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Presidential Ambitions of U.S. Supreme Court Justices: A History and an Ethical Warning

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PRESIDENTIAL AMBITIONS OF U.S. SUPREME COURT JUSTICES:
A HISTORY AND AN ETHICAL WARNING

William G. Ross

I. Introduction

A remarkably large number of U.S. Supreme Court Justices have had presidential aspirations. In at least three quarters of the presidential elections between 1832 and 1956, one or more Justices attempted to obtain a presidential or vice presidential nomination or were prominently mentioned as potential candidates.¹ Several Justices conducted covert presidential campaigns, and a few even openly campaigned from the bench. On numerous occasions, political parties or political leaders encouraged Justices to become presidential candidates. One Justice, Charles Evans Hughes, resigned from the Court to accept a presidential nomination.

No Justice during the past half century, however, appears to have entertained serious presidential ambitions. It is probably no coincidence that it has been nearly a half century since any Justice young enough to be elected president has held any significant elected office before taking his or her seat on the Court. During the past half century, most Justices have come to the Supreme Court from the U.S. Court of Appeals and have had previous careers as federal bureaucrats, private practitioners, or academics. With the exception of Sandra Day O’Connor, no Justice appointed since Earl Warren in 1953 has held any significant elective office, and few have been active in partisan politics. In contrast, most of the many Justices of yore who have had presidential aspirations had served as governors or members of Congress, and many had run for President before ascending the bench. Until the 1950s, many Justices were appointed because they were prominent in national politics. Only a few have become prominent in national politics merely because they were Justices.

During recent years, some critics of the Supreme Court appointment process have complained that the career backgrounds of Justices have become too narrow and that the Court would benefit from members who have had experience as elected legislative or executive officials. Shortly after David H. Souter announced his retirement in 2009, Senate Majority Leader Harry Reid expressed his preference for the appointment of someone other than a judge—“people with some real-life experience...rather than people who walk around in those black robes

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¹ Writing in 1958, John Frank accurately concluded that “for at least one hundred and twenty-five years, there has been no ten-year period in which a Supreme Court Justice has not been seriously and soberly considered for the presidential nomination.” JOHN P. FRANK, THE MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 275 (1958). As Frank observed, “[m]ost glittering of all the baubles of a roving judicial eye has been the greatest honor of all, the Presidency.” Id., at 273.
all the time.” Similarly, Patrick Leahy of Vermont, a member of the Senate Judiciary Committee, remarked in the wake of Souter’s retirement that he would “like to see more people from outside the judicial monastery, not just as judge.” And Joseph R. Biden, a longtime member of the Senate Judiciary Committee before his election to the vice presidency, declared in 2007 that “We have enough professors on the bench...I want someone who ran for dogcatcher.”

Although the Court probably would benefit from Justices who had served as elected officials since such persons might have a better understanding of the practical realities of politics and have a more profound appreciation of such issues as separation of powers and federalism, history demonstrates that Justices who have extensive political experience may have presidential aspirations. Nearly everyone agrees that presidential ambitions can distract justices and tempt them to trim their decisions to appeal to constituencies that could assist their candidacy. As Felix Frankfurter once asked, “What is more inimical for good work on the Court than for a Justice to cherish political, and more particularly, Presidential ambition?”

The first part of this article will provide a history of presidential ambitions among Supreme Court Justices. The second section will explain the way in which presidential ambitions among Justices are likely to diminish public confidence in the integrity of the Court’s decisions and the extent to which such ambition could influence the votes or opinions of politically ambitious Justices.

II. A History of Presidential Aspirations Among Supreme Court Justices

During the early years of the Republic, when both the Supreme Court and the federal government were less powerful than they have become, a Supreme Court justiceship was not necessarily regarded as the pinnacle of a career. John Jay was a gubernatorial candidate in New York in 1792 and he resigned as chief justice in 1795 to become governor; William Cushing was a candidate for the Massachusetts governorship in 1794; and John Rutledge resigned in as associate justice in 1791 to become chief justice of the South Carolina Court of Common Pleas.

John Marshall appears to have been the first member of the Court to have been regarded as a presidential possibility, although there is little evidence that Marshall sought the presidency. Marshall, who served for fourteen years in the Virginia legislature and who had briefly served as

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a member of the U.S. House of Representatives and as secretary of state, was no stranger to political office, but he relished his role as chief justice, in which he left a legacy greater than that of most presidents. In 1812, a decade after Marshall became chief justice, many Federalists regarded him as the ideal candidate to defeat James Madison’s bid for re-election as a Jeffersonian Republican. As one of Marshall’s biographers has explained, Federalist interest in Marshall was “natural” because “he was well known to all the prominent leaders of the party but still had managed to stay above the local squabbles of the past several years. His refusal to support the Alien and Sedition Laws years earlier was virtually forgotten. Also, it was believed that he could bring in some additional votes because of his nonpolitical stance during the past several years.” 6 Marshall’s judicial decisions in support of a powerful national government and vested property rights also must have made him attractive to Federalists.

