2012 VOL. 37 NO. 3

JOURNAL OF

SUPREME COURT HISTORY

SUPREME COURT HISTORICAL SOCIETY

The Supreme Court as an Issue in Presidential Campaigns

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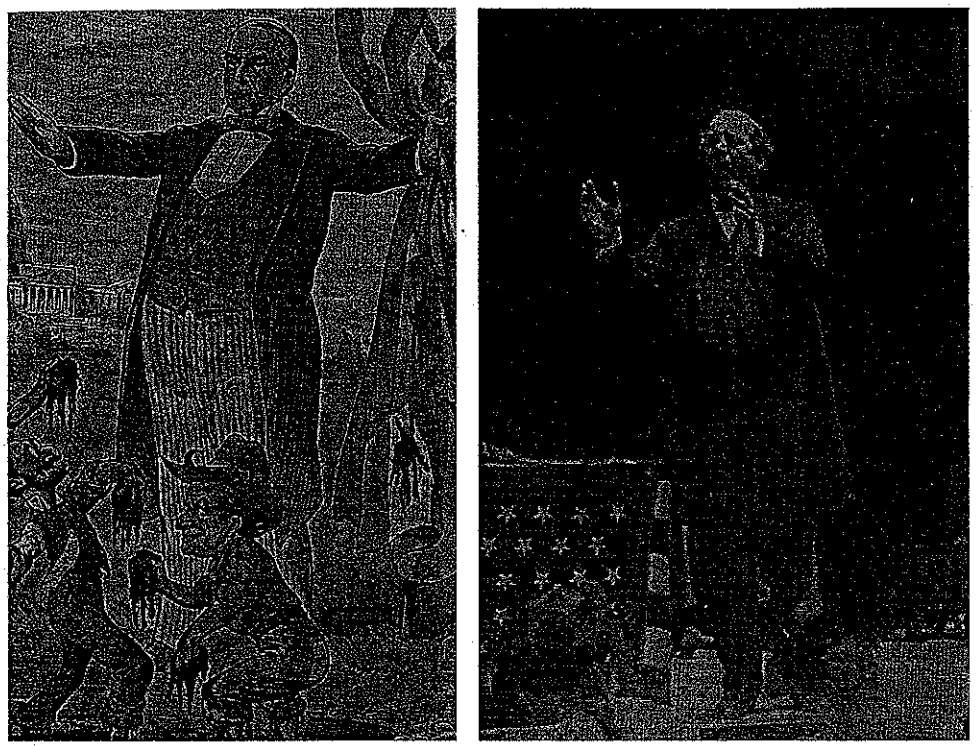
Although the Supreme Court's decisions have far-reaching political consequences and presidential elections profoundly affect the Court by determining who will appoint the Justices, the Court only sporadically has emerged as a significant issue in presidential campaigns. During the nineteenth and most of the twentieth centuries, the Court emerged as an issue only at times when its decisions were particularly controversial. During the past forty years, as voters have acquired more awareness of the political significance of Supreme Court appointments, the Court has become a persistent—but nearly always peripheral—election issue. Controversies concerning the Court, however, have provided some dramatic moments in presidential campaign history on the relatively rare occasions when candidates have placed the Court at center stage.

Judicial issues first played a role in the election of 1800, when the controversy over the federal judiciary's enforcement of the Alien and Sedition Acts may have helped to elect Thomas Jefferson to the presidency. Although this election preceded the 1801 appointment of John Marshall to the chief justiceship and the emergence of the Court as a powerful counterweight to Congress and the President, Jefferson's election reflected widespread discontent with the federal judiciary's imposition of harsh penalties under these statutes, which were designed to stifle opposition to the policies of President Adams, who steadfastly rejected attempts to lend American support to France in its war with Great Britain. During the election campaign, these laws acquired a political importance that exceeded their practical importance since Jeffersonians claimed that they represented a political attitude that threatened liberty itself.[1] Opposition to the statutes and attacks on the federal judiciary's enforcement of the laws encouraged John Adams to appoint Marshall to the chief justiceship during the waning days of his presidency. During the next two decades, the Marshall Court's controversial decisions protecting vested property interests, expanding the power of the federal government and increasing the

