

8-9-2018

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### Recommended Citation

Christopher W. Schmidt, *The Forgotten Issue? The Supreme Court and the 2016 Presidential Campaign*, 93 Chi.-Kent L. Rev. 411 (2018).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol93/iss2/6>

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## THE FORGOTTEN ISSUE? THE SUPREME COURT AND THE 2016 PRESIDENTIAL CAMPAIGN

CHRISTOPHER W. SCHMIDT\*

### INTRODUCTION

In the lead-up to virtually every presidential election over the past few decades, legal commentators and journalists have predicted that the future of the Supreme Court would feature prominently as a campaign issue. Alongside perennially controversial rulings such as *Roe v. Wade*,<sup>1</sup> there are always recently decided or pending Supreme Court cases on contentious issues such as criminal justice, religious liberty, gay rights, and guns that attract the attention of the public and their elected officials. Surely, explains one commentator after another, the presidential candidates will make a major issue of the Court, emphasizing the importance of the election for future appointments and insisting that the American people take into account the direction of the law on hot-button issues of the day when casting their ballot.<sup>2</sup> But these predictions have been consistently wrong—or at least considerably inflated. While the Court has featured as an issue on the campaign trail in every election since the 1960s, it has never been, with only rare exceptions, a prominent campaign issue. And every four years we have a new flurry of commentary wondering why, once again, the Supreme Court was the forgotten issue of the campaign.<sup>3</sup>

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1. 410 U.S. 113 (1973).

2. See, e.g., Jackie Calmes, *Court's Potential to Goad Voters Swings to Democrats*, N.Y. TIMES, Apr. 5, 2012, at A14; Ari Berman, *Why the Supreme Court Matters*, NATION (Apr. 11, 2012), <https://www.thenation.com/article/why-supreme-court-matters/> [<https://perma.cc/24GZ-FU5S>].

3. See, e.g., Linda Greenhouse, Opinion, *The Choice Confronting the Supreme Court's Chief Justice*, N.Y. TIMES (Nov. 10, 2016), <https://www.nytimes.com/2016/11/10/opinion/the-choice-confronting-the-supreme-courts-chief-justice.html> [<https://perma.cc/AM22-5DDD>] (“[F]or years, activists on both sides have bemoaned the absence of attention to the Supreme Court in presidential campaigns.”); Robert Barnes, *The Supreme Court, Absent from the Election Debate*, WASH. POST (Sept. 3, 2012), <https://www.washingtonpost.com/politics/decision2012/the-supreme-court-absent-from-the-election->

The 2016 election was going to be different. Surely this time the Supreme Court would be one of the leading issues on the campaign trail. Justice Antonin Scalia's death in February 2016 left a Court that was evenly divided between four ideologically conservative Republican-appointed Justices and four liberal Democratic-appointed Justices. Rarely has the ideological direction of the Court been so clearly in the balance.<sup>4</sup> When Republican senators refused to hold hearings on President Obama's nominee to the Court, Judge Merrick Garland, Democrats predicted that their opponents would pay a price at the polls.<sup>5</sup> Indeed, the justification Republicans gave for why they

debate/2012/09/30/ a6e62ce4-0aff-11e2-bb5e-492c0d30bff6\_story.html?utm\_term=.4afb20595d69 [http://perma.cc/SYK9-XB4T]; Garrett Epps, *Why Obama and Romney Don't Talk About the Supreme Court*, ATLANTIC (Oct. 17, 2012), <https://www.theatlantic.com/national/archive/2012/10/why-obama-and-romney-dont-talk-about-the-supreme-court/263741/> [https://perma.cc/A2SX-S2Y8]; Erwin Chemerinsky, Opinion, *What Nov. 6 Means for the Supreme Court*, L.A. TIMES (Oct. 30, 2012), <http://articles.latimes.com/2012/oct/30/opinion/la-oe-chemerinsky-scotus-future-20121030> [https://perma.cc/RHR8-Z283] ("The future of the Supreme Court is the forgotten issue in this year's presidential election."); William G. Ross, *The Supreme Court Should Be a Key Election Issue*, JURIST (Oct. 31, 2012), <http://www.jurist.org/forum/2012/10/william-ross-scotus-election.php> [https://perma.cc/M7Z3-NX3T] [hereinafter Ross, *Election Issue*]; William G. Ross, *Why the Supreme Court Matters in the Presidential Election*, JURIST (Oct. 16, 2008), <http://www.jurist.org/forum/2008/10/why-supreme-court-matters-in.php> [https://perma.cc/U7DY-D39E] [hereinafter Ross, *Presidential Election*] ("Judicial appointments rarely are an important issue in presidential election campaigns. This year's campaign has been no exception."); *id.* ("The Court was practically forgotten until the third debate between McCain and Obama on October 15, when both candidates discussed judicial appointments in response to a question. . . . Until last night, the Court had attracted widespread attention only once, and then only incidentally, when Sarah Palin during her interview with Katie Couric was unable to identify any decision, other than *Roe v. Wade*, with which she disagreed."); Editorial, *The Forgotten Issue*, NATION (Oct. 7, 2004), <https://www.thenation.com/article/forgotten-issue/> [https://perma.cc/HYK9-MLVC] (lamenting "the scanty press coverage, the Court's absence from political ads, the silence of the candidates"); Editorial, *Silence on the Court*, CHRISTIAN SCI. MONITOR (Sept. 25, 1992), <https://www.csmonitor.com/1992/0925/25203.html> [https://perma.cc/LDR2-7BQP] ("In the 1992 presidential campaign, the Supreme Court is the dog that didn't bark. . . . [T]he candidates have largely ignored the Supreme Court as a campaign issue."); David Savage, *Three Justices in Their 80s: Next President to Control Balance of Supreme Court*, L.A. TIMES, Oct. 12, 1988, at B1, B9 ("Despite the pivotal impact that the next President may exert, neither Bush nor Dukakis has made much of an issue of the future of the Supreme Court."); Harold Jackson, *Runners Ignore the Question of American's Nine Just Men*, GUARDIAN, Oct. 20, 1980, at 6.

4. See generally Kevin J. McMahon, "The Supreme Court: It's What it's All About" . . . or Was It? *Analyzing the Court Issue in the 2016 Presidential Election*, in CONVENTIONAL WISDOM, PARTIES, AND BROKEN BARRIERS IN THE 2016 ELECTION 41–60 (Jennifer G. Lucas et al. eds., 2018).

5. See, e.g., Nina Totenberg, *The Supreme Court: A Winning Issue In The Presidential Campaign?*, NPR (Sept. 29, 2016, 4:53 PM), <http://www.npr.org/2016/09/29/495960902/the-supreme-court-a-winning-issue-in-the-presidential-campaign> [https://perma.cc/KSN8-FL9U] ("At first, it looked as though the GOP stonewalling on the Garland nomination might be a powerful issue for the Democrats. The public agreed with the president by large margins, as much as 70 and 80 percent in some polls. And Democrats thought they could force the GOP to act or pay on Election Day."); Ari Berman, *The Supreme Court Is the Most Important Issue in the 2016 Election*, NATION (Feb. 16, 2016), <https://www.thenation.com/article/the-supreme-court-is-the-most-important-issue-in-the-2016-election/> [https://perma.cc/KSN8-FL9U] ("A cliché we hear every presidential cycle is that the Court should be one of the most important issues in the election, but this year, following the death of Antonin Scalia, it's never been truer.")

refused to hold hearings was that they believed the voters should have a chance to express their views on the direction of the Supreme Court.<sup>6</sup> Now the voters had their opportunity.<sup>7</sup>

But yet again, the candidates did not seem particularly interested in pressing the Court as one of their major campaign issues. Neither the Republican stonewall of President Obama's nominee nor the issue of the next Justice of the Supreme Court was a major issue for the candidates on the

Polls showed that strong majorities believed the Senate should hold hearings for Judge Garland and that most Americans believed the Republicans were playing politics by refusing to do so. Press Release, Monmouth University Poll, National: Senate Should Consider Scotus Pick (Mar. 21, 2016), <https://www.monmouth.edu/assets/0/32212254770/32212254991/32212254992/32212254994/32212254995/30064771087/f9bb7841-1c70-42f9-bed8-c4cf7fd764a7.pdf> [<https://perma.cc/FRU6-4334>]; Amber Phillips, *Americans Say by 2-to-1 That Senate Should Hold Hearings on Obama's Supreme Court Nominee*, WASH. POST. (Mar. 10, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/03/10/americans-say-2-to-1-that-senate-should-hold-hearings-on-obamas-supreme-court-nominee/?utm\\_term=.e94de068af79](https://www.washingtonpost.com/news/the-fix/wp/2016/03/10/americans-say-2-to-1-that-senate-should-hold-hearings-on-obamas-supreme-court-nominee/?utm_term=.e94de068af79) [<https://perma.cc/2BV3-YUM4>].

6. Mitch McConnell & Chuck Grassley, Opinion, *McConnell and Grassley: Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), [https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b\\_story.html?utm\\_term=.f51538982cd5](https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html?utm_term=.f51538982cd5) [<http://perma.cc/7483-USSF>]; Press Release, Majority Leader Mitch McConnell, U.S. Senator for Ky., Justice Antonin Scalia (Feb. 13, 2016), <http://www.mcconnell.senate.gov/public/index.cfm/2016/2/justice-antonin-scalia>; 162 CONG. REC. S926 (daily ed. Feb. 23, 2016) (statement of Sen. McConnell) ("The Presidential candidates are already debating the issue on stage. Americans are already discussing the issue among themselves, and voters are already casting ballots . . . with this issue very much in mind. . . . [L]et the people decide . . ."); Letter from Charles E. Grassley, Chairman, Senate Judiciary Comm., et al. to Mitch McConnell, Senate Majority Leader (Feb. 23, 2016), <https://www.grassley.senate.gov/sites/default/files/judiciary/upload/SCOTUS%2C%2002-23-16%2C%20member%20signed%20letter%2C%20no%20hearings.pdf> [<https://perma.cc/U2S3-H39D>] (letter from the Republican members of the Senate Judiciary Committee explaining their refusal to hold hearings on any replacement for Justice Scalia so that "the American people are not deprived of the opportunity to engage in a full and robust debate over the type of jurist they wish to decide some of the most critical issues of our time"); *id.* ("[T]he American people are presented with an exceedingly rare opportunity to decide, in a very real and concrete way, the direction the Court will take over the next generation. We believe The People should have this opportunity.").

7. See, e.g., Jay Michaelson, *Why the Merrick Garland Fight Is Good for Democracy*, DAILY BEAST (Apr. 29, 2016, 6:33 AM), <http://www.thedailybeast.com/why-the-merrick-garland-fight-is-good-for-democracy> [<https://perma.cc/VY6E-YRRL>] (arguing that the Republican refusal to give Judge Garland a hearing gave the presidential candidates the opportunity to "finally accomplish something no presidential candidate has managed to do in the last 50 years: get Americans to care about who's on the Supreme Court"); Paul Waldman, Opinion, *Why 2016 Will Be a Supreme Court Election*, WEEK (July 7, 2015), <http://theweek.com/articles/564891/why-2016-supreme-court-election> [<https://perma.cc/9PTH-UX5H>] ("[T]he court will probably be as big an issue in the 2016 presidential campaign as it has ever been. And if it isn't, it should be."); Amanda Terkel, *The Stakes of the 2016 Election Just Got Much, Much Higher*, HUFFINGTON POST (Feb. 13, 2016, 7:01 PM), [http://www.huffingtonpost.com/entry/2016-supreme-court\\_us\\_56bface3e4b0c3c55051ad0c](http://www.huffingtonpost.com/entry/2016-supreme-court_us_56bface3e4b0c3c55051ad0c) [<https://perma.cc/QP5Q-K7QT>] ("News of Supreme Court Justice Antonin Scalia's death broke Saturday just hours before the GOP candidates were set to debate in South Carolina, shaking up the presidential race and immediately becoming a major election issue.").

campaign trail.<sup>8</sup> Republican candidate Donald Trump issued his list of potential Supreme Court nominees, a two-stage process that brought some attention to the issue. But beyond this, he did little more than offer an obligatory, perfunctory reference to the Court in campaign speeches, supplemented by occasional, spirited forays into the importance of gun rights (and how if his opponent won, the Court would roll back these rights).<sup>9</sup> Hillary Clinton spoke less about the Court than did her opponent, and she made little effort to make the Garland blockade a campaign issue.<sup>10</sup> In two of their debates, the candidates received questions on the Court. The first time, Trump quickly changed the subject. The second time, Clinton and Trump engaged in a sharp but rather predictable exchange about abortion and guns—an exchange that was largely forgotten in post-debate news accounts.<sup>11</sup>

In the end, 2016 largely followed the patterns of past elections. Those with high hopes for a presidential campaign that would squarely focus on the critically important issue of the Supreme Court ended up writing yet another round of campaign pieces wondering why the Court was missing in action on the campaign trail.<sup>12</sup>

And yet the Court really mattered to the American people in this election. The Scalia vacancy attracted a good deal of public attention,<sup>13</sup> and voters claimed that who was appointed to the Supreme Court was important to them.<sup>14</sup> And according to exit polls, more than any election in recent

8. *Accord* McMahon, *supra* note 4.

9. *See infra* Part II.A.1.

10. *See infra* Part II.A.2.

11. *See infra* Part II.A.3.

12. William G. Ross, *Why the Supreme Court Is Not a Key Issue in the Presidential Election—and Why It Should Be*, JURIST (Oct. 10, 2016, 5:18 PM), <http://www.jurist.org/forum/2016/10/why-the-supreme-court-is-not-a-key-issue-in-the-presidential-election-and-why-it-should-be.php> [<https://perma.cc/MC2R-K695>]; Noah Feldman, *Why Nobody's Talking About the Supreme Court*, BLOOMBERG VIEW (Sept. 27, 2016, 11:25 AM), <https://www.bloomberg.com/view/articles/2016-09-27/why-clinton-and-trump-aren-t-talking-about-supreme-court> [<https://perma.cc/76EC-S4SU>]; Dahlia Lithwick, *Justices Ignored*, SLATE (July 21, 2016, 4:19 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/07/the\\_gop\\_refuses\\_to\\_talk\\_about\\_the\\_supreme\\_court\\_at\\_the\\_rnc.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/07/the_gop_refuses_to_talk_about_the_supreme_court_at_the_rnc.html) [<https://perma.cc/7YV3-TKZL>] (“Over and over again Republicans say that . . . the selection of new justices is the single most important issue of this election. Clearly it is an issue of such broad, vague, unspecified significance that nobody needs to talk about it.”).

13. *See e.g.*, *CBS News/New York Times Poll, March 17–20, 2016*, POLLINGREPORT, <http://www.pollingreport.com/court.htm> [<https://perma.cc/VNT4-KLZQ>] (29% responding that they had been “following news about the appointment of the next Supreme Court justice” “very closely”; another 34% responded “somewhat closely”).

14. *Id.* (37% responding that “the issue of which judges sit on the Supreme Court” is “extremely important; and another 31% saying it is “very important”); *see also* *Quinnipiac University Poll July 8–13, 2008*, POLLINGREPORT.COM, <http://www.pollingreport.com/court2.htm> [<https://perma.cc/Z8P4-GFTE>] (48% saying the appointment of Supreme Court Justices is “very important” in their vote for president and another 39% saying it is “somewhat important”); *CBS News/New York Times Poll, Sept. 27–29, 2000*, POLLINGREPORT.COM, <http://www.pollingreport.com/court3.htm> [<https://perma.cc/TDY8-GKNH>] (43% saying the appointment of Supreme Court Justices is “very important” in their vote for

memory, the voters placed the Supreme Court at or near the top of their list of issues that affected their selection.<sup>15</sup> Trump voters in particular justified their vote by referencing the Court.<sup>16</sup> This only sharpens the puzzle: in an election where extraordinary circumstances seemed perfectly aligned to force the Court to the front of public debate and where the people actually were thinking about the Court more than in the past, the candidates nonetheless seemed uninterested or unwilling to make the case for the Court as a central issue in the election. What happened?

