, and are reticent to comment publicly on their reasoning or its implications. The Court's public information office may be the only one in Washington that does not more than its name implies: it adds no "spin" nor explanation to the announcements and documents it releases.

STEPHENSON, *supra* note 1, at 179-80. Similarly, Stephenson points out that the Court

does not "fight back" as do other officials and agencies that have been scorned or scourged. The Court lacks nearly all routine tools of political sparring: appropriations, ostentatiousness, jobs, contracts, and investigation. Indeed, any forays by the Court into "politics as usual" would damage its legitimacy by calling into question its independence and impartiality.

*Id.* at 222-23.

provides a lightning rod for criticism. Controversies instead revolve around individual decisions of the Court, which run the gamut from conservative to moderate to liberal. In this context, Democrats must caution against a conservative capture of the Court, a warning which is less likely to inspire voter enthusiasm than is a clarion call to reverse the Court's direction.

The impact of judicial issues in presidential campaigns also may be muted because the issue often is little more than a reflection of how voters already feel about candidates. For example, a voter whose support of Gore was based upon his or her perception that Gore was more pro-choice than Bush was not likely to prefer Gore merely because Gore may have been more likely than Bush to appoint pro-choice judges to the federal courts. In an era of low voter turnout, however, the judicial issue may motivate some voters to travel to the polls because they perceive that judicial appointments raise the stakes of the election. The prospect of upcoming Supreme Court nominations also stimulates political activists to greater commitment and provides an incentive for fundraising.<sup>462</sup> Even when judicial issues merely reinforce voters' attitudes toward candidates, presidential campaigns may stimulate public discussion about judicial issues in a manner that helps to form or clarify attitudes about such issues.<sup>463</sup> In

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462. During the 2000 election, for example, the People for the American Way issued a seventy-eight page report entitled *Courting Disaster*, which warned about the dangers of "a Scalia-Thomas Supreme Court." PEOPLE FOR THE AMERICAN WAY FOUNDATION, *COURTING DISASTER: HOW A SCALIA-THOMAS SUPREME COURT WOULD ENDANGER OUR RIGHTS AND FREEDOMS* (2000), at <http://www.pfaw.org/issues/judiciary/reports/courtingdisaster-fullcopy.pdf>.

463. As Professor Stephenson has observed, "The Court may facilitate the definition and clarification of candidates' and parties' positions on critical issues in a campaign." STEPHENSON, *supra* note 1, at 231. As Stephenson explains,

This proposition is plausible because of the two avenues along which the Supreme Court ordinarily enters or is pulled into campaign warfare. First, the Court generates an issue on which candidates or parties then take difference positions. This does not mean that the Court literally invents a dispute by causing division on a subject where none previously existed. Rather, the Court thrusts an existing subject about which people hold conflicting views into national politics by proclaiming one side or another as constitutionally correct. When this occurs, the Court is said to have "nationalized" an issue. The second path unfolds when the Court takes sides on a question that has previously divided the parties at the national level. In this instance, the Court stokes the controversy, but the issue exists independent of the Court. In both, the Court's actions allow one party to wrap itself in the Consti-

this way, presidential campaigns are part of what Louis Fisher has called the ongoing "constitutional dialogue" among voters, legislators, executive officials, and judges at both the federal and state levels of government.

In particular, campaigns enable a candidate to read the pulse of his supporters in a manner that may influence his policies and judicial appointments if he is elected. For example, the vociferous warnings by Democrats during recent presidential campaigns about the importance of maintaining a Court that does not interfere with abortion may have provided sharp reminders to Democratic candidates that their core constituents will be deeply disappointed if they do not appoint pro-choice Justices. Conversely, the failure of Republican voters and activists during the 2000 campaign to emphasize the importance of appointing Justices who oppose affirmative action may suggest that they were not deeply antagonistic toward affirmative action.

Just as judicial issues can enable voters to influence candidates, presidential candidates may help to shape voter opinion by the manner in which they treat judicial issues. For example, Murphy and Tanenhaus concluded that Goldwater's attacks on the Court in 1964 helped to "articulate, mobilize, and legitimize conservative sentiment against the Court."<sup>464</sup> Similarly, the efforts by Nixon and Wallace during 1968 to blame the Court for rising crime rates may have helped to mobilize public support for the appointment of judges who were less solicitous of the rights of criminal defendants. During recent elections, the increasingly frequent references of candidates to the Court may have helped raise voter awareness of the Court's importance.