authority of the judiciary, generated hostility toward the Court among Jeffersonian Republicans, some of whom advocated measures to curtail federal judicial power. The Court, however, was not a significant issue in presidential elections, except in 1832, when the campaign was dominated by President Jackson's opposition to the Bank of the United States, which Congress had created to facilitate federal financial transactions and to create a source of credit for private businesses. To Jackson, this symbolized the expansion of federal power at the expense of the states and the aggrandizement of the power of wealthy merchants, financiers, and speculators at the expense of farmers, craftsmen, and owners of small businesses. The Court could not help but to be swept into the maelstrom since it had upheld the constitutionality of the Bank in *McCulloch v. Maryland* (1819),[2] a decision that provided a sweeping vision of congressional power to legislate for the nation's welfare under the Constitution's Necessary and Proper Clause. In vetoing the renewal of the Bank's charter in July 1832, Jackson declared that "[t]he opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."[3] As one scholar has explained, Jackson's transformation of the election into a referendum on his veto "placed the constitutional role of the Court in doubt."[4] Jacksonians derogated the Court's power of judicial review–even though the Court in *McCulloch* had not struck down the bank statute, while National Republicans claimed that criticism of judicial review called into question the rule of law. Jackson's reelection, however, did not result in any erosion of the Court's power. Although Chief Justice Taney and other Justices appointed by Jackson were less inclined than Marshall to favor vested property interests and the expansion of congressional power, the Taney Court used the power and prestige won for the Court during the Marshall era to craft a doctrine of state police power that helped to facilitate the continuation of economic development along capitalistic lines. The Court itself was not at the vortex of a presidential campaign until 1860, following its notorious *Dred Scott* decision, which held that Congress could not constitutionally exclude slavery from the territories.[5] Although the Justices apparently hoped that this decision would resolve an issue that the political system had failed to settle, Dred Scott exacerbated the controversy over slavery and helped to precipitate the Civil War. Bitterly assailed by the nascent Republican party, Dred Scott provided opponents of slavery with a tangible target on which to focus.[6] The decision was a prominent feature of the debates between Abraham Lincoln and Stephen Douglas in their 1858 contest to represent Illinois in the U.S. Senate,[7] and fear of the extension of slavery was such a dominant force in the 1860 presidential election that the legal scholar Charles Warren concluded that "Chief Justice Taney elected Abraham Lincoln to the Presidency."[8]

In contrast with later periods in which judicial decisions were controversial, opponents of Dred Scott tended to advocate the repudiation of this decision rather than the curtailment of the Court's institutional powers. As one scholar has explained, the "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."[9] Lincoln believed that "a Republican victory at the polls would be enough in itself to prevent further pro-slavery onslaughts by the existing Court."[10] Although Republicans bitterly condemned the decision, one historian has explained that 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."[11] Republican campaign literature, however, did not hesitate to criticize *Dred Scott* along with Taney.[12]



The Supreme Court first became a subject of political campaigns in the 1896 contest between William McKinley (left) and William Jennings Bryan (right). Bryan criticized three 1895 Supreme Court decisions striking down the federal income tax, excluding manufacturing from the scope of the Sherman Antitrust Act, and upholding the conviction of labor leader Eugene V. Debs for violating a federal injunction during a strike.

While the Republican platform did not actually mention *Dred Scott* by name, its disapproval of that decision was unmistakable. The platform declared that "the new dogma that the Constitution ... carries slavery into the any or all of the territories ... is a dangerous political heresy" that was at odds with the text of the Constitution as well as legislative and judicial precedent, and was "subversive of the peace and harmony of the country."[13]

Judicial issues first became regularly intertwined with presidential politics during the period between the 1890s and 1937, when the Supreme Court, lower federal courts, and state courts carefully scrutinized the constitutionality of social and economic regulatory legislation that was designed to ameliorate some of the harsher effects of the Industrial Revolution. These statutes presented novel issues of law since they often interfered with traditional concepts of private property or exceeded generally limits on congressional power under the commerce and taxing powers. Although the courts upheld more regulatory legislation than they struck down, the Court struck down several high-profile statutes, and the specter of judicial nullification of reform legislation demoralized progressive attempts to enact such laws. The courts during this period also often restricted the activities of labor unions, often through the use of injunctions against strikes, boycotts, and organizational efforts. Critics of the Supreme Court and other courts complained that a "judicial oligarchy" was thwarting the rights of the people and proposed various measures to curtail judicial power.

The Court's responses to economic regulation and the growing assertiveness of organized labor first became an issue during the tumultuous and pivotal contest between William McKinley and William Jennings

Bryan in 1896 in the wake of the triad of 1895 Supreme Court decisions striking down the federal income tax, excluding manufacturing from the scope of the Sherman Antitrust Act, and upholding the conviction of labor leader Eugene V. Debs for violating a federal injunction during a strike.[14] The Democratic platform blamed the federal government's deficit on the income tax decisions, alleging that the Court had overturned nearly a century of precedent. The platform also assailed "government by injunction as a new and highly dangerous form of oppression by which Federal judges become at once legislators, judges, and executioners" and proposed a federal statute to permit the use of juries in some cases involving contempt of court.[15] Keenly aware that derogation of theCourt could play into the hands of Republicans who sought to portray him as a dangerous radical, Bryan criticized the Court's decisions as he vigorously barnstormed through the nation, but he was careful to avoid the acerbic rhetoric with which some of his supporters assailed the Court, and he emphasized that he did not challenge judicial review.[16] This did not, however, inhibit various Republicans from alleging that Democrats threatened constitutional government by questioning the Court's decisions.[17]

Judicial issues receded in the election campaigns of 1900 and 1904 before resurfacing to a small degree in 1908, when judicial appointments for the first time became an election issue because of the relatively advanced ages of the Justices.[18] Such concerns were prophetic, for William Howard Taft had the opportunity to nominate six Justices during his single term as President.