To explain why the candidates were not more aggressive campaigning on this issue requires attention to the particularities of the 2016 election as well as historical perspective on the role the Court has played in past presidential campaigns. Certain factors unique to the 2016 campaign affected the way the candidates used, or chose not to use, the Court as a campaign issue. Yet historically the Court has rarely been a major issue for presidential candidates. It was not until the 1960s that major-party presidential candidates even considered the Supreme Court as an issue appropriate for presidential campaigns, and since then candidates have generally been reluctant to press the Court as a central issue in their election efforts. The 2016 campaign, for all its precedent-shattering and unpredictable qualities, basically fell into a predictable dynamic when it came to the candidates' treatment of the Court.

I divide this Article into two Parts. In Part I, I look to past presidential elections to offer historical perspective on the role of the Supreme Court as a campaign issue. In Part II, I look at the 2016 presidential election and identify reasons why the candidates did not make more of an issue of the Supreme Court. In the Conclusion, I briefly consider the assumption that this historical underperformance of the Supreme Court on the presidential campaign trail is a lost opportunity for the American people. Put simply, do we want our presidential candidates to talk more about the Supreme Court?

president and another 30% saying it is "somewhat important"); *Newsweek Poll, June 29–30, 2000*, POLLINGREPORT.COM, <http://www.pollingreport.com/court3.htm> [<https://perma.cc/TDY8-GKNH>] (same question, 36% and 37%).

15. *NBC News Exit Poll: Future Supreme Court Appointments Important Factor in Presidential Voting*, NBC NEWS (Nov. 8, 2016 6:12 PM), <https://www.nbcnews.com/card/nbc-news-exit-poll-future-supreme-court-appointments-important-factor-n680381> [<https://perma.cc/STB7-GCCJ>] [hereinafter *NBC News Exit Poll*].

16. *Id.* (Exit polls found that 27% of Trump voters said that the Supreme Court was the most important issue for them, compared to 19% of Clinton voters).

## I. THE SUPREME COURT AND PRESIDENTIAL CANDIDATES—LESSONS OF HISTORY

Presidential candidates' relative lack of engagement with the Supreme Court fits a general historical pattern. One of the lessons of history is that presidential candidates rarely find enough advantage in discussing the Court to make it a central issue of their election campaigns. The Supreme Court has always been an unwieldy and risky campaign issue. And on those occasions when one candidate has attempted to press the issue, opposing candidates have never really joined the debate.

In this Part, I identify two key constraints that historically have steered candidates away from embracing the Court as a significant issue on the campaign trail: (1) concerns with the propriety of using the Court as a campaign issue; and (2) asymmetries of engagement with the Court as an issue, which have prevented the Court from emerging as a full-fledged issue on the presidential campaign trail.

### A. Propriety

For much of American history, presidential candidates believed that the Supreme Court was not an appropriate campaign issue or that the American people would disapprove of making a political issue of the Court. They therefore consciously avoided making the Court an issue on the campaign trail. The 1860 election was a partial break in this pattern, since slavery was the central issue of the election and one could not discuss this issue without discussing the 1857 *Dred Scott* case,<sup>17</sup> in which the Court held that Congress lacked the authority to prevent the spread of slavery to the territories.<sup>18</sup> Apart from the exceptional 1860 election, however, this pattern basically held until the 1960s.

Deviations from this norm of propriety were risky. For example, in the weeks leading up to the 1932 presidential election, Democratic candidate Franklin D. Roosevelt gave a nationally broadcast speech in which, after noting that Republicans controlled both houses of Congress and the executive branch, he added—in an unscripted line, “for full measure, to make it complete”—that Republicans controlled “the United States Supreme Court as well.”<sup>19</sup> Republicans lashed out at Roosevelt, calling his comments “utterly

17. 60 U.S. (19 How.) 393 (1857).

18. DONALD GRIER STEPHENSON, JR., *CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS* ch. 4 (1999).

19. *Roosevelt Accused of 'Slurring' Court*, N.Y. TIMES, Oct. 27, 1932, at 1.

untrue,” “dangerous,” “outrageous,” and a “slur” against the Court.<sup>20</sup> Congressman James M. Beck, a former U.S. Solicitor General, declared FDR a “demagogue.”<sup>21</sup> “[I]t saps the foundation of our government to impute to the highest court of the land a statement that in spirit or actions it is partisan,” Beck said.<sup>22</sup> “To weaken respect for that court is to destroy the foundations of law and order.”<sup>23</sup> The *Washington Post* declared the statement an “insult to the court” and urged Roosevelt to disavow his words.<sup>24</sup> The *Chicago Defender*, a black newspaper, warned of FDR’s “dangerous” implication that he was willing to drag the Court—“the last citadel of human freedom and constitutional rights”—into partisan politics.<sup>25</sup> Although Roosevelt privately said all he had done was declare the truth,<sup>26</sup> his advisors worried that his comments would lose him votes; he said nothing more about the Court for the remainder of his successful campaign.<sup>27</sup>

Even in 1936, when, as in 1860, it seemed that there was no way to engage with the major issue of the election (in this case, the federal government’s role in providing social welfare to the nation and to regulate the nation’s economy) without engaging with the Supreme Court (which had struck down major pieces of federal legislation in the lead-up to the election<sup>28</sup>), incumbent Democratic President Franklin D. Roosevelt still refused to press the Court as a campaign issue. In January 1936, after the Court issued some particularly controversial rulings striking down New Deal legislation, *New York Times* columnist Arthur Krock predicted “a great national debate” about the power of the Court “is drawing near.”<sup>29</sup> The Supreme Court was “to go more or less on trial in a Presidential campaign for the first time in years,” Krock wrote later that spring.<sup>30</sup> Yet the Court never quite made it to its trial.<sup>31</sup>

20. *Id.* at 1, 10.

21. *Id.* at 10.

22. *Id.* at 1.

23. *Id.* at 10; see also *Lawyers Charge Roosevelt Slur on High Court*, N.Y. HERALD TRIB., Oct. 27, 1932, at 1.

24. *The Supreme Court*, WASH. POST, Oct. 28, 1932, at 6.

25. *Is the Supreme Court Involved?*, CHI. DEFENDER, Nov. 5, 1932, at 14.

26. JAMES F. BYRNES, *ALL IN ONE LIFETIME* 65 (1958).

27. *Gov. Roosevelt More Cautious as End Nears*, BALT. SUN, Nov. 1, 1932, at 7.

28. See, e.g., *United States v. Butler*, 297 U.S. 1 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

29. Arthur Krock, *Supreme Court Moves to the Fore as an Issue*, N.Y. TIMES, Jan. 8, 1936, at 18.

30. Arthur Krock, *Supreme Court Knows It Is on Trial in Election*, N.Y. TIMES, May 27, 1936, at 22.

31. William G. Ross, *The Supreme Court as an Issue in Presidential Campaigns*, 37 J. SUP. CT. HIST. 322, 329 (2012).

Roosevelt never talked about the Court during the 1936 campaign. During his first term, Roosevelt had launched broadsides against the Court, including his famous critique of the Court for its “horse-and-buggy” interpretation of the commerce power.<sup>32</sup> These comments were met with a strong backlash and helped revive a flagging Republican Party.<sup>33</sup> By the time of the 1936 election, he largely dropped his criticism of the Court.<sup>34</sup> His advisors urged him to campaign against the Court, but he resisted their entreaties.<sup>35</sup> Despite a steady stream of opinions adverse to his New Deal agenda, he barely mentioned the Court again until after the election.<sup>36</sup> The Court was an issue in the 1936 election, but the ones who discussed it were Roosevelt’s supporters and opponents, not the candidate himself.

In the presidential elections that followed, the Supreme Court barely featured as an issue. This only began to change in the 1950s and 1960s as politicians, including presidential candidates, came to see the Warren Court as a potentially valuable political issue.

The partial breakdown of the propriety constraints on presidential candidates using the Court as a campaign issue had its uncertain—and decidedly ignominious—beginnings in the 1950s. During the 1956 campaign, Republican Vice President Richard Nixon sought to score political points by embracing the *Brown v. Board of Education* decision.<sup>37</sup> He praised the “great Republican Chief Justice, Earl Warren” for “order[ing] an end to racial segregation in the nation’s public schools.”<sup>38</sup> (Warren had been the Republican

32. President Franklin D. Roosevelt, Press Conference (May 31, 1935), <http://www.presidency.ucsb.edu/ws/?pid=15065> [<https://perma.cc/7PHB-FJZZ>].

33. William E. Leuchtenberg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2080–81 (1999). According to one of his contemporary critics, FDR’s remarks about the Court “converted millions of people to the conservative point of view. His famous press conference attack on the Supreme Court did more to re-popularize the Constitution than one hundred years of political and educational oratory.” *Id.* at 2081.

34. *Id.* at 2081–82.

35. See WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 107–08 (1995).

36. Leuchtenberg, *supra* note 33 at 2082–87; BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 27 (1998) (“Roosevelt assiduously avoided raising either the Constitution or the Court as an issue in his campaign.”). One commentator noted in February 1936: “I thought a month ago that the Court and the Constitution were very definitely going to be in this year’s presidential debate. But everything in Washington is of the hush, hush attitude. . . .” Leuchtenberg, *supra* note 33, at 2084 (quoting Letter from George Fort Milton to George Foster Peabody (Feb. 10, 1936) (on file with the Library of Congress, George Fort Milton Papers, Box 19)). The Democratic platform included no direct references to the Court. *1936 Democratic Party Platform*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29596> [<https://perma.cc/9UPL-VSG9>].

37. 347 U.S. 483 (1954).

38. *Nixon Statement Creates a Storm*, BALT. SUN, Feb. 15, 1956, at 1. Nixon also said that “the great Republican Administration has registered the greatest advances for the rights of racial minorities since the Emancipation Proclamation itself.” *Id.*

governor of California before Dwight D. Eisenhower appointed him to the Supreme Court in 1953.) Democrats condemned Nixon for politicizing the Court.<sup>39</sup> Eisenhower had already gone on record saying he did not believe Court should be a campaign issue.<sup>40</sup> Republicans who were scheming to drop Nixon from the ticket used his comments to support their argument that he was a political liability.<sup>41</sup>

When Nixon ran against John F. Kennedy for the presidency in 1960, the Court was not an issue.<sup>42</sup> Four years later, however, Barry Goldwater, the Republican nominee, broke from tradition for a major party candidate and featured attacks on Warren Court decisions as a major part of his campaign against Democratic incumbent Lyndon B. Johnson.<sup>43</sup> He launched his crusade against the Court in an address in September 1964 before the American Political Science Association (“a generally hostile audience” of college professors, noted one reporter).<sup>44</sup> “Of all three branches of government, today’s Supreme Court is the least faithful to the constitutional tradition of limited government, and the principle of legitimacy in the exercise of power,” he stated.<sup>45</sup> The Court was acting like an organ of “raw and naked power.”<sup>46</sup> Goldwater targeted in particular the Court’s reapportionment, school prayer, and criminal justice rulings.<sup>47</sup> When he went to the South,

A debate erupted over whether, in fact, Nixon placed a comma before Warren’s name. See David Lawrence, *Importance of a Comma Shown in Attacks on Nixon*, N.Y. HERALD TRIB., Feb. 20, 1956, at 17. Some believed his spoken comments had a pause, thus indicating a comma, but the copy of the speech circulated to reporters before he delivered his remarks had no comma. *Id.* Many of the news reports used the circulated copy version (no comma). See, e.g., Chalmers M. Roberts, *Nixon Credits Racial Gains to His Party*, WASH. POST, Feb. 14, 1956, at 1.

39. Roberts, *supra* note 38 (Democratic National Chairman Paul Butler saying: “We must assume that Mr. Nixon was fully aware that he was dragging the Supreme Court into the arena of partisan politics in a campaign year. . . . Mr. Nixon’s statement is a blatant effort to exploit and capitalize on a decision which we are entitled to assume was by the justices of the Supreme Court without concern for any partisan political advantage which might accrue from it. . . . I would be just as shocked and just as indignant if a member of my party sought in similar fashion to exploit a decision of the highest court of our land for political advantage.”).

40. *Id.*

41. James Reston, *Nixon is Opposed by Some in G.O.P.*, N.Y. TIMES, Feb. 17, 1956, at 1.

42. STEPHENSON, *supra* note 18, at 174.

43. Ross, *supra* note 23, at 330 (noting that Goldwater “perhaps spoke more frequently and more harshly about the Court than any major party’s presidential candidate in history”); *id.* at 331 (“Goldwater became one of the first presidential candidates to emphasize the connection between presidential elections and federal court appointments.”).

44. George Tagge, *High Court Hit by Barry*, CHI. TRIB., Sept. 12, 1964, at 1.

45. *Goldwater Charges: Supreme Court Abuses Power*, BOS. GLOBE, Sept. 12, 1964, at 7.

46. Tagge, *supra* note 44.

47. LAURA KALMAN, *THE LONG REACH OF THE SIXTIES: LBJ, NIXON AND THE MAKING OF THE CONTEMPORARY SUPREME COURT* 50–51 (2017); Anthony Lewis, *Campaign Issues—VIII*, N.Y. TIMES, Nov. 1, 1964, at 79. Goldwater (through the words of his ghostwriter Brent Bozell) had attacked the Court’s school desegregation decision in *Brown v. Board of Education* in his 1960 manifesto, *Conscience of a Conservative*. BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 35–37 (1960).

where he blamed the Court for allowing “bullies and marauders” to take over city streets and steering the nation toward “the law of the jungle,” his white audiences greeted his attacks on the Court with particular enthusiasm.<sup>48</sup> *New York Times* Court reporter Anthony Lewis wrote that in the weeks preceding the election, Goldwater “seemed to be running against the nine justices instead of Lyndon B. Johnson.”<sup>49</sup>

Rather than engage his Republican opponent on the merits of his critiques of the Court, President Johnson followed precedent and declared that he did not believe the Court an appropriate issue for a presidential election.<sup>50</sup> The opposing side of whatever argument over the Court Goldwater sought to have did not come from his opponent, but from other prominent Democrats.<sup>51</sup> Although even here, rather than offering an alternative vision of the Court or the Constitution, Goldwater’s critics just condemned him for talking about the Court at all.<sup>52</sup> House Judiciary Chairman Emanuel Celler denounced his attacks as “violent demagoguery” that would “only incite disrespect for law and order” and compared Goldwater’s attacks to “what Hitler and Mussolini did.”<sup>53</sup> The idea that criticism of the Court by presidential candidates violated established rules of political propriety appeared to have some traction with voters, and may have contributed to Goldwater’s rout in the general election.<sup>54</sup>

48. Robert Healy, *Supreme Court Under Attack by Goldwater*, BOS. GLOBE, Sept. 16, 1964, at 1; Reg Murphy, *Goldwater Greeted by Big Crowds, Rips Supreme Court and ‘Scandals,’* ATLANTA CONST., Sept. 16, 1964, at 1.

Goldwater avoided talking about civil rights when in the South, but according to reporters, his audiences interpreted the candidate’s praise for the principle of states’ rights and attacks on the Court as demonstrating his skepticism toward federal civil rights policy. Healy, *supra*. The previous June, Goldwater had come out against the Civil Rights Act of 1964.

49. Anthony Lewis, *Campaign: The Supreme Court Key Issue*, N.Y. TIMES, Oct. 11, 1964, at E8.

50. Ross, *supra* note 31, at 330–31; Anthony Lewis, *Goldwater Stand on Court Decried*, N.Y. TIMES, Oct. 12, 1964, at 24; Lewis, *supra* note 47 (“Mr. Johnson’s position, according to those close to him, is that it is inappropriate for a President to criticize or defend the Court because it is an independent branch of government.”).