Federalists also believed that Marshall would help them carry critical states. In doing their electoral arithmetic, Federalists believed that their party needed to carry either Virginia or North Carolina in order to win the election. They could count on the 88 electoral votes of the anti-war New England states and had a reasonable chance of carrying Delaware and Maryland, but they still would need 15 more for victory. Since they lacked any hope of carrying South Carolina, Georgia, or any western state and were doubtful about success in the Middle Atlantic states, they pinned their hopes on North Carolina and Virginia. Since Madison was a Virginian, Federalists believed that they could carry Virginia only if a Virginian were on their ticket. 7 Some Federalists supported Marshall because they regarded him as the only Federalist who could carry Virginia, or because they regarded him as a stronger candidate than the front-runner, DeWitt Clinton, who eventually received the nomination. 8

Many Federalists, however, opposed Marshall’s nomination because they believed that he could serve the Federalist cause more effectively on the Court, which, as a Marshall biographer has observed, was “a more accurate assumption than people realized at the time.” 9 Some Maryland Federalists wanted to run Marshall as a peace candidate for president after the declaration of war in June, but he spurned the overtures and urged Federalists to make common cause with antiwar Republicans. 10 Meanwhile, Marshall removed himself from the political arena by spending the summer of 1812 on an expedition that explored the western wilderness of Virginia. 11 Marshall’s biographer Albert J. Beveridge believed that Marshall would have been a

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7 DAVID LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 281 (1949); BAKER, supra, at 534.

8 BAKER, id., at 534-35.

9 Id., at 535.


11 LOTH, supra, at 281.
much stronger candidate than Clinton because the “lawyers generally would have worked hard for him,” and he would have had more appeal to the mercantile classes. 12 Beveridge also concluded that “Federalists, who accepted Clinton with repugnance, would have exerted themselves to the utmost for Marshall, the ideal representative of Federalism.” 13

In the election of 1816, Marshall received four electoral votes for vice president, the smallest number of votes received by any of the running mates of the unsuccessful Federalist candidate, Rufus King. All four votes came from Virginia, where Marshall apparently was regarded as a favorite son candidate, and there is no apparent evidence that Marshall sought the vice presidency or the presidency during that year.

Shortly before the end of Marshall’s tenure, Associate Justice John McLean commenced his perennial campaigns for the presidency. McLean holds the dubious record among Justices for the most protracted campaign for the presidency, for he was a candidate of one type or another during at least seven of the eight presidential election campaigns between 1832 to 1860, which spanned nearly all of his thirty-two years on the bench. 14 McLean, who had served two terms in the U.S. House of Representatives and six years as postmaster general, had been politically prominent before becoming a Justice, but little in his background made him an obvious candidate for the presidency.

At various times during this period, McLean was considered as a candidate by at least eight political parties. Like Salmon P. Chase later in the century, McLean sometimes was available to more than one party during the same election year. In 1832, he hoped at various times to become the standard bearer of the National Republicans, the Democrats, or the Anti-Masons. 15 In advance of the 1836, 1844, and 1848 elections, he pinned his hopes on the Whigs, and in 1848 and 1852 he was mentioned as a possible candidate of the Free Soil party. 16 In advance of the 1856 election, McLean angled for the presidential nomination the nativistic American (“Know Nothing”) Party while focusing his attention on the newly formed Republican Party. 17 At the first Republican convention in 1856, McLean received 190 votes – about one

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13 Id.


15 Id., at 74, 76, 79,


third of the total—on a first informal ballot for the presidential nomination, and 37 votes on the official ballot. McLean quietly sought the Republican nomination again in 1860, a year in which he received 22 votes at the convention of the Constitutional Union Party. Meanwhile, McLean spurned overtures for consideration for vice presidential nominations, not because he had any scruples about politicking from the bench but rather because he regarded the vice presidency as too passive an office.

McLean’s presidential ambitions may have distracted him from his judicial duties, which included not only his service on the Supreme Court but also his work as a member of the circuit court on which all Supreme Court justices served until 1891. After reviewing McLean’s papers in the Library of Congress, John Frank wryly reported that he had “found there substantially nothing on the business of being a judge,” but that he had uncovered “an endless stream of observations” concerning his perennial candidacy for the presidency.