By 1912, the surge of Progressivism brought criticism of the courts to a crescendo and ensured that judicial issues were prominent in the presidential election. Some Progressives advocated various measures to restrain judicial power, including abolition of life tenure for federal judges, election of federal judges, and the requirement of a supermajority in decisions striking down legislation. While most of the plethora of progressive proposals for curbing judicial review never advanced beyond rhetoric, Progressives in several Western states secured the enactment of laws to permit the recall of state judges. Conservatives, who found judicial recall shocking, were even more appalled by former President Theodore Roosevelt's proposal for a recall of judicial decisions, which Roosevelt unveiled when he announced his presidential candidacy in February 1912. Roosevelt's recall would have permitted states to allow voters to revise state supreme court decisions that nullified state statutes on state or federal constitutional grounds.[19] Conservatives were not alone in denouncing Roosevelt's proposal as a threat to constitutional government, and Roosevelt soon found the proposal to be an albatross around the neck of his campaign. Although Roosevelt was too stubborn or too committed to the idea to retreat from it, he understandably downplayed his support for it, particularly after he lost the Republican nomination and became the candidate of the newly formed Progressive party. The ability of Roosevelt's opponents to use the recall to portray Roosevelt as a wild and dangerous radical may have caused Roosevelt to criticize the courts less frequently and less stridently during his autumn campaign than he had done during the previous two years.[20]

Republicans, however, would not allow the issue to recede and Taft practically made defense of judicial review the centerpiece of his re-election campaign. In accepting the G.O.P. nomination, Taft declared that the preservation of the Constitution was "the supreme issue" of the election and he assailed "hostility to the judiciary and the measures to take away its power and its independence," particularly the judicial recall and measures to restrict the use of injunctions against secondary boycotts and to permit the use of juries in contempt proceedings.[21] The Republican platform echoed these themes, pledging to maintain the "authority and integrity" of the

state and federal courts in order to protect civil liberties and political stability.[22]

In contrast with Taft and Roosevelt, the Democratic nominee, Woodrow Wilson, generally ignored judicial issues in his victorious presidential campaign, apparently fearing that criticism of the courts would offend voters or allow Republicans to brand him as radical.[23] The Democratic platform struck the same note of caution, chiding the Republicans for raising "a false issue respecting the judiciary" and suggesting that "lack of respect for the courts" was widespread.[24]

Although assessment of the precise impact of judicial issues on the 1912 election's outcome is not possible, Roosevelt's criticisms of the courts and his recall proposal did not prevent him from out-polling Taft, with twenty-eight percent of the popular votes and eighty-eight electoral votes.

The Supreme Court's more restrained exercise of judicial review for several years after 1912 and the growing public focus on the prospect of American participation in the First World War helped to ensure that judicial issues were not prominent in the 1916 contest between Wilson and Charles Evans Hughes. The Court nearly became a major issue, however, because Hughes resigned from the Court to accept the Republican nomination. Although Hughes had actively resisted efforts to draft him for the nomination and had accepted it only after Republicans had convinced him that only he could unite their still-fractured party, Hughes's abrupt metamorphosis from jurist to presidential candidate naturally lent credence to the long-standing complaint of progressives and labor unions that judges were merely politicians in black robes.[25] The immediate chorus of outrage over Hughes's acceptance of the nomination included proposals for constitutional amendments to limit political activity by former Justices.[26]

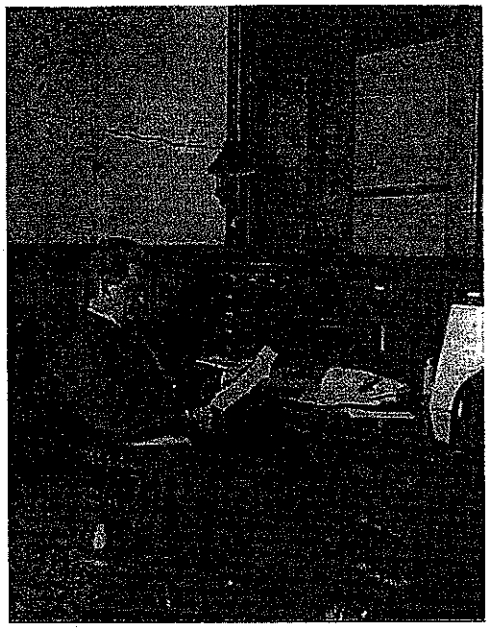
When he announced his presidential candidacy in February 1912, Theodore Roosevelt unveiled his proposal for a recall of judicial decisions, which would have permitted states to allow voters to revise state supreme court decisions that nullified state statutes on state or federal constitutional grounds.

Criticism of Hughes quickly wilted, however, after Wilson refused to permit the Democratic platform to condemn Hughes for resigning from the Court to become a candidate. The widespread perception that Hughes had not sought the nomination also helped to eliminate the Court as an election issue and spared the Court from loss of prestige. As Professor Bickel observed, the hazards that Hughes's candidacy presented to the Court were "negotiated with singular success and luck."[27]

The Court also had at least an indirect impact on the election of 1916 because President Wilson's appointment of Louis D. Brandeis to the Court in January of that year helped Wilson to obtain crucial support of progressives in what was one of the closest presidential elections in history.[28] Many of these progressives had voted for Roosevelt in 1912 and did not believe that Wilson's "New Freedom" reforms had sufficiently advanced the progressive agenda. Moreover, many progressives regarded themselves as Republican. They might have voted for the moderately progressive Hughes in much greater

numbers but for Wilson's nomination of Brandeis, an imaginative, tireless, articulate, and highly successful champion of progressive causes whose membership on the Court ensured that cases involving social and economic regulatory legislation and the rights of labor would receive a sympathetic hearing from a Justice who might be able to influence the thinking of at least some of his Brethren on the Court. Foreign and domestic issues arising out of the First World War dominated the next election in 1920, but judicial issues returned to the fore during the 1924 contest after the Taft Court handed down a number of decisions that restricted labor union activities[29] and invalidated a federal child labor[30] statute and a law regulating wages for women in the District of Columbia.[31] Once again, Progressives produced a multitude of proposals for curbing judicial review, including Wisconsin Senator Robert M. LaFollette's proposal to permit Congress to override Supreme Court decisions by two-thirds votes of both houses. LaFollette first proposed this remedy in 1922 and he continued to advocate it as he campaigned as a third party candidate in 1924, denouncing the Supreme Court decisions that hobbled organized labor and impeded social and economic regulatory legislation. The powerful Committee on Progressive Political Action, which endorsed LaFollette, advocated the virtual abolition of judicial review and called for the election of federal judges for limited terms.[32]