51. Homer Bigart, *Goldwater View Assailed*, N.Y. TIMES, Sept. 21, 1964, at 1 (describing the defense of the Court by Robert F. Kennedy, who had recently stepped down as U.S. Attorney General to run for the Senate); KALMAN, *supra* note 47, at 51.

52. See, e.g., Editorial, *Characteristically Barry*, BALT. SUN, Sept. 13, 1964, at 10; Lewis, *supra* note 49 (“Many observers were astonished to find the Court an issue” in the presidential campaign.); *id.* (quoting from a statement of prominent lawyers denouncing Goldwater’s “attack upon the ultimate guardian of American liberty” as “overpass[ing] the limits of comment appropriate to a Presidential candidate”).

53. William F. Buckley, *Goldwater’s Criticism of Supreme Court Really Backed Constitution*, L.A. TIMES, Sept. 18, 1964, at A6. Buckley countered by criticizing the assumption “that any criticism of the . . . Supreme Court equals an attack on the independence of the Court.” *Id.*

54. See generally Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and Supreme Court: The Goldwater Campaign*, 32 PUB. OPINION Q. 31 (1968).

The first time a presidential candidate successfully leveraged the Court as a campaign issue was in 1968. The Republican nominee, Richard Nixon, followed the Goldwater playbook by basically campaigning against the Warren Court, albeit with a much different result on election day. Nixon denounced the “activism” of the Court and promised to appoint judges who would “strictly” interpret the Constitution. He also attacked the Court for being soft on crime and contributing to the nation’s increasing crime rates.<sup>55</sup>

One reason Nixon was successful in using a challenge to the Supreme Court as a campaign strategy was because of the work others had done in breaking down the propriety constraints that long had been in place. Nixon was continuing a campaign against the Warren Court by Republican leaders that Goldwater had initiated four years earlier.<sup>56</sup> Their efforts were also made to look less extreme by the presence in both the 1964 and 1968 elections of third-party candidate George Wallace, who was running with a defiantly populist law-and-order campaign strategy that included frequent attacks on the Court. Wallace’s attacks were so blunt and so harsh, that they made whatever Nixon had to say in 1968 appear more mainstream. He said that the Supreme Court was “pretty sick”<sup>57</sup> and that Chief Justice Earl Warren “hasn’t enough law to try a chicken thief.”<sup>58</sup> “[T]hese judges on the Supreme Court . . . have made it impossible to convict a man,” he would tell campaign audiences. “The man that hits you is out of jail even before you get to the hospital.”<sup>59</sup>

Nixon’s attacks were also bolstered by the Court’s declining approval ratings in the late 1960s. Between 1967 and 1968, the percentage of people rating the Court as “excellent” or “good” dropped from 45% to 36%;<sup>60</sup> by 1968, a majority of Americans rated the Supreme Court as fair to poor.<sup>61</sup>

55. STEPHENSON, *supra* note 18, at ch. 7; *see also* KEVIN J. MCMAHON, *NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* (2011).

56. Murphy & Tanenhaus, *supra* note 54.

57. John Oppendahl & William Serrin, *Wallace Wows VFW; Urges Law and Order*, DETROIT FREE PRESS, Aug. 23, 1968, at A1.

58. Homer Bigart, *Wallace Considers Entering Primary in New Hampshire*, N.Y. TIMES, Apr. 1, 1967, at 1.

59. James K. Batten, *Wallace Could Tip Scales In 1968 Presidential Race*, DETROIT FREE PRESS, May 3, 1967, at 6B.

Like LaFollette before him, Wallace backed his bombastic rhetoric with calls to rethink the independence of the judiciary from democratic oversight. Wallace’s Independent Party Platform included a proposal for federal district court judges to face periodic retention elections and for federal appeals judges and Supreme Court Justices to face periodic Senate re-confirmation. *American Independent Party Platform of 1968*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29570> [<https://perma.cc/GMN9-7DLK>].

60. STEPHENSON, *supra* note 18, at 180 (citing Gallup Poll).

61. 3 THE GALLUP POLL: PUBLIC OPINION, 1935–1971, at 2147 (George Horace Gallup ed., 1972).

This made the Court a more viable (and vulnerable) target for political attacks.<sup>62</sup>

Yet even in 1968, when the longstanding assumption that the Court should not be a prominent campaign issue finally succumbed to the combined pressures of political demands and an unpopular Court, there remained a sense of lurking discomfort with the issue. One of Nixon's advisers warned Nixon that "any condemnation of the Court will be interpreted as fascist."<sup>63</sup> Nixon tried to distinguish his support for the Court as an institution from his criticism of particular decisions, and he avoided criticism of the Court's school desegregation rulings.<sup>64</sup> He also found other ways to advance his law-and-order campaign. For instance, Nixon attacked Johnson's Attorney General much more consistently and directly than the Court.<sup>65</sup>

The election of 1968 thus weakened but did not sweep aside propriety concerns when it came to using the Court as an issue in presidential campaigns. After Nixon's demonstration in 1968 of how attacks on the Court could be leveraged into an election victory, the Court became a viable campaign issue for candidates.<sup>66</sup> But it remained a risky one. Candidates still felt the need to tread carefully when engaging the issue, lest they face criticism for politicizing the Court and compromising its independence—criticism not only from opponents, but also from the press and sometimes from members of their own party. Whether the Supreme Court was an appropriate topic on the campaign trail remained a concern for presidential campaigns.

Beginning in the 1980s, this propriety question has been caught up in debates over whether presidents should have "litmus tests" for nominees to the Supreme Court. The idea of a Supreme Court litmus test first became

62. Chris Hickman, *Courting the Right: Richard Nixon's 1968 Campaign Against the Warren Court*, 36 J. SUP. CT. HIST. 287, 288 (2011) ("[A]ll the years of withering—at times, outrageous—criticism of the Warren Court protected Nixon, as his campaign against the Court could appear moderate by comparison.").

63. *Id.* at 296; *see also id.* at 295–97.

64. *Id.* at 288, 301 n.6.

65. *See, e.g.*, Richard Nixon, Statement Submitted to Republican National Convention Committee on Resolutions: "The Crusade Against Crime" (July 31, 1968), <http://www.presidency.ucsb.edu/ws/?pid=123914> [<https://perma.cc/WEJ4-RRCJ>] ("A new Attorney General, with a new attitude and a new awareness and a new determination, could make a world of difference in the quality of American life by making decisive inroads on the security of organized crime.").

66. The first time candidates faced a question about appointments to the Supreme Court in a presidential debate came in 1976. *Presidential Campaign Debate: October 22, 1976*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=6517> [<https://perma.cc/3GBF-3YHK>]. Jimmy Carter gave a rather prosaic response, saying he would base his appointment on merit and would select "someone who would most accurately reflect my own basic political philosophy, as best as I could determine it, which would be to continue the progress that has been made under the last two Courts—the Warren Court and the Burger Court." *Id.* Ford referenced his appointment of Justice John Paul Stevens as indicative of the kinds of appointments he would make; he also praised the Burger Court for cutting back on the *Miranda v. Arizona*, 384 U.S. 436 (1966), decision. *Id.*

prominent in debates over *Roe v. Wade* and the right to abortion. In 1980, the Republican platform included a promise to “work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life,”<sup>67</sup> and the party’s nominee, Ronald Reagan, denounced *Roe*. Yet Reagan also insisted that he would not use opposition to the decision as a requirement for his Supreme Court nominees.<sup>68</sup> Democrats nonetheless attacked Reagan throughout his presidency for having an abortion litmus test.<sup>69</sup> Daniel Patrick Moynihan went so far as to declare “ideological tests for the judiciary” a form of “corruption.”<sup>70</sup> When Democrats sought to press the Court as an issue in the 1984 election, the *Washington Post* editors urged caution and warned its readers not to “believe any politician who tells you that he can deliver the Supreme Court of your dreams.”<sup>71</sup> In 1988, both major party candidates disclaimed having any litmus tests for Court appointments.<sup>72</sup> Four years later, then-incumbent George H.W. Bush again rebuffed accusations that he had any litmus tests.<sup>73</sup> Bush supporters attacked Democratic nominee Bill Clinton when he indicated that a commitment to upholding *Roe* would be a requirement for his Court nominees. Clinton and his advisors tried to steer clear of the litmus-test label and they chose to largely sidestep the Court as a campaign issue.<sup>74</sup> In 2000 and

67. *Republican Party Platform of 1980*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25844> [<https://perma.cc/E7H2-BGVM>].

68. Wallace Turner, *Reagan Says He Would Not Use Single-Issue Test to Pick Judges*, N.Y. TIMES, Oct. 2, 1980, at A1; *Transcript of Ronald Reagan’s Remarks at News Conference in Los Angeles*, N.Y. TIMES, Oct. 15, 1980, at A24. Reagan’s discussion of the factors he would use in selecting a nominee to the Supreme Court came in response to attacks against his candidacy by prominent liberal lawyers who said they opposed him because they feared he would pull the Court too far to the right. Turner, *supra*; Jack Greenberg, *A Reagan Supreme Court*, N.Y. TIMES, Sept. 12, 1980, at A23; STEPHENSON, *supra* note 18, at 203–04.

69. Doug Bandow, *The Democrats’ Abortion Litmus Test*, WALL ST. J., July 29, 1992, at A11.

70. *Id.*

71. Editorial, *Court Bashing*, WASH. POST, Aug. 13, 1984, at A14.

72. *Presidential Debate at the University of California in Los Angeles: October 13, 1988*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29412> [<https://perma.cc/9H7T-BM8B>]; William G. Ross, *Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 447 (2002).

73. James Gerstenzang & William J. Eaton, *Bush Restates His Belief That Roe vs. Wade Should Be Reversed*, L.A. TIMES (July 2, 1992), [http://articles.latimes.com/1992-07-02/news/mn-1915\\_1\\_roe-decision](http://articles.latimes.com/1992-07-02/news/mn-1915_1_roe-decision) [<https://perma.cc/KU6C-SGRY>].

74. *Silence on the Court*, *supra* note 3 (“Even many prochoice 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.”); Ruth Marcus, *On Support for Choice and Limits, Bush-Clinton Contrasts Are Sharp*, WASH. POST, Aug. 16, 1992, at A21 (Clinton saying, “I hate to have any litmus tests” and that a litmus test “makes me uncomfortable”); *id.* (Clinton aide George Stephanopoulos explaining, “Bill Clinton would never ask [a nominee] about a specific case, so there’s no litmus test in that sense at all”); *cf.* Bandow, *supra* note 69 (“[I]f Republican litmus tests are bad, so too are Democratic litmus tests. And if litmus tests endanger the judiciary and ultimately the Constitution, then Bill Clinton poses a greater threat

again in 2004, George W. Bush came out strongly in support of a pro-life position on abortion, yet he too insisted he would not make opposition to *Roe* a litmus test for his Court appointments.<sup>75</sup>

The 2016 election exploded what previously had been a stable precedent that presidential candidates must openly reject litmus tests for potential Supreme Court appointments. In the Democratic primary, Bernie Sanders declared that his nominees would have to be committed to overturning *Citizens United*, even embracing the previously verboten “litmus test” label.<sup>76</sup> Clinton matched Sanders by also stating opposition to *Citizens United* would be a litmus-test and then upped the ante by declaring that she would have “a bunch of litmus tests” for her nominees.<sup>77</sup> On the other side, Trump went on record declaring opposition to *Roe* and support for religious liberty and for *Heller* as litmus tests for his nominees.<sup>78</sup> Legal commentators and newspaper editors protested the apparent fall of the no-litmus-test norm,<sup>79</sup> but their criticism had little effect on the candidates. Whether there is any life left in this norm is a question that will be answered in future elections.

than does George Bush. It would be nice to hear some of those vociferous opponents of the pro-life litmus test say so.”).

75. *Presidential Debate in Boston: October 3, 2000*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29418> [<https://perma.cc/UQ29-YAQR>]; Kevin J. McMahon, *A “Moral Values” Election?: The Culture War, the Supreme Court, and a Divided America*, in WINNING THE WHITE HOUSE, 2004: REGION BY REGION, VOTE BY VOTE 23, 33–35 (Kevin J. McMahon et al. eds., 2005).

76. Press Release, Friends of Bernie Sanders, Sanders Supreme Court Litmus Test: I Will Nominate Justices Who Would Overturn Citizens United (May 10, 2015), <https://bernieanders.com/press-release/sanders-supreme-court-litmus-test-i-will-nominate-justices-who-would-overturn-citizens-united/> [<https://perma.cc/6FKX-4M3G>] (“If elected president, I will have a litmus test in terms of my nominee to be a Supreme Court justice. That nominee will say that we are going to overturn this disastrous decision in Citizens United because that decision is undermining American democracy.”).

77. Hillary Clinton, Remarks at the CNN Democratic Presidential Town Hall in Derry, New Hampshire (Feb. 3, 2016), <http://www.presidency.ucsb.edu/ws/?pid=111596/> [<https://perma.cc/55YE-K6DJ>].

78. See, e.g., Nick Gass, *Trump Promises ‘Absolute Litmus Test’ on Religious Liberty*, POLITICO (Feb. 25, 2016, 9:33 PM), <https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/02/donald-trump-religious-litmus-test-republican-debate-219824> [<https://perma.cc/5HHF-Y4VV>]; Sapan Deb, *Donald Trump’s Supreme Court Litmus Test*, CBSNEWS.COM (Feb. 17, 2016, 10:55 PM), <https://www.cbsnews.com/news/campaign-2016-donald-trump-supreme-court-litmus-test/> [<https://perma.cc/QK2Y-H8AS>].

79. See, e.g., Editorial, *How Not to Pick a Supreme Court Justice*, WASH. POST (Oct. 15, 2016), [https://www.washingtonpost.com/opinions/how-not-to-appoint-a-supreme-court-justice/2016/10/14/ebefd478-917b-11e6-9c52-0b10449e33c4\\_story.html?utm\\_term=.9f61f3c682e5](https://www.washingtonpost.com/opinions/how-not-to-appoint-a-supreme-court-justice/2016/10/14/ebefd478-917b-11e6-9c52-0b10449e33c4_story.html?utm_term=.9f61f3c682e5) [<https://perma.cc/5XD9-G63M>] (Clinton’s “candor is not costless, and the attitude it represents should not be accepted as normal. As a potential president, Ms. Clinton should have more respect for the independence and dignity of the judiciary as a co-equal but non-political branch of government. . . . Every step closer to accepting ideological litmus tests developed in the heat of political campaigns as the basis for judicial selections—every step toward putting court rulings to a vote—erodes the foundations of the judicial branch.”); Editorial, *The Danger of Trump, Sanders and Clinton’s Supreme Court Lists and Litmus Tests*, WASH. POST (May 20, 2016), [https://www.washingtonpost.com/opinions/the-danger-of-trump-sanders-and-clintons-supreme-court-lists-and-litmus-tests/2016/05/20/f59484d8-1179-11e6-8967-7ac733c56f12\\_story.html?utm\\_term=.d603fb180cc9](https://www.washingtonpost.com/opinions/the-danger-of-trump-sanders-and-clintons-supreme-court-lists-and-litmus-tests/2016/05/20/f59484d8-1179-11e6-8967-7ac733c56f12_story.html?utm_term=.d603fb180cc9) [<https://perma.cc/B8LS-MN6A>] (“Litmus

### B. *Asymmetry of Interest and Engagement with Court*

Another historical trend that has prevented the Supreme Court from becoming a more robust issue in presidential campaigns is that political debates over the Court, particularly in the context of presidential elections, tend to be one-sided affairs. When politicians try to leverage the Court as a campaign issue, they overwhelmingly do so by attacking the Court. The Court has always been an inviting target.<sup>80</sup> These attacks are sometimes generalized challenges to the institution, but more often they are targeted challenges to particular decisions or lines of decisions.