Presidential elections also may have at least an indirect impact on the Court by making the Court more broadly aware of public opinion. The landslide re-election of Roosevelt in 1936, for example, may have influenced the Court's decision early in 1937 to reverse recent precedent to uphold a state minimum wage law.<sup>465</sup> Similarly, the defeat of Goldwater in

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tution while the other party goes on the attack against the judiciary.  
*Id.* 231-32.

464. Murphy & Tanenhaus, *supra* note 201, at 47.

465. See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Although this decision was not announced until after President Roosevelt had proposed his Court-packing plan in February 1937, it was decided in December 1936. See

1964 may have emboldened the Warren Court to continue its activism on such issues as civil rights and criminal justice.

The role of judicial issues in elections during the past sixty years also illustrates the nearly universal acceptance of the Court's power to review the constitutionality of state and federal legislation. In contrast to the virile attacks on the courts by populists, progressives, and labor unions during the late nineteenth and early twentieth centuries, no major candidate or political movement for the past sixty years, with the partial exception of the 1968 Wallace campaign, has questioned the validity of judicial review or attacked the Court as an institution. Even the most vociferous critics of the Court seem content to continue to allow the Court to exercise vast powers, either because they support such powers or because they recognize the political impracticability of curbing them.

The reluctance of presidential candidates to advocate Court curbing measures or to criticize individual Justices also reflects the abiding respect that Americans have for federal court and judges, even though the Court's counter-majoritarian function has and probably will continue to inspire controversy that will find expression in presidential campaigns.<sup>466</sup> Even LaFollette in 1924, Goldwater in 1964,

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ROSS, *supra* note 31, at 311.

466. As Professor Stephenson has observed, "That the Court has long appeared deliberately to be different in its behavioral and political isolation from the rest of the national government may make the Court an inviting target for someone eager to convince voters that the justices have thwarted the will of the people." STEPHENSON, *supra* 1, at 23. Indeed, Stephenson has argued that the Court's "susceptibility to entanglement" in presidential politics is not merely the product of occasional decisions that "touch a public nerve," but rather "has necessarily been a characteristic of American politics because of the constitutional role that the justices have assumed for themselves" insofar as the Court "sometimes appears, or . . . can be made to appear, at odds with a political system founded on the 'consent of the governed.'" *Id.* at 220-21. (emphasis in original). Accordingly, as this article demonstrates, many candidates have questioned the Court's role in American politics, even its countermajoritarian function of protecting the rights of minorities. Various presidential candidates have warned against allowing unelected judges to serve as guardians of personal liberties. For example, Goldwater declared during the 1964 campaign that "[n]ow perhaps the constitutional restrictions on the popular branches of government aren't enough to protect the rights of minorities and individuals. If this is so, the restrictions should be tightened up by the normal process of amendment, not through judicial revision of the Constitution." GOLDWATER SPEECHES, *supra* note 188 (speech at Charlotte, North Carolina, Sept. 21, 1964). Similarly, LaFollette during the 1924 campaign, in an apparent reference to *Meyer*, averred that "[i]n all the history of this world, no people has ever looked to the courts as the guardian of its liberties. The liberties of the people rest with the

and Wallace in 1968 generally refrained from personal criticism of individual judges, notwithstanding Taft's unpopularity among liberals during LaFollette's day and that Warren was anathema to many conservatives during the 1960s. Indeed, it is significant that two of the most vociferous efforts to transform the judiciary into an election issue were made not by critics of the Court but rather by defenders of the Court. These two efforts were the 1896 and 1924 campaigns of Republicans who believed, with good reason, that they could win votes by alleging that their opponents sought to emasculate the federal judiciary, which Republicans portrayed as the bulwark of property rights and personal liberties. Faced with these attacks, both Bryan in 1896 and LaFollette in 1924 significantly muted their earlier criticisms of the courts and tried to assure voters that they did not intend seriously to tamper with judicial power.

The issue today, therefore, is not the validity of judicial power itself but rather who will exercise that power. In a variation on the old adage, "if you can't beat them, join them," voters and politicians of all persuasions today seek to elect presidents and senators who will appoint judges who will serve their agendas. Although the Supreme Court remains the primary focus of the electorate's attention, the growing tension between the President and the Senate in the nomination of lower federal judges during the so-called "era of divided government" may be making voters more cognizant that presidential elections also can have a profound impact on the composition of the lower federal bench. While few votes may pivot on judicial appointments, voters are rightly giving more attention to the types of judicial nominations that presidential candidates would make.