With LaFollette assembling a formidable coalition of intellectuals, liberals, farmers, industrial workers, and ethnic voters, Republicans feared with good reason that he would carry enough Midwestern and Western states to throw the election into the House of Representatives. Borrowing a page from their playbooks of 1896 and 1912, Republicans seized upon LaFollette's criticism of Supreme Court decisions as an ideal means of framing their theme that LaFollette was a dangerous radical who would foment political upheaval that would ruin the nation's burgeoning prosperity. In one of his few campaign speeches, the normally phlegmatic Coolidge feverishly warned that LaFollette's proposal to permit nullification of Supreme Court decisions would encourage "confiscation of property and the destruction of liberty" and that Americans would "see their savings swept away, their homes devastated, and their children perish from want and hunger."[33] In another speech, he alleged that LaFollette's proposal would "destroy the States, abolish the Presidential office, close the courts and make the will of Congress absolute."[34] Meanwhile, Republican vice presidential candidate Charles G. Dawes relished his opportunities to savage LaFollette's proposal in nearly every speech of his campaign.[35] Some Democrats likewise attacked the proposal in apocalyptic rhetoric,[36] as did many prominent attorneys. Hughes, for example, charged that LaFollette's proposal would "denature the Supreme Court" and "destroy

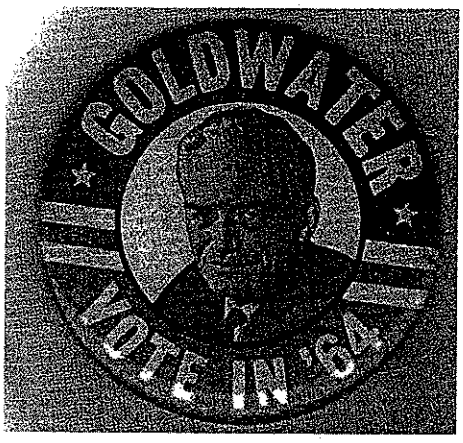


Wisconsin Senator Robert M. LaFollette proposed permitting Congress to override Supreme Court decisions by two-thirds votes of both houses in 1922 and he continued to advocate for it as he campaigned as a third party candidate in 1924, denouncing the Supreme Court decisions that hobbled organized labor and impeded social and economic regulatory legislation.

our system of government,"[37] and a statement signed by many of New York's leading attorneys alleged that "LaFollette's attack upon our Constitution and the Supreme Court is but the first step toward Socialism, Bolshevism, and chaos."[38]

Republicans were particularly adept in using the Court issue as a means of eroding LaFollette's disproportionate support among Roman Catholics, Jews, and Lutherans, who looked to the federal courts for protection against ethnic and religious discrimination in the wake of the resurgent nativism that followed the First World War. Many of these voters, who constituted LaFollette's political base, were grateful to the Supreme Court for its decision in *Meyer v. Nebraska*, which struck down laws prohibiting the teaching of German in parochial and private schools.[39] This decision was particularly important because it cast a pall over a powerful nationwide movement to eliminate parochial education by requiring all children to attend public school. Relying on *Meyer*, a federal district court in March 1924 struck down Oregon's compulsory public education law in a decision that the Supreme Court affirmed after the 1924 election.[40]

Chief Justice Taft, who was worried about the increasing criticism of the Court for its invalidation of economic regulatory legislation, personally encouraged Republicans to use LaFollette's Court-curbing proposal as a political weapon. Taft, for example, advised Coolidge early in his presidential campaign that the Court issue was "so important that it is of great benefit to be stressed,"[41] and he urged the editor of the *St. Louis Post-Dispatch* to praise *Meyer* and the Oregon school decision in editorials denouncing LaFollette's Court proposal.[42] In response to *Meyer*, LaFollette and other progressives pointed out that the Court's use of judicial review had protected vested economic interests far more often than it had fostered non-economic personal liberties, and LaFollette questioned whether people should look toward the Court for protection of their liberties anyway. "In all the history of the world," he told an Omaha audience, "no people has ever looked to the courts as the guardians of its liberties. The liberties of the people rest with the people."[43]



While running for President in 1964, Senator Barry M. Goldwater of Arizona, who perhaps spoke more frequently and more harshly about the Court than any major party's presidential candidate in history, linked his attacks on the Court with the broader themes of his campaign, particularly the threats to states' rights and what he termed America's "moral decay."