It has proven harder to get political leverage out of *supporting* the Court.<sup>81</sup> One of the most enthusiastically pro-Court campaigns was run by the Republicans in 1936. At the Republican national convention, ex-President Herbert Hoover earned a rousing response when he declared, “[t]he American people should thank Almighty God for the Constitution and the Supreme Court,” and expressed gratitude that Roosevelt had not had an opportunity to appoint any Justices during his first term.<sup>82</sup> The Republican candidate, Alf Landon, included as a standard part of his campaign speeches praise of the Court and its willingness to strike down New Deal legislation.<sup>83</sup> This election did not go well for the Republicans: Landon lost the Electoral College vote 523–8.

And even if a presidential candidate is inclined to advance a defense of the Court as a campaign issue, there are risks to embracing the Court. Most importantly, the Court is unpredictable. In 1936, as the Republicans were preparing to campaign in defense of the Court, the Justices issued their stunningly unpopular decision in the *Tipaldo* case,<sup>84</sup> striking down by a 5–4 vote

tests . . . subvert the independence of the judiciary.”); Editorial, *No Litmus Tests for Supreme Court Justices*, DES MOINES REG. (Sept. 26, 2015, 12:02 AM), <http://www.desmoinesregister.com/story/opinion/editorials/caucus/2015/09/26/editorial-litmus-test-supreme-court-clinton-sanders/72801906/> [<https://perma.cc/5U87-WX4K>] (“Presidents have always looked for judges they believe agree with broad constitutional principles, but it is wrong to hold a nominee to a specific position on a specific case.”).

80. Cf. Bethany Blackstone & Greg Goelzhauser, *Presidential Rhetoric Toward the Supreme Court*, 97 JUDICATURE 179, 183 (2014) (finding that when Presidents speak about the Court, they critique more than praise).

81. The Court historically has had diffuse support, but when people are asked more specifically about what the Court has done, they are less impressed. See generally James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998).

The most consistent defenders of the Court on the presidential campaign trail are usually not the candidates themselves, but the outgoing presidents, who tend to emphasize their appointments to the Court as among the achievements on their administration. In 2000, Bill Clinton talked about the Court frequently while campaigning for Al Gore. In 2016, President Obama often seemed more interested than Hillary Clinton in talking about the Court.

82. Leuchtenberg, *supra* note 33, at 2090.

83. *Id.* at 2092–93.

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

a New York state minimum wage law.<sup>85</sup> Republicans had been arguing that the states, not the federal government, should take the lead in protecting workers, so this decision undermined a core premise of their opposition to the New Deal.<sup>86</sup> As a result, Republicans put their pro-Court campaign theme on hold for several months.

The Court is thus a risky ally for a presidential candidate. It was not only the unpopularity of the Warren Court but also the risk that it might at any time hand down a controversial bombshell that likely explains why Johnson kept mum about the Court in the 1964 campaign.<sup>87</sup> This was surely a factor in Democratic nominee Hubert Humphrey's relatively muted defense of the Court in 1968.

These risks are particularly relevant for incumbent Presidents. For example, in 1972, after he had the opportunity to appoint four Justices, Nixon chastised his advisors for their "elation over finally having a 'Nixon Court.'" What they failed to appreciate, he explained, was that "we are now stuck with whatever decisions the new Supreme Court majority hands down."<sup>88</sup> (Never one to leave his political fate in the hands of others—or to allow ethical constraints to get in his way—Nixon communicated directly with Chief Justice Burger his displeasure with the Court's busing decisions.<sup>89</sup>) When the Supreme Court issued *Planned Parenthood v. Casey*,<sup>90</sup> its June 1992 decision reaffirming *Roe*, a decision most pro-life conservatives saw as a stinging defeat, President George H.W. Bush, who was running for re-election on a pro-life platform, simply declared it a pro-life victory.<sup>91</sup>

85. Of the 344 newspaper editorials written in response to the decision, only ten defended it. *Morehead v. New York Ex Rel. Tipaldo*, OXFORD REFERENCE, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100209241> [<https://perma.cc/8M7B-PBTQ>].

86. Leuchtenberg, *supra* note 33, at 2090, 2101–03.

87. See generally Murphy & Tanenhaus, *supra* note 54 (noting Johnson's refusal to discuss the Court as a campaign issue as well as the high public disapproval of many decisions in the early 1960s).

88. KALMAN, *supra* note 47, at 305.

89. MCMAHON, *supra* note 55, at 232.

90. 505 U.S. 833 (1992).

91. President George H.W. Bush, Statement on the Supreme Court Decision on Abortion (June 29, 1992), <http://www.presidency.ucsb.edu/ws/?pid=21164> [<https://perma.cc/WNE4-NBXC>] ("I am pleased with the Supreme Court's decision upholding most of Pennsylvania's reasonable restrictions on abortion . . . The Pennsylvania law supports family values in what is perhaps the most difficult question a family can confront. My own position on abortion is well-known and remains unchanged. I oppose abortion in all cases except rape or incest or where the life of the mother is at stake."). Political commentators declared the decision a different kind of victory for Bush. If the Court had overturned *Roe*, most commentators believed it would have hurt Bush and the Republican Party at the polls. See, e.g., Robin Toner, *Ruling Eases a Worry for Bush, but Just Wait, His Critics Warn*, N.Y. TIMES, June 30, 1992, at A1. Abortion rights activists declared the decision a defeat for their cause—some even declared that *Roe* was dead—in an effort to leverage the ruling for the upcoming election. Sara Fritz, *Both Sides on Issue Vow to Continue the Fight*, L.A. TIMES, June 30, 1992 at WA7.

The result is a tendency toward an asymmetry of interest and engagement with the Court. We have never seen a presidential election in which both sides press the issue of the Court. The typical pattern in those elections when the Court has become an issue is for one candidate to attack the Court and the other to do one or more of the following: (a) avoid the issue; (b) attack the other side for attacking the Court; or (c) attack some other aspect of the Court's work. This is hardly a recipe for a robust political debate about the future of the Supreme Court.

Partisan dynamics that have been in place going back to the Warren Court era have amplified the asymmetry of political engagement with the Court. Since the 1960s, Republicans have been more interested than Democrats in leveraging the Court as an electoral issue. Nixon in 1968 talked about the Court more than his Democratic opponent, Vice President Humphrey. (Nixon chided Humphrey for his "respectful silence" about the Court.<sup>92</sup> "Whenever I begin to discuss the Supreme Court, Mr. Humphrey acts like we're in church," complained Nixon.<sup>93</sup>) Ronald Reagan in 1980 campaigned on the Court more aggressively, and more effectively, than did Jimmy Carter.<sup>94</sup> (Reagan also leveraged the Court for his political advantage by promising to nominate the first female Justice to the Court during his 1980 campaign.<sup>95</sup>)

The one partial break in the pattern of partisan asymmetry came in 1984. "For the first time since 1968, it appears that the future of the [U.S.] Supreme Court will be a major issue in a presidential campaign," noted one

92. R.W. Apple, Jr., *Nixon Intensifies Blows at Humphrey On Ohio Train Tour*, N.Y. TIMES, Oct. 23, 1968, at 1.

93. James Doyle, *Nixon Whistle Stops His Way Across Heartland*, BOS. GLOBE, Oct. 23, 1968, at 14.

94. STEPHENSON, *supra* note 18, at ch. 8.

95. *Transcript of Ronald Reagan's Remarks at News Conference in Los Angeles*, *supra* note 68; Douglas E. Kneeland, *Reagan Pledges Woman on Court*, N.Y. TIMES, Oct. 15, 1980, at 1; Lou Cannon, *Reagan Pledges He Would Name a Woman to the Supreme Court*, WASH. POST, Oct. 15, 1980, at A6. Reagan's pledge was a reaction to attacks against him as being against women's rights (he opposed passage of the Equal Rights Amendment) and poll numbers showing his support among women was markedly lower than among men. Martin F. Nolan, *Reagan Vows to Name Woman to High Court*, BOS. GLOBE, Oct. 15, 1980, at 1; Kneeland, *supra*. He prefaced his announcement promising to appoint a woman to the Supreme Court with a defense of his record of promoting women's rights. *Transcript of Ronald Reagan's Remarks at News Conference in Los Angeles*, *supra*. Reagan's Democratic opponent, Jimmy Carter, criticized Reagan's promise, saying that he did not think it "proper" "to make a campaign promise to name any particular kind of person to the Supreme Court . . ." Fred Barnes, *Anderson Votes Could Elect Reagan, Carter Hints*, BALT. SUN, Oct. 16, 1980, at A15. In the summer of 1981, Reagan would follow through on his campaign pledge by nominating Sandra Day O'Connor to replace Justice Potter Stewart.

Reagan also apparently gave a private promise to a leading African-American supporter that if Justice Thurgood Marshall stepped down, he would appoint another African American to replace him. Frederick Allen, *Abernathy: Reagan Pledged to Keep Black on Top Court*, ATLANTA CONST., Oct. 23, 1980, at A1.

news report.<sup>96</sup> But this time the Democrats were the ones pressing the issue, engaging in what the *Washington Post* called an “unbashful bashing on the potential Reagan court.”<sup>97</sup> “We must win to save the Supreme Court of the United States,” proclaimed Democratic presidential nominee Walter Mondale early in the campaign. “If that Court is replaced by Mr. Reagan, it could well be that our great cause of justice will be doomed for the lifetime of everyone in this room.”<sup>98</sup> Commentators noted that the advanced age of a number of the Justices (five were seventy-five or older) made the Court an unusually important issue in the 1984 election.<sup>99</sup> The Justices themselves contributed to the public debate over the court. In the summer of 1984, several of the liberal Justices gave public speeches lamenting what they saw as the rightward direction of the Court.<sup>100</sup> And Justice William Rehnquist gave a speech in the early fall in which he defended the role of the President in shaping the Court (while downplaying the efficacy of these efforts).<sup>101</sup> Late in the campaign, when polls showed him well behind the incumbent Reagan, Mondale gave a campaign speech dedicated to the issue.<sup>102</sup> In the face of

96. Steven Stark, *Will Court Bear Reagan Brand?*, BOS. GLOBE, July 29, 1984, at A25.

97. *Court Bashing*, *supra* note 71.

98. Linda Greenhouse, *Taking the Supreme Court's Pulse*, N.Y. TIMES, Jan. 28, 1984, at 8.

99. George F. Will, *The Aging of the Court*, WASH. POST, Oct. 14, 1984, at D7; Philip Hager, *Vacancies Expected—High Court: An Issue in Campaign*, L.A. TIMES, Sept. 22, 1984, at SD1; Fred Barbash, *Election Also Could Determine Future Course of Supreme Court*, WASH. POST, July 15, 1984, at A3; James J. Kilpatrick, *Potter's Clay*, BALT. SUN, Jan. 31, 1984, at A7; Greenhouse, *supra* note 98.

100. *Swing Toward the Right Crystallizes at the Supreme Court*, ATLANTA CONST., Sept. 30, 1984, at 6A; Will, *supra* note 99.

In subsequent elections, Justice Blackmun continued his effort to make the Court an issue of presidential politics. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“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.”); Donna Halvorsen, *Blackmun Foresees Fall of New Abortion Standard*, STAR TRIB. (Minneapolis), July 25, 1992, at A1; *Blackmun Has Sharp Opinions of Colleagues*, N.Y. TIMES, July 18, 1988, at A10 (“For better or for worse, the 1988 election will be a very significant one.” With a Republican victory, “[t]he court could become very conservative well into the 21st Century.”). On Blackmun’s distinctively blunt extrajudicial commentary, see Christopher W. Schmidt, *Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech*, 88 CHI.-KENT L. REV. 487, 499, 507 (2013).

101. *On the Record; Rehnquist on Justices*, N.Y. TIMES, Oct. 20, 1984, at 1. Rehnquist’s key point was to insist that even though Presidents have always appointed Justices that align with their own ideological commitments, the Court has remained unpredictable and independent. *Id.*; see also Lyle Denniston, *Justice Doubts Any President Can Pack Court*, BALT. SUN, Oct. 20, 1984, at 1A (“A Supreme Court justice stepped to the edge of the presidential campaign yesterday, implicitly advising the candidates not to count too heavily on controlling the court’s future direction.”); *id.* (“If Mr. Mondale has been able to stir voters’ concerns about the issue, the justice’s speech might soften the impact.”); Herman Schwartz, *Rehnquist's Partisan Intrusion*, N.Y. TIMES, Oct. 26, 1984, at A35 (condemning Rehnquist for a “blatant intrusion into partisan politics”).

102. Thomas Oliphant, *Campaigner Mondale Finally in Groove*, BOS. GLOBE, Oct. 28, 1984, at 16; Bernard Weinraub, *Mondale Calls Remark by Reagan 'Despicable'*, N.Y. TIMES (Oct. 28, 1984), <http://www.nytimes.com/1984/10/28/us/mondale-calls-remark-by-reagan-despicable.html> [<https://perma.cc/G96U-3AA7>].

these attacks, Reagan and the Republicans chose not to press the Court as an election issue.<sup>103</sup> Commentators concluded that the issue failed to attract voters for the Democrats,<sup>104</sup> and Mondale was routed at the polls on election day.<sup>105</sup>

By the next presidential election, the Democrats have given up on the Court as way to win votes. Michael Dukakis, the Democratic nominee, “has apparently decided that as a campaign issue, the Supreme Court is a loser,” noted one reporter.<sup>106</sup> “He mentions the court only before black and overwhelmingly Democratic audiences.”<sup>107</sup>

In the middle of the 1992 election campaign, the Supreme Court issued its *Casey* decision, which reaffirmed the constitutional right to abortion while also upholding substantial limitations on access to that right. The right to abortion became, according to one news commentator, “perhaps the most divisive and politically explosive issue of the November election.”<sup>108</sup> President Bush promised to appoint Justices who would overturn *Roe*, while Clinton initially seemed intent on turning the election into a referendum on the issue.<sup>109</sup> “[T]he constitutional right to choose is hanging by a thread,” Clinton warned.<sup>110</sup> “You have four judges plainly committed to repeal *Roe vs. Wade*, three others nibbling around the edges and a brave Justice Blackmun saying he doesn’t know how much longer he can hang on.”<sup>111</sup> Clinton then made his plea to the voters: “This is one of the things this presidential election is about, and I hope the American people will say in clear, unambiguous terms: We do not want to go back.”<sup>112</sup>

103. Ross, *supra* note 72, at 441–54. When given an opportunity to discuss his position on the Supreme Court in a presidential debate, Reagan had only this to say: “I have appointed one member to the Supreme Court: Sandra Day O’Connor. I’ll stand on my record on that. And if I have the opportunity to appoint any more, I’ll do it in the same manner that I did in selecting her.” *Debate Between the President and Former Vice President Walter F. Mondale in Louisville, Kentucky: October 7, 1984*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucs.edu/ws/?pid=39199> [<https://perma.cc/J8B9-VHS5>].

104. Lyle Denniston, *With Eyes on Election, Supreme Court Returns*, BALT. SUN, Oct. 1, 1984, at 1A.

105. STEPHENSON, *supra* note 18, at 209.

106. Savage, *supra* note 3, at B9.

107. *Id.*; see also Ross, *supra* note 72, at 447.

108. Marcus, *supra* note 74.

109. Jean Latz Griffin, *Abortion Remains Most Divisive Issue*, CHI. TRIB. (Oct. 19, 1992), [http://articles.chicagotribune.com/1992-10-19/news/9204040688\\_1\\_poor-women-abortion-mother-s-life](http://articles.chicagotribune.com/1992-10-19/news/9204040688_1_poor-women-abortion-mother-s-life) [<https://perma.cc/9F43-SVCD>]; Toner, *supra* note 91.

110. Steve Daley, *Ruling Weakens Abortion Right: Ruling Throws Issue into the Political Ring*, CHI. TRIB. (June 30, 1992), [http://articles.chicagotribune.com/1992-06-30/news/9202270566\\_1\\_justice-blackmun-pennsylvania-law-supports-family-abortion](http://articles.chicagotribune.com/1992-06-30/news/9202270566_1_justice-blackmun-pennsylvania-law-supports-family-abortion) [<https://perma.cc/FU73-E7VL>].