LaFollette's volleys against the Court played well with liberals, but even many of LaFollette's most ardent admirers bored easily when their candidate addressed the specific details of judicial decisions. After his supporters vacated Madison Square Garden in droves while LaFollette offered a lesson in the fine points of constitutional law during a speech early in his autumn campaign, LaFollette addressed judicial issues less frequently and in much less detail. Toward the end of the campaign, LaFollette tried to distance himself from his proposal to permit congressional nullification of Supreme Court decisions, admitting that the measure was unlikely to survive the gauntlet of the constitutional amendment process.[44] This reflected LaFollette's recognition that the Republicans had effectively exploited his Court-curbing proposal, as well as his desire to emphasize what he regarded as more important issues.[45] In

order to avoid running afoul of widespread respect for the judiciary, LaFollette also generally avoided personal criticism of Taft, although one of his campaign brochures claimed that it was ironic that Taft, whom the people had rejected in his effort to win re-election to the nation's highest office, now occupied by appointment the powerful position of Chief Justice.[46]

Although LaFollette placed well for a third party candidate, winning seventeen percent of the popular vote and carrying his home state of Wisconsin, his attacks on the Court probably eroded his support. One scholar 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."[47] Contemporary commentators agreed. *The New Republic*, which had endorsed LaFollette, lamented the success of the "whipped-up panic over the supposed danger to the Supreme Court and the Constitution,"[48] and syndicated columnist Mark Sullivan wrote that "LaFollette suffered greatly through dramatizing himself in opposition to the Supreme Court."[49]

While the Supreme Court's review of social and economic regulatory legislation remained controversial, the Court was not an important issue in the 1928 and 1932 elections. The issue flared up only briefly in the closing days of the 1932 campaign after Republicans, including President Hoover, attacked Franklin Roosevelt's off-hand remark that the Republicans controlled the Court.[50]

In 1936, the Court remained in the background of the presidential contest even though one might have expected the Court to become a major issue since the Court had crippled the New Deal by striking down several major New Deal measures during 1935 and 1936. Although many of Roosevelt's supporters urged him to use these decisions as an election issue, Roosevelt refrained from any broadsides against the Court, limiting himself to discreet hints that Court reform might be part of his post-election agenda.[51] Roosevelt may have feared that attacks on the Court might have played into Republican efforts to malign him as an enemy of the Constitution, and he wanted a clean slate on which to work after the election in framing measures to prevent the Court from continuing to obstruct his programs.

The remedy that Roosevelt unveiled after his landslide re-election—the appointment of six additional Justices—generated an enormous controversy in which Roosevelt was accused of trying to "pack" the Court for political purposes. Although Congress rejected Roosevelt's proposal, the Court became much more amenable to social and regulatory legislation starting in 1937, and Roosevelt's ability to appoint several Justices who were sympathetic to the New Deal ensured that the Court ceased to be a target of criticism by liberals and progressives.

Republican allegations that Roosevelt's "Court-packing" proposal was subversive of constitutional government—had grown cold by the time of the 1940 presidential campaign despite sporadic attempts by Republicans to re-kindle it by linking it with their warnings that the New Deal and Roosevelt's bid for an unprecedented third term threatened constitutional government. Republicans also alleged that Roosevelt's success in appointing Justices who were sympathetic toward the New Deal threatened the separation of powers.[52]

Although judicial issues continued to recede in 1944 when Roosevelt sought and received a fourth term, Republicans charged that Roosevelt's appointment of allegedly subservient Justices and his disregard of the two-term tradition threatened constitutional government. The Republican nominee Thomas E. Dewey reminded voters of Roosevelt's effort to obtain "an obedient Supreme Court" through his Court-packing plan and lamented that "time and mortality... have enabled Mr.

Roosevelt to pack the courts with New Deal appointees."[53]

Political criticism of Supreme Court decisions receded after the Judicial Revolution of 1937 but flared up again, this time on the "conservative" end of the political spectrum, during the Warren Court era of the 1950s and 1960s. The Court's decisions opposing racial segregation, particularly *Brown v. Board of Education* (1954), and its decisions protecting the rights of political subversives during the height of the Cold War provoked much controversy, as did its many decisions extending the procedural rights of criminal defendants. Like "liberal" critics of the Court before 1937, these Conservatives proposed various measures to curb the institutional powers of the Court. In particular, they proposed limitating the Court's jurisdiction over various controversial subjects.[54] During the 1956 and 1960 election campaigns, both parties were reticent about the Court's controversial decisions on racial desegregation and domestic security issues, partly because they did not want to politicize these issues even more than they already had been politicized.[55]

The Court's additional decisions in the early 1960s on the sensitive subjects of desegregation, and criminal procedure, and its pioneering decisions on school prayer, and reapportionment helped to ensure that the Court became a major issue in 1964. Campaigning for the Democratic presidential nomination, Alabama Governor George C. Wallace attacked these decisions with gusto in nearly all of his speeches. Borrowing a phrase favored by progressives who criticized the Court earlier in the century, Wallace alleged that "a judicial oligarchy" threatened American democracy.[56] This allegation was later embraced by the Republican presidential nominee, Senator Barry M. Goldwater of Arizona, who perhaps spoke more frequently and more harshly about the Court than any major party's presidential candidate in history. As the columnist Anthony Lewis observed three weeks before the election, Goldwater "has seemed to be running against the nine justices instead of Lyndon B. Johnson."[57]

Goldwater linked his attacks on the Court with the broader themes of his campaign, particularly the threats to states' rights and so-called "moral decay." His particularly harsh criticisms of the Court's reapportionment[58] and school prayer[59] decisions were echoed by the Republican party's platform, which called for constitutional amendments to permit the forty-nine states that had bicameral legislatures to use factors other than population in apportioning membership in one house of the legislature and to permit noncoerced prayer in public schools.[60] Although Goldwater avoided criticizing the Court's desegregation decisions, reporters who covered his campaign believed that southern audiences had these decisions in mind when they cheered Goldwater's attacks on the Court for interjecting itself into social and political issues.[61]

Goldwater's criticisms of the Court, like those of LaFollette in 1924, may have played into the hands of the Democrats, who based much of their strategy on attempts to portray the Republican nominee as a dangerous radical. House Judiciary Committee chair emanuel celler, for example, castigated Goldwater for his "violent demagoguery" and for using the "Court as a political football."[62] Like LaFollette's critics four decades earlier, Cellar warned that Goldwater's remarks could have revolutionary consequences by inciting disrespect for the rule of law. In terms that were reminiscent of the elite bar's admonitions about LaFollette in 1924, fifty prestigious lawyers, including a dozen law school deans and five former American Bar Association presidents, issued a statement on October 11 deploring Goldwater's "attack upon the ultimate guardian of American liberty."[63] Unlike Coolidge in 1924, however, President Johnson refrained from joining such criticism of Goldwater, confining himself to a lofty

declaration that he did not regard the Court as an appropriate election issue.[64]

Like earlier candidates, particularly LaFollette in 1924, Goldwater found that his supporters responded well to general attacks on the Court but that they had scant patience for detailed analysis of judicial decisions. One Republican campaign organizer practically cried when he reported to national headquarters that Goldwater's discussion of constitutional law bored and confused a Charlotte audience that had expected "blood and guts" from Goldwater after South Carolina Senator Strom Thurmond "got the crowd all fired up."[65]

Unlike LaFollette and many of his fellow Conservatives, Goldwater did not advocate any curtailment of the Court's institutional powers. Instead, Goldwater became one of the first presidential candidates to emphasize the connection between presidential elections and federal court appointments. Goldwater warned, for example, that "the makeup of the Supreme Court" was reason to be "very, very worried about who is the President for the next four or eight years,"[66] and he promised to appoint "judges who will support the Constitution, not scoff at it."[67]

Like LaFollette in 1924 and other presidential candidates who have castigated decisions of the Court, Goldwater refrained from personal criticism of the Justices. At a time when many conservatives were calling for the impeachment of Chief Justice Earl Warren and even denouncing him as a traitor, Goldwater publicly described Warren as "a very loyal man" and not "un-American" when one of his supporters at a campaign rally tried to goad him into a personal attack on the Chief Justice.[68]

Goldwater's strident criticisms of the Court's decisions probably had little impact on the outcome of the election, which Goldwater lost in a major landslide, except to the extent that they may have reinforced Democratic allegations that Goldwater was an extremist. Although Goldwater's defeat ensured the demise of growing efforts to use the constitutional amendment process to overturn or modify various Supreme Court decisions, the Court remained controversial. During the next four years, the Court's decisions, particularly *Miranda v. Arizona*[69] and other decisions protecting the rights of criminal defendants, helped to ensure that the Court would become a major election issue in 1968.

During the 1968 campaign, Richard Nixon criticized the Court more than any successful presidential candidate in history.[70] Unlike Goldwater in 1964, Nixon generally refrained from discussions of particular decisions, confining himself to more general criticism of judicial activism, especially in cases involving criminal procedure. Campaigning at a time when rising crime was one of the electorate's major concerns, Nixon's criticisms of the Court fit nicely into his broader efforts to assure voters that he would help to restore so-called "law and order." Although Nixon denounced *Miranda* and advocated legislation to allow a judge and jury to decide whether a confession was voluntary,[71] he generally refrained from proposing institutional reforms or constitutional amendments to overturn specific decisions. Instead, Nixon focused on judicial appointments as a remedy, promising to nominate 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 superlegislators with a free hand to impose their political viewpoints on the the American people."[72] Nixon's promise to nominate such judges had particular resonance because, in June 1968, Warren announced his intention to retire from the Court and eighty-three-year-old Justice Hugo L. Black also was expected to be close to retirement.

Nixon's emphasis on judicial issues paled in comparison with the ferocious manner in which Wallace assailed the Court during his 1968 third party presidential campaign.

Wallace, who carried five southern states and won a larger share of the vote—thirteen percent—than any third party candidate since LaFollette, made attacks on the Court a staple of his campaign speeches. Wallace, for example, declared that "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."[73] Wallace did not spare Warren, whom he alleged to have "done more to destroy constitutional government in this country than any one man."[74]

The platform of the American Independent party, which was hastily formed to provide Wallace with ballot access, advocated that Supreme Court and Court of Appeals judges be subject to periodic reconfirmation by the Senate, and that district judges face periodic retention elections that would require appointment of a new judge if the voters opposed retention. The platform also castigated the courts for "their solicitude for the criminal and lawless element in our society," which was "one of the principal reasons for the turmoil and near revolutionary conditions which prevail in our country today."[75]

Meanwhile, Democratic nominee Hubert H. Humphrey defended the Court, declaring that the "Court in these very critical years has served the national interest extraordinarily well." [76] Humphrey insisted 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."[77] Humphrey also warned that no President could "manage" the Supreme Court.[78] Judicial issues in the 1968 campaign were understandably important, for Nixon had the opportunity to appoint four Justices during his first term, at least three of whom helped to move the Court in a more "conservative" direction. Professor Stephenson has described the 1968 campaign as "a watershed event for the Supreme Court both institutionally and jurisprudentially" insofar as it "inaugurated an era of conspicuous politicization of the judiciary."[79] Growing public recognition of the importance of Supreme Court appointments has made detailed senatorial examination of Court nominees a permanent part of the confirmation process since the 1970s and also has caused judicial selection to become a perennial issue in presidential campaigns even during times when most of the Court's decisions have been arousing any particular controversy.