111. *Id.*

112. *Id.*

In what would become a pattern in modern elections, the attention the Court received as a campaign issue during the primaries and when the Justices released their end-of-the-term rulings in early summer lessened over the summer and by the fall, as election day neared, it had receded to a minor concern for the candidates. In late September, the *Christian Science Monitor* noted that neither of the candidates were talking about judicial appointments anymore; the Court had become “the dog that didn’t bark” in the 1992 presidential campaign.<sup>113</sup>

In the 1996 campaign, the Court never featured prominently. Republican presidential nominee Bob Dole made early efforts to use the Court to attack Clinton as soft on crime, but they did not seem to resonate and he focused on other issues.<sup>114</sup> In the weeks leading up to the election, a reporter for the *New York Times* described the Court as “possibly the most consequential—and the most neglected—issue in the 1996 campaign.”<sup>115</sup> After a flurry of attention to the issue in the Republican primary the previous spring, “the High Court has essentially been abandoned as an applause line on the campaign trail.”<sup>116</sup>

The 2000 presidential campaign saw an uptick of attention to the Court.<sup>117</sup> Democratic nominee Al Gore sought to paint his opponent, Republican nominee George W. Bush, as a dangerous conservative on the issues of abortion and civil rights.<sup>118</sup> Although Bush never pressed the Court as a major campaign issue, his supporters sought to mobilize the conservative base by emphasizing the importance of future judicial appointments in advancing their goal to end abortion and affirmative action and bolster gun rights.<sup>119</sup> One of the three presidential debates featured a question on the Supreme Court, which led to an exchange between Bush and Gore about the kinds of Justices they would appoint.<sup>120</sup>

The Court featured as an issue in the presidential elections of 2004, 2008, and 2012, although generally not one the candidates themselves

113. *Silence on the Court*, *supra* note 3. Despite this lack of attention from the candidates, the Court remained an important issue for the voters in the 1992 election. Exit polls found that a third of the voters ranked Supreme Court appointments as “very important” in determining their vote; 50% of these voters went for Clinton, 39% for Bush. E. J. Dionne Jr., *Abortion Rights Supporters Claim Election Gains: Exit Polls Indicate*, WASH. POST, Nov. 9, 1992, at A9.

114. Ross, *supra* note 72, at 456–60.

115. Richard L. Berke, *A Missing Issue in the Big Race*, N.Y. TIMES, Oct. 13, 1996, at E1.

116. *Id.*

117. Ross, *supra* note 72, at 460 (“Judicial issues were more prominent in the 2000 election than in any election since 1968.”).

118. *Id.* at 461–66.

119. *Id.* at 466–68.

120. *Presidential Debate in Boston: October 3, 2000*, *supra* note 75.

seemed interested in drawing attention to. Interest groups on the right and left used the prospect of judicial appointments as a way to rally supporters, but the candidates never treated the Court as an issue that was likely to gain them significant votes beyond those they had already secured.<sup>121</sup> Each of these elections produced what was becoming a familiar genre of campaign commentary: news stories noting that despite its importance, the candidates were not discussing the future of the Supreme Court on the campaign trail.<sup>122</sup>

## II. THE SUPREME COURT IN THE 2016 ELECTION

The history of the Supreme Court as an issue in presidential campaigns shows that there are, in effect, built-in headwinds that have tended to discourage candidates from fully embracing the Court as an election issue. At the same time, history shows that each election has its own distinctive dynamics that, within these broader constraints, can make candidates elevate or diminish the role of the Court in their campaigns. Each election has its own incentives and disincentives for the presidential contenders to talk about the Court on the campaign trail.

This then brings us to 2016, when we had an election in which various factors aligned in a way that provided unusually powerful incentives for the candidates to aggressively deploy the Court as a central issue in their campaigns. The confluence of high-profile, controversial recent rulings on issues such as same-sex marriage, abortion, campaign-finance reform, and affirmative action with Justice Scalia's death and the Republican blockade of Judge Garland's nomination seemed to provide the perfect platform for the candidates to frame the election as a referendum on the direction of the Court. This was not to be, however. The Court featured in the campaign, and interest groups on both sides pressed the issue as much as they could, but the candidates did not seem interested in using their positions at the heads of their tickets to raise the profile of the issue. Donald Trump mentioned the Court more often than Hillary Clinton, although even he did little more than offer brief stump-speech references to its importance, with occasional references to hot-

121. See Kevin J. McMahon, *Searching for the Social Issue*, in WINNING THE WHITE HOUSE, 2008, at 59, 70 (Kevin J. McMahon et al. eds., 2009) (noting that in 2000, 2004, and 2008, the Democratic candidate "virtually ignore[d] the Court on the campaign trail"); Barnes, *supra* note 3 (noting absence of the Supreme Court as an issue in the 2012 presidential campaign); Epps, *supra* note 3 (same); Ross, *Presidential Election*, *supra* note 3 (noting absence of the Supreme Court as an issue in the 2008 presidential campaign); *The Forgotten Issue*, *supra* note 3 (noting absence of the Supreme Court as an issue in the 2004 presidential campaign).

122. See, e.g., Ross, *Election Issue*, *supra* note 3; Chemerinsky, *supra* note 3; *The Forgotten Issue*, *supra* note 3.

button issues such as abortion and guns. As the election neared, each candidate talked less and less about the Court.

In this Part, I summarize the role the Court played as a campaign issue in the 2016 election. I then discuss the circumstances distinctive to this election that help explain why, despite the factors that seemed to align so as to make this election exceptional when it came to the role of the Court on the campaign trail, the Court remained at best a secondary issue for the candidates on the campaign trail.

*A. The Supreme Court as an Issue in the 2016 Election—What the Candidates Said*

1. Trump and the Court

In the Republican primary, the candidates talked about the Supreme Court, although there was little in the way of disagreement. They all praised *District of Columbia v. Heller*,<sup>123</sup> the 2008 case in which the Court for the first time recognized an individual right to bear arms under the Second Amendment; they all condemned *Roe v. Wade*.<sup>124</sup> When Justice Scalia died in February 2016, the Republican candidates each praised him as the platonic ideal of a Supreme Court Justice and quickly lined up behind the plan of Senate Republicans to refuse to hold hearings on any Obama nominee.<sup>125</sup> “I think it’s up to Mitch McConnell and everybody else to stop it,” Trump declared. “It’s called delay, delay, delay.”<sup>126</sup>

Trump was first forced to engage with the Supreme Court issue beyond his standard platitudes when his primary challenger Ted Cruz, a U.S. Senator from Texas who had been a Supreme Court clerk and Texas Attorney General, tried to elevate the Court as an issue in the primary by running a television spot titled “Supreme Trust.” “Life, marriage, religious liberty, the Second Amendment. We’re just one Supreme Court justice away from losing them all,” the voiceover warned. “We cannot trust Donald Trump with these serious decisions.”<sup>127</sup> Trump countered by saying he would release a list of people from which he would select his nominee to fill the vacancy on the

123. 554 U.S. 570 (2008).

124. 410 U.S. 113 (1973).

125. *Transcript of the Republican Presidential Debate*, N.Y. TIMES (Feb. 14, 2016), <https://www.nytimes.com/2016/02/14/us/politics/transcript-of-the-republican-presidential-debate.html> [<https://perma.cc/2G7P-Y2DF>].

126. *Id.*

127. Ted Cruz, *Supreme Trust: Ted Cruz TV Ad*, YOUTUBE (Feb. 15, 2016), <https://www.youtube.com/watch?v=Kbca-7bc374> [<https://perma.cc/2H8F-DXSY>].

Supreme Court.<sup>128</sup> On May 18, 2016, he released his list, a first for a presidential candidate.<sup>129</sup> The list of eleven names had been prepared with the help of the conservative Heritage Foundation and Federalist Society. Trump reiterated his promise that if elected his eventual nominee would be chosen from it. The list consisted of sitting judges, all white, six serving on federal circuit courts and five on state supreme courts; three of the eleven were women. According to the *New York Times*, the list “quell[ed] concerns that he would not select conservative jurists.”<sup>130</sup> It was a “peace offering to conservatives,” noted another account.<sup>131</sup> On September 23, after securing the Republican nomination and just before his first debate with Hillary Clinton, Trump released a second, supplemental list of ten names.<sup>132</sup> This list brought some diversity to his roster, including more women and three people of color; it also included the only non-judge, Republican senator Mike Lee of Utah. Taken as a whole, the twenty-one-person list consisted of traditional, conservative judges (and one lawmaker), with a skew toward people from outside the nation’s capital.<sup>133</sup> One commentator described the second list as

128. Jill Colvin & Mark Sherman, *Trump Unveils List of Potential Picks for Supreme Court Seat*, ASSOCIATED PRESS (May 18, 2016), <https://elections.ap.org/content/trump-unveils-list-potential-picks-supreme-court-seat> [<https://perma.cc/D4HY-BK93>]. His promise came at an event in Palm Beach, Florida. “I am going to give a list of either five or 10 judges that I will pick, 100 percent pick, that I will put in for nomination,” Trump said. “Because some of the people that are against me say: ‘We don’t know if he’s going to pick the right judge. Supposing he picks a liberal judge or supposing he picks a pro-choice judge.’” *Id.*

129. Press Release, Donald J. Trump, Donald J. Trump Releases List of Potential United States Supreme Court Justices (May 18, 2016), <http://www.presidency.ucsb.edu/ws/?pid=117786> [<https://perma.cc/SCX5-T3WR>].

130. Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html> [<https://perma.cc/2PZN-MBKW>]. According to Trump:

I have a lot of people that are conservative that really like me, love everything I stand for, but they really would like to know my view . . . because perhaps outside of the defense of our country, perhaps the single most important thing the next president is going to have to do is pick Supreme Court justices.

Colvin & Sherman, *supra* note 128 (quoting Fox News interview).

131. Jennifer Bendery & Sam Stein, *How Donald Trump Gained Power Over Senate Republicans With His Supreme Court List*, HUFFINGTON POST (May 20, 2016, 1:28 PM), [http://www.huffpost.com/entry/donald-trump-supreme-court-nominees-senate-republicans\\_us\\_573f3da4e4b045cc9a70d19a](http://www.huffpost.com/entry/donald-trump-supreme-court-nominees-senate-republicans_us_573f3da4e4b045cc9a70d19a) [<https://perma.cc/9EE3-QV78>].

132. See Richard Wolf, *Trump’s 21 Potential Court Nominees Are Overwhelmingly White, Male, and from Red States*, USA TODAY (Dec. 1, 2016, 7:32 AM), <https://www.usatoday.com/story/news/politics/elections/2016/12/01/donald-trump-supreme-court-21-nominees-list-nomination/93964888/> [<https://perma.cc/R5F2-3XN5>].

133. Colvin & Sherman, *supra* note 128 (“The decision to release such a list is highly unusual for a presidential candidate, and comes as Trump is working to unite a Republican Party fractured by his candidacy and assuage still-skeptical establishment Republicans who question his ability to win a general election.”); Oliver Roeder, *Trump’s Court Picks Are Mostly White Men, but They Are Still Unconventional*, FIVETHIRTYEIGHT (May 18, 2016, 7:14 PM), <https://fivethirtyeight.com/features/trumps-court-picks-are-mostly-white-men-but-they-are-still-unconventional/> [<https://perma.cc/2LGB-Y8HN>]. The list

“a sort of political life raft” in case Trump performed poorly in the first debate, noting that the Court “is a unifying issue for Trump across varying constituencies in the GOP.”<sup>134</sup>

While campaigning for the Republican nomination, Trump referenced the Court with some regularity, but he kept his comments simple, brief, and vague. If Clinton were elected, Trump told supporters at a rally in May 2016, “[y]ou will have a Supreme Court that will destroy our nation.”<sup>135</sup> “I am also going to appoint great Supreme Court Justices,” was a typical stump speech line—and often the totality of his discussion on this campaign issue.<sup>136</sup>

The one Court-related topic that Trump seemed eager to discuss was the Second Amendment. “The Second Amendment is under siege,” he warned an audience in South Carolina during the Republican primary. “We lost a great Supreme Court justice and nobody thought this was gonna be part of the equation. And all of a sudden, if somebody gets in and it’s the wrong person, they’ll take that Second Amendment away so fast your head will spin.”<sup>137</sup> “Hillary [Clinton] is a disaster on the Second Amendment,” he added.<sup>138</sup> Trump also said he would use agreement with *Heller* as a litmus test for nominating a Justice.<sup>139</sup>

In his speech accepting the Republican nomination for President in July 2016, Trump briefly referenced the Supreme Court. “We are also going to

earned Trump praise from conservative activists and Republican leaders. Colvin & Sherman, *supra* note 128. According to Senate Judiciary Committee Chairman Chuck Grassley: “Understanding the types of judges a presidential nominee would select for the Supreme Court is an important step in this debate so the American people can have a voice in the direction of the Supreme Court for the next generation.” *Id.*

134. Reena Flores & Major Garrett, *Donald Trump Expands List of Possible Supreme Court Picks*, CBS NEWS (Sept. 23, 2016, 9:06 AM), <https://www.cbsnews.com/news/donald-trump-expands-list-of-possible-supreme-court-picks/> [<https://perma.cc/5D2X-4FLD>].

Some critics expressed concern that Trump was somehow politicizing the Court or that by listing specific potential nominees he was turning the appointment process into a kind of an election. *See, e.g., How Not to Pick a Supreme Court Justice, supra* note 79 (describing Trump’s list as “a terrible precedent”); Michael Dorf, *Has Trump Set Up a Supreme Court Election?*, NEWSWEEK (May 25, 2016, 6:40 AM), <http://www.newsweek.com/trump-supreme-court-list-constitutional-election-463153> [<https://perma.cc/5WHE-2EL6>]. Dorf did not endorse these critiques, instead concluding that the length of the list gave it enough uncertainty to prevent it from becoming an end-run around the constitutional appointment process. *Id.*

135. Colvin & Sherman, *supra* note 128. Trump also tweeted, “if the Dems win the Presidency, the new JUSTICES appointed will destroy us all!” Donald J. Trump (@realDonaldTrump), TWITTER (July 21, 2016, 9:12 AM), <https://twitter.com/realdonaldtrump/status/756129793054220288> [<https://perma.cc/929P-KLQ2>].

136. *Full Transcript: Donald Trump NYC Speech on Stakes of the Election*, POLITICO (June 22, 2016, 10:50 AM), <http://www.politico.com/story/2016/06/transcript-trump-speech-on-the-stakes-of-the-election-224654> [<https://perma.cc/6ENU-5P4X>].

137. Deb, *supra* note 78.

138. *Id.* (alteration in original).

139. *Id.*

appoint justices to the United States Supreme Court who will uphold our laws and our Constitution,” he said. Trump continued:

The replacement for Justice Scalia will be a person of similar views and principles. This will be one of the most important issues decided by this election. My opponent wants to essentially abolish the [Second] [A]mendment. I, on the other hand, received the early and strong endorsement of the National Rifle Association and will protect the right of all Americans to keep their families safe.<sup>140</sup>

During the general election, Trump pressed the same themes he had in the primary.<sup>141</sup> “Even if you can’t stand Donald Trump, even if you think I’m the worst, you’re going to vote for me. You know why? Judges,” he told a rally in Virginia.<sup>142</sup> In the fall of 2016, Trump’s standard stump speech included one reference to the Court, placed at the end of a list of initiatives he said he would accomplish in his first hundred days in office.<sup>143</sup>

At an event in Wilmington, North Carolina in August, Trump offered what amounted to one of his most lengthy unprompted discussion of the Court:

We have to win. That November 8 day is so important.

You know I bring things up like the judges right? Supreme Court Justices, we have to get—you know, you could have as many as four? I guess it’s a scenario where this president could pick five Supreme Court Justices.

140. *Full Text: Donald Trump 2016 RNC Draft Speech Transcript*, POLITICO (July 21, 2016, 6:21 PM), <http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974> [<https://perma.cc/WAR2-4UX8>].

141. *Read the Full Transcript of Donald Trump’s ‘Second Amendment’ Speech*, TIME (Aug. 9, 2016), <http://time.com/4445813/donald-trump-second-amendment-speech/> [<https://perma.cc/9UKL-AJBX>].

142. Igor Bobic, *Donald Plays His Trump Card with Fretful GOP: Remember the Supreme Court*, HUFFINGTON POST (Aug. 2, 2016, 2:44 PM), [https://www.huffingtonpost.com/entry/donald-trump-supreme-court\\_us\\_57a0b0dde4b0e2e15eb72daa](https://www.huffingtonpost.com/entry/donald-trump-supreme-court_us_57a0b0dde4b0e2e15eb72daa) [<https://perma.cc/2ZYZ-6WUE>].

143. *See, e.g.*, Donald J. Trump, Remarks at the Phoenix Convention Center in Phoenix, Arizona (Oct. 29, 2016), <http://www.presidency.ucsb.edu/ws/?pid=119182> [<https://perma.cc/LLT5-3W39>] (“Just think about what we can accomplish in the first 100 days—We are going to have the biggest tax cut since Ronald Reagan; eliminate every unnecessary job-killing regulation; cancel every illegal Obama executive order; stop the massive inflow of refugees and keep Radical Islamic Terrorist[s] out of our country; rebuild our military and take care of our Vets; reduce surging crime and support the men and women of law enforcement; provide school choice and put an end to Common Core; save the [Second] [A]mendment; and appoint Justices to the Supreme Court who will uphold and defend the Constitution of the United States.”).

Of the thirty-nine Trump campaign speeches The American Presidency Project database has collected for Trump between September 15 and Election Day, Trump referenced Supreme Court nominations in thirty of them. Almost all of these references were just a single, brief mention of the Court, along the lines of the preceding quotation.

And if you pick two that are left, left, left, it's going to be a disaster for our country. Your Second Amendment, the National Rifle Association endorsed and they endorsed me early, a long time ago.<sup>144</sup>

He praised Justice Scalia as “a great one” and promised that if elected he would replace him with “Justices very much like Justice Scalia.”<sup>145</sup> Trump went on:

So if for no other reason, I mean it's such an important—it's one of the most important elections for a lot of reasons, not just that but for a lot of reasons. But that's so obviously, because for whatever reason, they say this could be the presidency. This next four years is where you will pick more Supreme Court Justices than anybody has ever had the opportunity to do. Believe me, I'll make you very proud of those Justices every day.<sup>146</sup>

Trump's talk about appointing Justices, however, was quickly overshadowed by his controversial comments, also made in his Wilmington speech, that seemed to encourage gun rights activists to use their weapons against Hillary Clinton if she won the election. “If she gets to pick her judges, nothing you can do, folks,” he said, before adding: “Although the Second Amendment people, maybe there is. I don't know.”<sup>147</sup>

## 2. Clinton and the Court

Throughout the campaign, from stump speeches to debates, Hillary Clinton gave the Supreme Court far less attention than did her Republican opponent. And she referenced the Court with decreasing frequency as the campaign went on.<sup>148</sup> In the winter and spring of 2016, while running against Bernie Sanders in the Democratic primary, she would emphasize the importance of the Court for voters. In early February, when asked at a candidate forum whether she would have a litmus test for her selection of appointees to the Court, she said:

I do have a litmus test. I have a bunch of litmus tests because I agree with you. The next president could get as many as three appointments. You know one of the many reasons why we can't turn the White House over to the Republicans again is because of the Supreme Court. I'm looking for

144. *Read the Full Transcript of Donald Trump's 'Second Amendment' Speech*, *supra* note 141.

145. *Id.*

146. *Id.*

147. *Id.*

148. During the primary, Clinton published an op-ed on the Court. Hillary Clinton, *Opinion, A Make-or-Break Moment for Supreme Court Appointments*, BOS. GLOBE (Jan. 8, 2016), <https://www.bostonglobe.com/opinion/2016/01/08/make-break-moment-for-supreme-court-appointments/ULPa9x5VEUjqfeTn8rCpdN/story> [<https://perma.cc/E9B7-A39V>] (“There's a lot at stake in this election. Nowhere is this clearer than in the [U.S.] Supreme Court.”). By the fall of 2016, she was barely mentioning the issue.

people who understand the way the real world works, who don't have a kneejerk reaction to support business, to support the idea that you know money is speech, that gutted the Voting Rights Act . . . . We have to preserve marriage equality. We have to go further to end discrimination against the LGBT community. . . [applause][.] We've got to make sure . . . [applause][.] We've got to make sure to preserve *Roe v. Wade*, not let it be nibbled away or repealed.<sup>149</sup>

Later in the month, when Senate Republicans first announced they would not hold hearings on Judge Garland, she denounced their actions.<sup>150</sup> If Trump's favorite Court-related topic was the Second Amendment, for Clinton it was campaign finance reform. Her references to the Court mentioned liberal issues such as abortion rights and marriage equality, but the theme she emphasized most consistently was her opposition to the Court's rulings limiting campaign finance regulation, particularly its 2010 *Citizens United* ruling.<sup>151</sup> She said she would seek to overrule that decision by appointing new Justices or, if necessary, by constitutional amendment.<sup>152</sup>

Clinton's single reference to the Court in her speech at the Democratic National Convention was framed as a kind of populist call to arms. "I believe America thrives when the middle class thrives," she said.<sup>153</sup> "I believe our economy isn't working the way it should because our democracy isn't working the way it should."<sup>154</sup> This linkage between economic opportunity and the political system provided a segue to the Court: "That's why we need to appoint Supreme Court justices who will get money out of politics and ex-

149. Clinton, *supra* note 77. Clinton's primary competitor, Bernie Sanders, had already stated that he considered a commitment to overruling *Citizens United* a litmus test for his nominees. Jonathan H. Adler, *Clinton Has 'A Bunch of Litmus Tests' for Supreme Court Nominees*, WASH. POST: VOLOKH CONSPIRACY (Feb. 4, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/04/clinton-has-a-bunch-of-litmus-tests-for-supreme-court-nominees/> [perma.cc/XH5P-DEQP].

150. Hillary Clinton, Statement on Senate Republicans' Announcement to Block SCOTUS Appointment (Feb. 24, 2016), <http://www.presidency.ucsb.edu/ws/?pid=119448> [https://perma.cc/6SEC-G295]; Hillary Clinton, Statement on President Obama's Supreme Court Nomination (Mar. 16, 2016), <http://www.presidency.ucsb.edu/ws/?pid=119481> [https://perma.cc/42WR-Y386].

151. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

152. *Full Text of Hillary Clinton's Campaign Rally Speech*, CNN (June 13, 2015, 1:46 PM), <http://www.cnn.com/2015/06/13/politics/hillary-clinton-campaign-rally-full-transcript-2016/index.html> [https://perma.cc/9PZA-4DMV].

153. Hillary Clinton, Address Accepting the Presidential Nomination at the Democratic National Convention in Philadelphia, Pennsylvania (July 28, 2016), <http://www.presidency.ucsb.edu/ws/?pid=118051> [https://perma.cc/68KG-2UYY].

154. *Id.*

pand voting rights, not restrict them. And if necessary, we will pass a constitutional amendment to overturn Citizens United!”<sup>155</sup> Having touched on the issue, she then quickly moved on, back to her populist themes.<sup>156</sup>

The previous night, in his address at the convention, Bernie Sanders, Clinton’s main opponent in the Democratic primary, emphasized the Court more than Clinton would in her speech. He denounced *Citizens United* as “one of the worst Supreme Court decisions in the history of our country.” Sanders continued:

Hillary Clinton will nominate justices to the Supreme Court who are prepared to overturn Citizens United and end the movement toward oligarchy that we are seeing in this country. Her Supreme Court appointments will also defend a woman’s right to choose, workers’ rights, the rights of the LGBT community, the needs of minorities and immigrants and the government’s ability to protect our . . . environment.<sup>157</sup>

Sanders then spoke directly to his followers, urging them to vote for Clinton because of the Court: “[I]f you think you can sit it out, take a moment to think about the Supreme Court justices that Donald Trump would nominate and what that would mean to civil liberties, equal rights and the future of our country.”<sup>158</sup>

Post-convention commentary included the predictable lamentations of opportunities lost. “We know the numbers, but many seem to think the future of the Supreme Court is simply one more issue to be evaluated, no weightier than others,” wrote one commentator.<sup>159</sup> “Indeed, only at 11:15 PM on the first day of the Democratic Convention was the status of the Supreme Court briefly discussed by Bernie Sanders. Hillary mentioned it even more briefly the last day of the convention.”<sup>160</sup>

In the winter and fall of 2016, Clinton made four official statements on the Supreme Court and judicial nominations, and her campaign issued three press releases on the issue. After July 2016, there were none.<sup>161</sup> In the Amer-

155. *Id.*

156. *Id.*

157. *READ: Bernie Sanders’ Speech at The Democratic Convention*, NPR (July 25, 2016, 10:42 PM), <http://www.npr.org/2016/07/25/487426056/read-bernie-sanders-prepared-remarks-at-the-dnc> [<https://perma.cc/AFD5-K6KC>].

158. *Id.*

159. David Morris, *Hillary Clinton, The Supreme Court and A Progressive Future*, HUFFINGTON POST: THE BLOG (July 29, 2016, 9:50 AM), [https://www.huffingtonpost.com/david-morris/hillary-clinton-the-supre\\_b\\_11258126.html](https://www.huffingtonpost.com/david-morris/hillary-clinton-the-supre_b_11258126.html) [<https://perma.cc/3Z56-EDZT>].

160. *Id.*

161. *2016 Presidential Election Speeches and Remarks*, THE AM. PRESIDENCY PROJECT, [http://www.presidency.ucsb.edu/2016\\_election\\_speeches.php?candidate=70&campaign=2016CLINTON&doctype=5001](http://www.presidency.ucsb.edu/2016_election_speeches.php?candidate=70&campaign=2016CLINTON&doctype=5001) [<https://perma.cc/E3YH-S9Q3>].

ican Presidency Project's database of thirty-six campaign speeches she delivered between September 15 and Election Day, only in three of them did she make any mention of nominations to the Supreme Court (and then only relatively brief references).<sup>162</sup> Whatever emphasis the Clinton campaign and its allies placed on the future of the Court as a campaign issue (and exit polls show that a fifth of all Clinton voters cited the Court as the most important issue for them, so clearly there were Clinton-backers making it an issue), it was largely done by surrogates and supporters, not by the candidate herself. By the summer and fall of 2016, the Court was simply not an issue she seemed interested in pursuing on the campaign trail.

### 3. The Debates

Although Trump did not seem interested in doing much beyond mentioning the issue of the Supreme Court and Clinton often did not seem interested in doing even this, they were required to speak at some length about the future of the Court in response to questions at two of the three presidential debates. The Court made a brief appearance in the second when an audience member selected to ask a question described the Court as “[p]erhaps the most important aspect of this election,” and then asked the candidates, “[w]hat would you prioritize as the most important aspect of selecting a Supreme Court justice?”<sup>163</sup> “This is one of the most important issues in this election,” Clinton agreed.<sup>164</sup> She explained that she wanted Justices “who understand the way the world really works, who have real-life experience, who have not just been in a big law firm and maybe clerked for a judge and then gotten on the bench, but, you know, maybe they tried some more cases, they actually understand what people are up against.”<sup>165</sup> She also said she “would want to see the Supreme Court reverse Citizens United and get dark, unaccountable money out of our politics,” “stick with *Roe v. Wade* and a woman’s right to choose, and . . . stick with marriage equality.”<sup>166</sup> She concluded her remarks

162. *Id.*; see e.g., Hillary Clinton, Remarks at Ohio State University in Columbus (Oct. 10, 2016), <http://www.presidency.ucsb.edu/ws/?pid=119155> [<https://perma.cc/9GJB-257G>] (“[Y]ou don’t want someone who says that he’s going to appoint Supreme Court justices who will reverse marriage equality; who will—who will keep Citizens United, one of the worst decisions ever made, that allowed dark, unaccountable money in our electoral system; that will reverse a woman’s right to make her own health care decisions; who will defund Planned Parenthood.”).

163. *Presidential Debate at Washington University in St. Louis, Missouri: October 9, 2016*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=119038> [<https://perma.cc/CLR4-3U89>].

164. *Id.*

165. *Id.*

166. *Id.*

by criticizing the Senate for “a dereliction of duty” in refusing to vote on the Garland nomination.<sup>167</sup>

Trump said he hoped to find judges “very much in the mold of Justice Scalia,” citing the list he had compiled of possible selections, “so that people would see, highly respected, highly thought of, and actually very beautifully reviewed by just about everybody.”<sup>168</sup> He said he would appoint people who “respect the Constitution of the United States. . . . Also, the Second Amendment, which is totally under siege by people like Hillary Clinton.”<sup>169</sup> Then, after barely a hundred words on the Court, he changed topic. “Now, Hillary mentioned something about contributions . . .”—and he was off talking about how much money he put into his campaign and how Clinton relied on “big money from all of these different corporations.”<sup>170</sup>

“The question was about the Supreme Court,” Clinton protested, noting that her commitment to stronger regulations for gun purchases did not undermine her “respect” for the Second Amendment.<sup>171</sup>

In the third presidential debate, the moderator led off with a question about the Supreme Court. He noted that “the next president will almost certainly have at least one appointment and likely or possibly two or three appointments,” and therefore “will, in effect, determine the balance of the court for what could be the next quarter century.”<sup>172</sup> He then posed a two-part question: (1) “[W]here do you want to see the court take the country?”; and (2) “[W]hat’s your view on how the Constitution should be interpreted?”<sup>173</sup>

Responding first, Clinton explained that “when we talk about the Supreme Court, it really raises the central issue in this election, namely, what kind of country are we going to be?”<sup>174</sup> She went on to state that she wanted a Court that would

stand on the side of the American people, not on the side of the powerful corporations and the wealthy. For me, that means that we need a Supreme Court that will stand up on behalf of women’s rights, on behalf of the rights of the LGBT community, that will stand up and say no to Citizens United . . . .

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Presidential Debate at the University of Nevada in Las Vegas: October 19, 2016*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=119039> [<https://perma.cc/5GCD-S227>].

173. *Id.*

174. *Id.*

. . . [I]t is important that we not reverse marriage equality, that we not reverse *Roe v. Wade*, that we stand up against Citizens United, we stand up for the rights of people in the workplace, that we stand up and basically say: The Supreme Court should represent all of us.<sup>175</sup>

She concluded by saying that she hoped the Senate would “do its job” and confirm Obama’s nominee.<sup>176</sup>

“The Supreme Court: It’s what it’s all about,” Trump started off.<sup>177</sup> “[I]t’s just so imperative that we have the right justices.”<sup>178</sup> He then talked about Justice Ginsburg and her “very, very inappropriate statements toward me” (a reference to criticisms the Justice had made about Trump several months earlier<sup>179</sup>) before moving to the Second Amendment, “which is under absolute siege.”<sup>180</sup> If Clinton won the election, he said, “we will have a Second Amendment which will be a very, very small replica of what it is right now.”<sup>181</sup> Noting that he had released a list of twenty people he would choose from, he assured voters that

the justices that I’m going to appoint will be pro-life. They will have a conservative bent. They will be protecting the Second Amendment. They are great scholars in all cases, and they’re people of tremendous respect. They will interpret the Constitution the way the founders wanted it interpreted. And I believe that’s very, very important.<sup>182</sup>

The moderator then directed Clinton to talk about the Second Amendment in light of her record of criticism toward *Heller*.<sup>183</sup> Clinton said she believed in the “reasonable regulation” of guns.<sup>184</sup> “I see no conflict between saving people’s lives and defending the Second Amendment,” she concluded.<sup>185</sup>

Trump responded by saying that *Heller*—which he described as “a well-crafted decision” in which Justice Scalia was “so involved” (Justice Scalia wrote the majority opinion)—caused Clinton to become “extremely upset, extremely angry.”<sup>186</sup> “[T]here’s no doubt that I respect the Second

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a ‘Faker,’ He Says She Should Resign*, CNN (July 13, 2016, 7:45 AM), <https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/> [<https://perma.cc/F3PS-RMQ9>].