Conclusion

Although most voters appear to be aware of at least some major Supreme Court decisions and understand that Presidents help to shape constitutional law by nominating Justices and other federal judges, presidential candidates generally find that the Court is difficult to transform into an election issue. As the nation's most revered defender of the rule of law and the Constitution, the Court is so widely respected, even when its decisions are unpopular, that attacks on the Court always have been politically perilous. Harsh criticism of the Court can backfire, making a candidate vulnerable to allegations that he seeks to politicize the Court or lacks respect for the Constitution.

Transformation of the Court into a political issue is also difficult for presidential candidates because anything other than the most superficial criticism requires discussion of the subtleties of the Court's decisions, which may bore or confuse many voters and are certainly out of place in campaigns that are increasingly focused on simple themes and sound bites. During the past forty years, such criticism has also been problematic because the Court's decisions have been so diffuse that the Court has not been closely identified with the views of either political party or either end of the political spectrum.

It is, therefore, understandable that modern candidates have addressed the Court mostly in the context of the appointment process. Even this, however, presents difficulties since it is never clear which Justices, if any, will depart from the Court during the coming four years. Moreover, even in an age of close scrutiny of nominees, it is never certain that a Justice will conform to the expectations of the President who nominates her. The increasing scrutiny of potential Justices during both the pre-nomination and confirmation processes, however, has helped to reduce the chances of such surprises and therefore helps to ensure that Court appointments will remain an issue in presidential campaigns.

ENDNOTES

[1] See Donald Grier Stephenson, Jr., **Campaigns and the Court: The U.S. Supreme Court in Presidential Elections** 68-69 (1999).

[2] 17 U.S (4 Wheat.) 316 (1819).

[3] James D. Richardson, **Messages and Papers of the Presidents, vol. 2**, 582 (1897).

[4] Stephenson, *op. cit.*, 74.

[5] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[6] See Stephenson, op. cit., 98-103.

[7] See Harold Holzer, ed., The Lincoln-Douglas Debates 22, 42, 101-02, 151, 168-73, 263-64, 295-96, 320, 325, 360, 361-62 (1993).

[8] Charles Warren, The Supreme Court in United States History, vol. 1 357 (rev. ed. 1937).

[9] Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 454 (1978).

[10] Ibid.

[11] William Lasser, **The Limits of Judicial Power: The Supreme Court in American Politics** 51 (1988).

[12] See Stephenson, op. cit., 102.

[13] Donald Bruce Johnson, compiler, National Party Platforms, vol. 1, 32 (1978).

[14] *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *In re Debs*, 158 U.S. 564 (1895).

[15] Donald Bruce Johnson, **National Party Platforms, vol. 1** 98, 99 (1978).

[16] William G. Ross, **A Muted Fury: Populists, Progressives, and Labor Unions Confront the Court, 1890-1937** 35-36 (1994).

[17] Alan F. Westin, "The Supreme Court, the Populist Movement, and the Election of 1896," 15 *Journal of Politics* 30-39 (1953).

[18] See e.g.,"The Supreme Court and the Next President," *World's Work*, Oct. 1908, 10740; "Campaign to Affect Court," *New York Times*, Feb. 10, 1908, 1.

[19] Ross, supra note 6, 134-36.

[20] *Ibid.*, 136-48.

[21] "Speech of William Howard Taft Accepting the Republican Nomination for President of the United States,: Aug. 1, 1912, S. Doc. 902, 62nd Cong., 2d sess., 1912.

[22] Johnson, *supra* note 5, 194.

[23] Ross, *supra* note 6, 151.

[24] *Ibid.*, 176.

[25] Ross, *supra* note 6, 161.

[26] See 51 *Congressional Record*, 63rd Cong., 2d sess., July 31, 1916, 11851; "Stone Raps Hughes and the Platforms," *New York Times*, June 13, 1916, 1.

[27] Alexander M. Bickel and Benno C. Schmidt, Jr., **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 9, The Judiciary and Responsible Government, 1910-1921** 397 (1984).

[28] Melvin Urofsky, **Louis D. Brandeis: A Life** 434-35 (2009).

[29] E.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Truax v. Corrigan*, 257 U.S. 312 (1921); *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922).

[30] *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

[31] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

[32] Johnson, *supra* note 13, 256.

[33] "Coolidge Assails LaFollette Views on Supreme Court," *New York Times*, Sept. 7, 1924, 1.

[34] "Coolidge States Views on Issue in Last Big Speech," *New York Times*, Oct. 24, 1924, 4.

[35] Charles G. Dawes, **Notes as Vice President 1925-1929** 19-20 (1935).