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

Amendment,” Clinton insisted, “that I also believe there’s an individual right to bear arms. That is not in conflict with sensible, commonsense regulation.”<sup>187</sup> Trump responded with an attack on gun regulation, praise for the NRA, and a promise “to appoint justices that will feel very strongly about the Second Amendment, that will not do damage to the Second Amendment.”<sup>188</sup>

The moderator then turned the topic to abortion. Trump promised to appoint only “pro-life” Justices who would overturn *Roe v. Wade*.<sup>189</sup> “And that’ll happen automatically, in my opinion, because I am putting pro-life justices on the court.”<sup>190</sup> Clinton responded that she supported *Roe*, which she described as “guarantee[ing] a constitutional right to a woman to make the most intimate, most difficult, in many cases, decisions about her health care that one can imagine.”<sup>191</sup> She then attacked Trump’s promise to withhold federal funds from Planned Parenthood. “I will defend Planned Parenthood. I will defend *Roe v. Wade*, and I will defend women’s rights to make their own health care decisions.”<sup>192</sup> The moderator pressed Clinton to explain her vote against a bill to ban so-called “partial-birth abortions,” which set Trump off on a diatribe against “rip[ping] the baby out of the womb in the ninth month on the final day.”<sup>193</sup> Clinton said that Trump was mischaracterizing the issue by using “scare rhetoric” and tried to bring the issue back to the rights of women who are faced with “one of the worst possible choices that any woman and her family has to make.”<sup>194</sup> Trump tried to bring the issue back to abortions taking place “as late as one or two or three or four days prior to birth.”<sup>195</sup> At that point, the moderator turned to the topic of immigration.

#### 4. Summary

The Supreme Court was clearly an important issue for the 2016 presidential campaigns, but considered from the perspective of what the candidates actually said on the campaign trail, neither candidate treated it as a major issue. The candidates spoke about the Court relatively more in the earlier stages of their campaigns. It was more significant in the primaries than

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

in the general election; the candidates chose to give relatively more attention to the issue in the summer of 2016 than in the fall. In the weeks leading up to election day, it was only an issue when someone forced the candidates to discuss it: Clinton's most revealing comments came when she was pressed on the issue in a radio interview in September; and both candidates spoke about the Court in their second and third debates, but only when asked direct questions on the issue.

This is not to say that the Supreme Court was absent from the presidential campaign generally. The relative lack of interest in pushing the issue by the heads of the tickets is highlighted by the fact that others involved were doing more to press the issue. For instance, Trump's running mate, Mike Pence, often spoke about the Court at more length than did Trump. Whereas Trump's stump speech typically included a single reference to his promise to appoint a conservative Justice to the Court, Pence regularly gave several minutes in his stump speech to the issue.<sup>196</sup>

And activist groups were dedicated to pushing the Court as a campaign issue. The Federalist Society and the Heritage Foundation helped compile Trump's list of potential nominees.<sup>197</sup> The conservative Judicial Crisis Network sought to make the Court the central issue of the election.<sup>198</sup> The National Rifle Association pushed the Court as a justification for opposing Clinton and supporting Trump.<sup>199</sup> The group ran ads warning that allowing Clinton to appoint the next Supreme Court Justice would take away an individual's "right to self defense."<sup>200</sup>

On the other side, liberal advocacy groups such as the American Constitution Society<sup>201</sup> and People for the American Way,<sup>202</sup> and abortion rights

196. Sam Hananel & Mary Clare Jalonick, *Differences Aside, Supreme Court Unites Trump*, *Senate GOP*, ASSOCIATED PRESS (Aug. 23, 2016), <https://www.ap-news.com/2b042d2f077945238a37c1146b52e972> [<https://perma.cc/VVU8-2UG5>].

197. See *supra* notes 130–132 and accompany text.

198. See, e.g., Carrie Severino, *5 Things About the Supreme Court from Last Night's Debate*, JUDICIAL CRISIS NETWORK (Oct. 20, 2016), <https://judicialnetwork.com/5-things-supreme-court-last-nights-debate/> [<https://perma.cc/8CVE-D25M>] ("Donald Trump has made the Supreme Court the centerpiece of his appeal to voters, going so far as to name 21 well-regarded lawyers, mostly judges, who faithfully interpret the law and the Constitution as written."); Carrie Severino, *Where's Hillary's List?*, JUDICIAL CRISIS NETWORK (Sept. 27, 2016), <https://judicialnetwork.com/wheres-hillarys-list/> [<https://perma.cc/C7WZ-Z892>].

199. See NRA POLITICAL VICTORY FUND, <https://www.nrapvf.org/campaigns/2016/hillary-clinton/> [<https://perma.cc/559F-WXHB>].

200. NRA, *Don't Let Hillary Clinton Leave You Defenseless*, YOUTUBE (Sept. 20, 2016), [https://youtu.be/hPM8e\\_DauUw](https://youtu.be/hPM8e_DauUw) [<https://perma.cc/D7HC-FTT8>].

201. See, e.g., Erwin Chemerinsky, *Constitution Day 2017: The Importance of Election 2016*, AM. CONSTITUTIONAL SOCIETY: ACSBLOG (Sept. 19, 2016), <https://www.acslaw.org/acsblog/constitution-day-2017-the-importance-of-election-2016> [<https://perma.cc/WSU5-U66Z>].

202. Alex Hart, *Trump or Clinton Will Be Our President for Four Years, but the Supreme Court Justices They Pick Serve For Life*, PEOPLE FOR THE AM. WAY (Oct 20, 2016), <http://www.pfaw.org/blog->

organizations sought use the issue of Supreme Court appointments to mobilize their supporters to vote for Clinton.

In the 2016 election, the candidates did not lead the way when it came to using the Supreme Court as a campaign issue. The Court was a significant issue of the campaign, but it was not because the candidates sought to make it so.

### *B. The Supreme Court and the Voters*

Even if the presidential candidates did not treat the Court as a major issue on the campaign trail, it proved so for voters at the polls. According to one exit poll, 22% of voters said Supreme Court appointments was the most important factor in their decision to support a candidate (19% for Clinton voters; 27% for Trump voters); 48% of voters said Supreme Court appointments was an important factor. (For a point of comparison, in the 2008 election, these numbers were 7% and 47%.)<sup>203</sup>

Among Republicans who were uncertain about Trump as their party's nominee, the Supreme Court featured prominently as their justification for voting for Trump. According to the Heritage Foundation's John G. Malcolm, for conservatives who were "skeptical, to put it mildly, about Donald Trump," the candidate's "very, very sober list . . . was greatly reassuring."<sup>204</sup> When Ted Cruz endorsed Trump in September (something he conspicuously refused to do at the Republican Convention two months earlier), he listed the

posts/trump-or-clinton-will-be-our-president-for-four-years-but-the-supreme-court-justices-they-pick-serve-for-life/ [https://perma.cc/7CZG-FFQJ]; Elliot Mincberg, *New Trump Supreme Court List Makes Even Clearer the Dangers of a Trump Supreme Court*, PEOPLE FOR THE AM. WAY (Sept. 26, 2016), <http://www.pfaw.org/blog-posts/new-trump-supreme-court-list-makes-even-clearer-the-dangers-of-a-trump-supreme-court/> [https://perma.cc/YDP9-B2CY]; Elliot Mincberg, *Edit Memo: The Disastrous Consequences of a Trump Supreme Court*, PEOPLE FOR THE AM. WAY (Sept. 9, 2016), <http://www.pfaw.org/press-releases/edit-memo-the-disastrous-consequences-of-a-trump-supreme-court/> [https://perma.cc/4CK4-PXN5]; Elliot Mincberg, *June Shows Why November is the Most Important Month for the Supreme Court and our Rights*, PEOPLE FOR THE AM. WAY (June 30, 2016), <http://www.pfaw.org/blog-posts/june-shows-why-november-is-the-most-important-month-for-the-supreme-court-and-our-rights/> [https://perma.cc/7UYA-AQZ6].

203. *NBC News Exit Poll*, *supra* note 15. Other exit polls found similar numbers. According to a CNN exit poll, 21% identified the Supreme Court as the most important issue (with Trump voters more likely to be in this category, 56% versus 41%), and an additional 48% naming the Court as an important factor. The CNN poll found Clinton voters more likely to name the Court as not a factor at all in their vote (55% versus 37%). *Exit Polls*, CNN (Nov. 23, 2016), <http://www.cnn.com/election/results/exit-polls> [https://perma.cc/2PZ6-7B9U]; see also *Election 2016 National Exit Poll Results and Analysis*, ABC NEWS (Nov. 9, 2016, 2:10 AM), <http://abcnews.go.com/Politics/election-2016-national-exit-poll-results-analysis/story?id=43368675> [https://perma.cc/GSS7-DQR5]; *Fox News Exit Polls*, FOX NEWS, <http://www.foxnews.com/politics/elections/2016/exit-polls> [https://perma.cc/TD9H-T88P].

204. Adam Liptak, *Trump's Supreme Court List: Ivy League? Out. The Heartland? In*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/us/politics/trump-supreme-court-justices.html> [https://perma.cc/ZZL7-C959].

Supreme Court as the first and most important factor in his decision. He specifically cited Trump's list of potential Supreme Court nominees (which Trump had just completed with his second, supplemental list) as demonstrating Trump's commitment to appoint reliably conservative Justices.<sup>205</sup> Other Trump skeptics, particularly among cultural and religious conservatives, also cited the Court as the key factor in their support for his candidacy.<sup>206</sup>

### C. *Why Did the Candidates Not Make More of an Issue of the Court?*

Considering the unique circumstances at the Supreme Court during the 2016 election and the undeniable significance of the issue in the minds of the voters, why did the candidates not try to make more of a campaign issue of the Supreme Court? In Part I, above, I suggested ways in which longstanding historical patterns help explain their treatment of the Court. Here, I lay out factors particular to the 2016 election that inhibited the candidates from pushing a debate over the future of the Court as a major campaign issue.

#### 1. The Trump Factor I

So much of the attention of the press in the 2016 election was taken up with the personalities of the candidates and the scandals (real and imagined) revolving around them that few matters of substance were able to break through as consistently discussed campaign issues. Trump in particular had a personality and a penchant for provocation that sucked up a great deal of the media coverage of the election. For instance, the substance of his one major speech on a Court-related issue, the Wilmington address in August,

205. Ted Cruz, FACEBOOK (Sept. 23, 2016), <https://www.facebook.com/ted-cruzpage/posts/10154476728267464> [<https://perma.cc/E95P-DKWG>] (“For anyone concerned about the Bill of Rights—free speech, religious liberty, the Second Amendment—the Court hangs in the balance. I have spent my professional career fighting before the Court to defend the Constitution. We are only one justice away from losing our most basic rights, and the next president will appoint as many as four new justices. We know, without a doubt, that every Clinton appointee would be a left-wing ideologue. Trump, in contrast, has promised to appoint justices ‘in the mold of Scalia.’”); Al Weaver, *Cruz: Trump’s Supreme Court Commitment Led to Endorsement*, WASH. EXAMINER (Sept. 26, 2016, 11:47 AM), <http://www.washingtonexaminer.com/cruz-trumps-supreme-court-commitment-led-to-endorsement/article/2602828> [<https://perma.cc/98ZV-L8QA>].

206. See, e.g., William Bennett, *What a Clinton Supreme Court Would Mean for America*, REAL CLEAR POLITICS (Aug. 23, 2016), [https://www.realclearpolitics.com/articles/2016/08/23/what\\_a\\_clinton\\_supreme\\_court\\_would\\_mean\\_for\\_america\\_131586.html](https://www.realclearpolitics.com/articles/2016/08/23/what_a_clinton_supreme_court_would_mean_for_america_131586.html) [<https://perma.cc/Y84N-PLJU>] (“People often ask me how I—a so-called conservative intellectual and author of ‘The Book of Virtues’—can support and vote for Donald Trump. I have many good reasons, but nothing on the home front is more important than the Supreme Court.”); Hugh Hewitt, *It’s the Supreme Court, Stupid*, WASH. EXAMINER (July 31, 2016, 5:00 PM), <http://www.washingtonexaminer.com/its-the-supreme-court-stupid/article/2598256> [<https://perma.cc/6443-XM7S>].

was quickly overshadowed by his apparent encouragement of gun-rights activists to shoot his opponent.<sup>207</sup> In the last debate, the candidates' discussion of the Court was largely lost in the post-debate coverage, which focused more on Trump's complaints about not winning the Emmy for *The Apprentice*, his reference to "bad hombres," his description of Clinton as a "nasty woman," and his refusal to commit to accepting the outcome of the election if he lost.<sup>208</sup> In a presidential campaign as sensational and surprise-filled as this one, even if the candidates had been interested in pressing the issue (which they generally were not), the rather staid and serious topic of the Supreme Court would have had trouble breaking through the din.

## 2. The Trump Factor II

It is hard to conclude that Trump gave much thought to the Supreme Court or even that he cared all that much about the Court itself. He had his basic talking points—praise Justice Scalia, promise to appoint conservative Justices—but when he tried to go beyond these points, the limits of his interest and knowledge quickly became apparent. In a Republican primary debate, Trump said that judges "sign bills."<sup>209</sup> Following the debate, in response to a question about how he would appoint Supreme Court Justices, Trump had this to say:

I would wanna see scholars, but I think more than my asking, I would go on references of other people that I respect. Because that is not necessarily my world. I'm very much into the world of legal and legality. But, that is not my world, so I would go to people that I have great respect for and say, "Who do you recommend?"<sup>210</sup>

207. See *supra* notes 144–147 and accompanying text.

208. See, e.g., Amy Howe, *Last Night's Presidential Debate: The Supreme Court and the Candidates*, SCOTUSBLOG (Oct. 20, 2016, 11:02 AM), <http://www.scotusblog.com/2016/10/last-nights-presidential-debate-the-supreme-court-and-the-candidates/> [<https://perma.cc/C973-5TAZ>].

Many news accounts of the debate did not even mention the discussion of the Court. See, e.g., Leigh Ann Caldwell, *5 Major Takeaways From the Third and Final 2016 Presidential Debate*, NBC NEWS (Oct. 20, 2016, 4:21 AM), <https://www.nbcnews.com/storyline/2016-presidential-debates/5-major-takeaways-third-final-presidential-debate-n669831> [<https://perma.cc/6QT9-JH8G>]; Eyder Peralta, *The Final Presidential Debate In 100 Words (And 6 Videos)*, NPR (Oct. 19, 2016, 11:28 PM), <http://www.npr.org/sections/thetwo-way/2016/10/19/498626158/the-final-presidential-debate-in-100-words-and-6-videos> [<https://perma.cc/7DTS-ZJAV>]; Susan Page, *Analysis: After a Brutal Campaign, a Brutal Debate*, USA TODAY (Oct. 19, 2016, 11:38 PM), <https://www.usatoday.com/story/news/politics/elections/2016/10/19/analysis-trump-clinton-debate-las-vegas/92399898/> [<https://perma.cc/H9SJ-9LCC>].

209. Jeffrey H. Anderson, *Trump on the Separation of Powers: Judges Sign Bills*, WEEKLY STANDARD (Feb. 29, 2016 9:29 AM), <http://www.weeklystandard.com/trump-on-the-separation-of-powers-judges-sign-bills/article/2001315> [<https://perma.cc/LKM6-GL67>].

210. Kerry Pickett, *Trump Talks About Judges 'Signing Bills'*, DAILY CALLER (Feb. 26, 2016, 2:35 PM), <http://dailycaller.com/2016/02/26/trump-talks-about-judges-signing-bills-video/> [<https://perma.cc/G64Y-YXJD>].

At another point in the campaign, he promised to appoint Justices who would look into Hillary Clinton's emails.<sup>211</sup> When directly asked about the Court in the second debate, Trump gave a few talking points and then changed the subject. In the third debate he steered the discussion away from the Court, the Justices, and the Constitution, and toward the substantive issues of abortion and guns. Rather than responding to the moderator's question about the Court and the direction of the country or about approaches to constitutional interpretation, Trump talked about ripping babies out of wombs.<sup>212</sup>

At his campaign rallies, like at the Republican Convention, the Court was a bullet point for Trump. On rare occasions did he choose to expand it to a paragraph or a page.<sup>213</sup>

### 3. The Garland Problem I

Why did Clinton not spend more time attacking the Republican blockade of President Obama's nominee, Merrick Garland, to replace Justice Scalia on the Court? According to National Public Radio's Nina Totenberg, in the months following the Republican leadership's declaration that they

211. Nolan D. McCaskill, *Trump: I'd Pick Justices Who Would Look at Clinton's Email Scandal*, POLITICO (Mar. 30, 2016, 10:07 AM), <https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/trump-supreme-court-clinton-email-221377> [<https://perma.cc/7H6V-Y5FG>].

212. See Richard Wolf, *Supreme Court Debate: Stark Contrasts Emerge Between Trump, Clinton*, USA TODAY (Oct. 20, 2016, 11:19 AM), <https://www.usatoday.com/story/news/politics/elections/2016/10/20/supreme-court-debate-clinton-trump-guns-abortion/92452362/> [<https://perma.cc/VPF2-YGUT>] ("Legal experts who had expected a broader discussion of the court's role were disappointed."); *id.* (quoting Elizabeth Wydra, president of the Constitutional Accountability Center, criticizing the candidates for "wast[ing] an incredible opportunity . . . to educate the American people on their vision of the Constitution's role in our society and our courts," and instead focusing on "specific hot-button issues" such as abortion and guns).

213. As proved so often the case in the 2016 campaign, Trump's combination of ignorance and instincts resonated with his supporters. The American electorate generally cares about the Court in the abstract, but voters are rarely interested in listening to detailed descriptions about the role of the Court or constitutional jurisprudence. See, e.g., Epps, *supra* note 3 ("[J]udges matter to ordinary people. It's just nearly impossible to explain why. And in a town-hall-cum-slugfest debate, the nuances are liable to be wasted at best, and dangerous to the candidates at worst."); Dahlia Lithwick, *It Isn't Tilting in The Same Old Ways*, WASH. POST (June 15, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/13/AR2008061303178.html> [<https://perma.cc/5NTU-RLAD>] ("[I]t's hard to generate much public hysteria over nameless, faceless, future jurists deciding nameless, faceless future cases."). In the past, presidential candidates who have sought to make the Court a major campaign issue have faced the obstacle that campaign rallies generally do not want to hear too much about the Court. See, e.g., Ross, *supra* note 31, at 328 (Progressive Party candidate Robert M. LaFollette, who launched sweeping attacks on the courts as a central part of his campaign, bored audiences when he went on too long dissecting the flaws of the judiciary); *id.* at 331 (Goldwater running into much the same problem at campaign events when he went on at too much length about the errors of the Warren Court). Broad brushstrokes scored points; anything beyond this gained little more and risked confusing audiences—or putting them to sleep.

were refusing to hold hearings on Garland, “the issue as a Democratic weapon seemed to melt away.”<sup>214</sup>

One factor may be the difficulty to pressing an issue on the campaign trail that is basically one of legal process. “Do your job” sounded good and made a nice Twitter hashtag, but it never became an effective Democratic rallying cry for the 2016 elections. Democrats tried to make this a campaign issue in Senate races involving members of the Judiciary Committee, but gained little traction. The American people believed overwhelmingly that the Republicans were wrong to do what they did,<sup>215</sup> but the issue never coalesced in a way that could swing votes against Republicans.<sup>216</sup> Clinton on occasion raised the Garland blockade, albeit with decreasing frequency as election day neared; she seemed to consciously avoid making it a significant issue.

#### 4. The Garland Problem II

Another reason the Garland blockade was not a great campaign issue for Clinton was the awkwardness of pressing the issue of putting on the Court someone she had not chosen and who she did not believe to be the best person for the job. In her occasional comments on the kind of Justice she would appoint if elected, she spoke about people with broad experience and a kind of a populist sensibility. In a radio interview in September, she was asked: “If you become President, will you ask the President to pull Merrick Garland’s nomination to allow someone younger to be in his place and if you do, will the appointment be the first African-American woman nominee in history?”<sup>217</sup> She responded that she would “look broadly and widely for people who represent the diversity of our country and bring some common

214. *Presidential Election Likely to Impact Short Handed Supreme Court*, NPR (Sept. 29, 2016, 4:33 PM), <http://www.npr.org/2016/09/29/495965219/presidential-election-likely-to-impact-short-handed-supreme-court> [https://perma.cc/2C4K-U3RR].

215. Greg Sargent, *Do Americans Want Obama to Pick Scalia’s Replacement? Depends on the Poll Wording*, WASH. POST: THE PLUM LINE (Feb. 19, 2016), <https://www.washingtonpost.com/blogs/plum-line/wp/2016/02/19/do-americans-want-obama-to-pick-scalias-replacement-depends-on-the-poll-wording/> [https://perma.cc/3HGT-XUEG].

216. See, e.g., Mary Clare Jalonick, *If Clinton Wins, More in GOP Say No to 9 on Supreme Court*, ASSOCIATED PRESS (Nov. 1, 2016), <https://apnews.com/8ffd85eee5c74c9c8c07eb67eec0e42d/if-clinton-wins-more-gop-say-no-9-supreme-court> [https://perma.cc/ZQ28-J94X] (“[T]he GOP blockade has barely registered in this year’s elections.”); Jim Geraghty, *Remember Merrick Garland?*, NAT’L REV. (Sept. 29, 2016, 6:37 PM), <https://www.nationalreview.com/2016/09/merrick-garland-supreme-court-fight-absent-campaign-trail/> [https://perma.cc/5U2E-NMK4]; Hananel & Jalonick, *supra* note 196 (“Most of the vulnerable Republican senators have not wavered in their support for McConnell’s obstruction.”).

217. Tonya Pendleton, *Hillary Clinton Says She’s Doing Better; Talks Plans For African-Americans, HBCU’s & What She’s Still Outraged About*, BLACKAMERICAWEB.COM (Sept. 15, 2016), <https://blackamericaweb.com/2016/09/15/hillary-clinton-says-shes-doing-better-talks-plans-for-african-americans-hbcus-what-shes-still-outraged-about/> [https://perma.cc/ZT34-VFGA].

sense, real world experience.”<sup>218</sup> To the predominantly African-American radio audience, she singled out for criticism the Court’s 2013 ruling striking down a core part of the 1965 Voting Rights Act.<sup>219</sup> “[W]e need a Supreme Court that actually represents the people of this country and our most fundamental values.”<sup>220</sup> This was hardly an endorsement of Garland, a white male federal appeals court judge with experience working in law firms and prestigious government posts.

Garland, in short, was not a nomination made for the dynamics of a presidential campaign. It was hard for Democrats to rally around him. As Neil Sroka, spokesman for the liberal group Democracy for America, put it: “Imagine how fired up progressive voters would have been if the GOP was opposing the first black woman candidate for the bench.”<sup>221</sup> Obama’s strategy in nominating Garland, which was to find a moderate liberal who was widely respected in legal circles on the assumption that this profile would generate support from both sides of the aisle, was exactly the wrong strategy when viewed from the campaign trail.<sup>222</sup> In the end, Obama’s strategy to win over Senate Republicans failed, and Clinton was stuck with a less-than-ideal symbol with which to press the Court as a campaign issue.

218. *Id.* When she talked about the Court, Clinton usually referenced this idea of a justice with “real-life experience.” See, e.g., Clinton, *supra* note 162; Clinton, *supra* note 77.

219. *Shelby County v. Holder*, 570 U.S. 2 (2013).

220. Pendleton, *supra* note 217.

221. Sean Higgins, *Dems, GOP Plot Next Moves in Supreme Court Fight*, WASH. EXAMINER (Sept. 24, 2016, 12:01 AM), <http://www.washingtonexaminer.com/dems-gop-plot-next-moves-in-supreme-court-fight/article/2602619> [<https://perma.cc/ZFR4-WATZ>]; see also Greg Stohr, *What Clinton Won't Say: Whether Garland Is Her High Court Pick*, BLOOMBERG (Sept. 7, 2016, 11:39 AM), <https://www.bloomberg.com/news/articles/2016-09-07/what-clinton-won-t-say-whether-garland-is-her-high-court-pick> [<http://perma.cc/2V27-EU35>].

Although a different nominee would have offered a more powerful potential rallying point for the Clinton campaign, it would also have made a more inviting target for critics. During the 1992 campaign, for example, Bill Clinton suggested he might appoint liberal New York Governor Mario Cuomo to the Court, which might have heartened his base, but led critics to use the statement to attack Clinton. Clinton quickly backtracked. James Gerstenzang, *Pumped-Up Bush Greeted by Applause, Challenges*, L.A. TIMES, Oct. 30, 1992, at A1 (Bush saying having Cuomo on the Court would be a “disaster”); Ross, *supra* note 72, at 454–55.

As it was, Clinton’s antagonists highlighted her unwillingness to commit to re-nominate Judge Garland as an indication that she wanted to appoint more liberal judges. Carrie Severino, *Why Won't Hillary Say Whether She'll Re-Nominate Garland?*, JUDICIAL CRISIS NETWORK (Sept. 9, 2016), <https://judicialnetwork.com/wont-hillary-say-whether-shell-re-nominate-garland/> [<https://perma.cc/8QNH-58S9>].

222. See, e.g., *With GOP's SCOTUS Obstruction, DFA Says Nominating Centrist Would Be “Unmitigated Disaster,”* DEMOCRACY FOR AM. (Feb. 24, 2016, 7:00 PM), <http://www.democracyforamerica.com/site/page/with-gops-scotus-obstruction-dfa-says-nominating-centrist-would-be-unmitiga> [<https://perma.cc/FMC4-2DBR>] (Charles Chamberlain, Executive Director of the liberal advocacy group Democracy for America, warning that “[n]ominating a so-called ‘centrist’ to the Supreme Court would be an unmitigated disaster that would sap Democrats of the broad, public support needed to either get Senate Republicans to reverse their obstruction or to rally the grassroots troops we’ll need to defeat the GOP in November”).

## 5. The 2016 Polls

Another contributing factor was the fact that most people—including those devising Clinton’s campaign strategy—believed, based on poll numbers, that Clinton was going to win the election.<sup>223</sup> Emphasizing the Garland blockade as a campaign issue, they assumed, would not matter in the end. By avoiding the issue, she tied herself less to Garland himself, which would assumedly make it easier for her to nominate someone else, if she so chose, once elected. Some commentators surmised that by the fall of 2016, liberals were quietly accepting of the Republican refusal to hold hearings on Garland, since this opened the possibility of a more liberal nominee once Clinton was elected.<sup>224</sup>

### *D. The 2016 Election in Perspective*

The 2016 election saw the Supreme Court as more of an issue than in perhaps any previous presidential election and it saw the candidates speaking about the Court more frequently than most previous candidates (relatively low bars, admittedly). And voters claimed it was the most important issue at rates never seen before in American history. Yet, even recognizing these unprecedented elements of the election, it is still striking to note how relatively little the major party candidates talked about the Court. Clinton treated it as a minor issue, mentioning it only cursorily and discussing it at some length only when she felt compelled to do so. Trump repeatedly described the future of the Supreme Court as a major issue—sometimes he called it the most important issue of the election—but he rarely felt compelled to treat it more than one in a long list of stump speech promises.

The 2016 election showed the durability of certain historical trends: attacks were the easiest way to draw attention to the Court; attacks were never really met, but rather were avoided or met with counter-attacks.

Trump did not need to do much to leverage the issue—and he did not appear to be interested in doing much. For conservatives, the future of the

223. See, e.g., Caroline Kenny, *Political Prediction Market: Clinton’s Odds Rise Again*, CNN (Nov. 8, 2016, 12:17 PM), <https://www.cnn.com/2016/11/07/politics/political-prediction-market-hillary-clinton-donald-trump/index.html> [<https://perma.cc/7H5R-K6U3>]; Carl Bialik, *Top Pollsters Expect Clinton To Win*, FIVETHIRTYEIGHT (Oct. 18, 2016, 3:01 PM), <http://fivethirtyeight.com/features/top-pollsters-expect-clinton-to-win/> [<https://perma.cc/DJ5K-JR4C>].

224. See, e.g., Higgins, *supra* note 221 (“[A] lot of Democrats and liberal activists may secretly like McConnell’s opposition. With most polls showing Clinton ahead of Trump, few fear that anyone other than a liberal will replace Scalia on the bench. While activists like Garland, they’re not wedded to him.”); Jay Michaelson, *As Donald Trump Sinks, Republicans May Rethink Merrick Garland*, DAILY BEAST (Aug. 23, 2016 1:00 AM) <https://www.thedailybeast.com/as-donald-trump-sinks-republicans-may-rethink-merrick-garland> [<https://perma.cc/V7LY-EE6E>].

Court and a concern with judicial appointments were part of the fabric of politics. Trump inherited a political scene that allowed him to benefit from the Supreme Court as an election issue with minimal work on his part.

Clinton didn't have the readily accessible language that conservatives had cultivated over the past fifty years (strict constructionists, constitutionalists, interpret the law rather than make the law). Clinton had to work harder than Trump did to press the Court as an issue for her voters. The best she could do was to make some motions toward a quasi-populist approach to judicial decision making based on the idea that judges needed broad experience—hardly an inspiring rallying point for a political campaign. Rather than rethinking a strategy that failed to resonate on the campaign trail, she focused on other issues.

#### CONCLUSION

In light of this less-than-inspiring history of the Supreme Court as an issue in presidential campaigns, one might ask whether we really want the Supreme Court to be more of an issue on the campaign trail. That presidential candidates should talk more about Supreme Court is a widely accepted assumption among legal and political commentators.<sup>225</sup> But should it be? Maybe we should not only accept that the Court is destined, to some extent, to be the forgotten issue of our presidential campaigns, but we should be grateful. At minimum, I believe the experience of the 2016 campaign, viewed with some sense of the history of the Supreme Court as a campaign issue, should make us reconsider what we can realistically expect when presidential candidates talk about the Court.

Usually when the Court features in presidential campaigns, it is as a target of attack. Attacks are rarely met with defenses of the Court. A candidate may defend a particular decision. But the institution of the Court stands exposed and defenseless. Rather, attacks are met with counter attacks. Trump went after *Roe*; Clinton went after *Citizens United*. The closest we get to a defense of the Court is more of a defense repackaged into a counter attack: defend existing rulings by warning that one's opponent will appoint Justices who will overturn precedent (and then attacking that). The candidates may score some political points, but the Supreme Court comes out the loser.

225. See, e.g., Linda Greenhouse, Opinion, *Supreme Court Litmus Testing in the 2016 Election*, N.Y. TIMES (May 28, 2015), <https://www.nytimes.com/2015/05/28/opinion/supreme-court-litmus-testing-in-the-2016-election.html> [<https://perma.cc/6HHP-59PX>] (writing that the Supreme Court “urgently belongs” on the “campaign screen”); *Silence on the Court*, *supra* note 3. (“[I]t’s a shame that [the candidates in the 1992 presidential election] are ducking the responsibility to articulate their judicial philosophies. . . . Since the candidates are dodging the issue, voters and the press should challenge them to confront it.”).

What would a better election campaign discussion of the Court and its role look like? It's hard to know. We've never seen it.