[36] Although the Democratic nominee John W. Davis, a prominent constitutional lawyer, extravagantly attacked LaFollette's Court proposal early in the campaign, Davis and other Democrats later warned voters that Republicans were using the Court issue as a means of distracting attention from the Teapot Dome scandal. *See* Ross, *supra* note 6, 268-69, 271-72.

[37] "Hughes in St. Paul Scores Third Party," *New York Times*, Oct. 26, 1924, 16; "Hughes in Chicago Promises Prosperity," *New York Times*, Oct. 29, 1924, 8.

[38] "Court Limitation Assailed by Bar," *New York Times*, Oct. 7, 1924, 2.

[39] 262 U.S. 390 (1923).

[40] *Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce*, 296 F. 928 (D. Ore. 1924), *aff'd*, 268 U.S. 510 (1925).

[41] William Howard Taft to Calvin Coolidge, Sept. 11, 1924, Taft Papers, Series 3, Reel 267, Manuscript Division, Library of Congress.
[42] William Howard Taft to Casper S. Yost, Sept. 11, 1924, *ibid.*
[43] LaFollette speech, Omaha, Oct. 20, 1924, LaFollette Family Papers, Series B, Box 228, Manuscript Division, Library of Congress.
[44] *See* e.g., LaFollette speech, Detroit, Oct. 9, 1924, LaFollette Family Papers, *ibid.*; LaFollette speech, Chicago, Oct. 11, 1924, *ibid.*;LaFollette speech, Omaha, Oct. 20, 1924, *ibid.*
[45] Ross *supra* note 6, 267.
[46] *Ibid.*, 278-79.
[47] Kenneth C. MacKay, **The Progressive Movement of 1924** 163 (1947).
[48] *New Republic*, Nov. 26, 1924, 1.
[49] Mark Sullivan, "Looking Back on LaFollette," *World's Work*, Jan. 1925, 331.
[50] *See* William E. Leuchtenberg, **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** 83 (1995).
[51] William E. Leuchtenberg, "When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis," 108 *Yale Law Journal* 195 (1999).
[52] *See* e.g., Wendell Willkie, "The Court Is Now His," *Saturday Evening Post*, Mar. 9, 1940, 29, 72, 76.
[53] "The Text of Governor Dewey's Address in Chicago Pledging Honesty in Government," *New York Times*, Oct. 26, 1944, 13.
[54] *See* C. Herman Pritchett, **Congress versus the Supreme Court, 1957-1960** (1961); Lucas A. Powe, Jr., **The Warren Court and American Politics** (2000); Clifford M. Lytle, **The Warren Court and Its Critics** (1968).
[55] *See* William G. Ross, "The Role of Judicial Issues in Presidential Elections," 42 *Santa Clara Law Review* 424-26 (2002).
[56] *See* e.g., Speech at the Alabama State Fair Grounds, June 27, 1964, Reel 1, Papers of George C. Wallace, State Archives, Montgomery, Alabama.
[57] Anthony Lewis, "Campaign: The Supreme Court Key Issue," *New York Times*, Oct. 11, 1964, 8E.
[58] *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).
[59] For an excellent analysis of Nixon's use of the Court as a campaign issue, see Christopher Hickman, "Courting the Right: Richard Nixon's 1968 Campaign against the Warren Court," 36 *Journal of Supreme Court History* 287-303 (2011).
[60] *Engle v. Vitale*, 370 U.S. 421 (1962).
[61] Johnson, *supra* note 5, vol. 2, 683, 686.
[62] Walter F. Murphy and Joseph Tanenhaus, "Public Opinion and Supreme Court: The Goldwater Campaign," 32 *Public Opinion Quarterly* 31, 33 (1968).
[63] Press Release, "Cellar Defends Supreme Court Against Goldwater Charges" (Sept. 13, 1964), Box 298, Emmanuel Cellar Papers, Manuscript Division, Library of Congress.
[64] Anthony Lewis, "Goldwater Stand on Court Decried," *New York Times*, Oct. 12, 1964, 24.
[65] Murphy and Tanenhaus, *supra* note 50.
[66] Memorandum from Pat Ryder to Denison Kitchel, et al., Sept, 23, 1964, Box W-8, Barry Goldwater Papers, Arizona Historical Foundation, Hayden Library, Arizona State University.
[67] Barry M. Goldwater, *The Speeches, Remarks, Press Conferences, and Related Papers of Senator Barry M. Goldwater, July 16-November 4, 1964* 500 (1965).
[68] *Ibid.*, 665.
[69] "Goldwater Takes Turn to Left," *New York Times*, Feb. 15, 1964, 11.
[70] 377 U.S. 201 (1966).
[71] *See* Stephen E. Ambrose, **Nixon: The Triumph of a Politician, 1962-1972** 154 (1989).
[72] Stephenson, *supra* note 1, 181.
[73] Dan T. Carter. The Politics of Rage: George Wallace, The Origins of the New Conservatism, and the Transformation of American Politics 367 (1995).
[74] Walter Rugaber, "Wallace Woos Mississippi; Scores Warren Career," New York Times, June 22, 1968, 17.
[75] Johnson, supra note 5, vol. 2, 702.
[76] "Excerpts from Debate among the Three Candidates before California Delegation," New York Times, Aug. 28, 1968, 34.
[77] Ibid.
[78] See Max Frankel, Humphrey Scores 'The Same Nixon,'" New York Times, Sept. 14, 1968, 1.
[79] Stephenson, supra note 1, 183.