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19 WEİSENBURGER, supra at 213.
20 Id. [Weisenburger], at 104-05.
21 FRANK, supra, at 273. McLean’s political correspondence was so voluminous that Congress in 1849 debated the question of whether Supreme Court justices should continue to enjoy the franking privilege. Id.
McLean made no apologies for his presidential ambitions. In a letter shortly after he became a Supreme Court justice, McLean defended the propriety of presidential candidacies by Supreme Court justices, expressing disbelief that any reflective person “could entertain the least apprehension of any improper influence being used by a Judge who comes before the people in a popular election, and especially that it could corrupt the bench.” McLean contended that a judgeship “is without exception the most unfavorable post a candidate can occupy” because a judge has no patronage to dispense and in every judicial decision “disappoints one party and his counsel who, though restrained in their expressions of resentment against him as Judge, would gladly in the exercise of their right of suffrage show their disapprobation. And if the Judge can be supposed to be influenced in any decision by popular consideration, his popularity is at once destroyed.”

McLean expressed his political views in numerous newspaper articles and letters that quickly were released for publication. In 1847, for example, he wrote a letter excoriating the Mexican War, and in 1848 wrote a letter expressing his view on one of the most controversial political and constitutional issues of the day – the power of Congress to prohibit slavery in the territories. Eight years later, when public debate over this issue had reached an even more intense pitch, McLean again publicly discussed the issue of slavery on the eve of the Court’s decision in *Dred Scott.*

Since McLean had long been an outspoken opponent of slavery, there is little reason to suppose that his political ambitions motivated his dissent in *Dred Scott.* Because McLean’s fellow Justices recognized that *Dred Scott* offered what Don E. Fehrenbacher has described as “a rare opportunity for judicial heroics” that might advance McLean’s presidential ambitions, the Court may have postponed its decision until after the election in order to dash his candidacy. McLean’s dissent may very well have enabled him to obtain the Republican presidential

22 WARREN, supra, at 270, n.1, quoting letter of McLean to Duff Green, Sept. 16, 1829.

23 WARREN, supra, at 270-71.

24 *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857)(ruling that Congress had no power to prohibit slavery in the territories).

25 Professor Fehrenbacher has questioned whether McLean’s “pathetic whispers of hope” for attaining the presidency in 1860, when he would be seventy-five years old, “actually governed his judicial conduct” in *Dred Scott.* DON E. FEHRENBACKER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 310 (1978). Moreover, Fehrenbacher pointed out that “one may well suspect bias in a historical explanation that attributes selfish personal motives only to the two dissenting justices,” McLean and Benjamin Curtis. *Id.*

26 *Id.*, at 289. [Fehrenbacher]

27 *Id.*, at 202, 290; WEISENBURGER, supra, at 197.
nomination in 1856 if the Court had decided the case in advance of the Republican convention.  

Presidential fever on the Court became even more intense after McLean’s death in 1861, for four of the five Justices appointed by Lincoln – Chase, Stephen J. Field, Samuel Miller, and David Davis – had strong presidential ambitions and were actively considered as candidates during their years on the Court.

With the exception of McLean, Chase holds the Court’s record for the most vociferous quest for the presidency. Chase’s ambitions were more significant than McLean’s, however, because they were more realistic. Chase’s presidential ambitions preceded his tenure on the Court, for he was one of the leading contenders for the Republican presidential nomination in 1860.  

Lincoln presumably appointed Chase both as Secretary of the Treasury and as Chief Justice because he sought to co-opt a dangerous political rival. Chase also had sought the Republican nomination in 1856 and had hoped to obtain it in 1864 if the Republicans refused to re-nominate Lincoln, who regarded Chase’s presidential ambition as “mad insanity.”  

Like other political activists who have become Justices, Chase was bored by legal technicalities and often found his judicial duties unduly dry and tedious. As Chase admitted privately in January 1866, “I think I have a good deal of executive ability and often wish I were in some more active employment than hearing causes which take up my whole time.”

Since Chase already was a perennial presidential candidate when he became chief justice, it is hardly surprising that his critics from the beginning suspected that his every move was

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28 Finkelman, supra, at 564-65. Professor Finkelman has pointed out the irony that the desire of Republican leaders to nominate a more politically experienced candidate in 1860 may have caused them to ignore “McLean’s solid and powerful response to Taney’s majority opinion.” Id., at 565.


31 JAMES FORD RHODES, HISTORY OF THE UNITED STATES, VOL VI 168 (1906).

32 As one of Chase’s biographers has explained, “[t]hough supremely industrious, Chase had little liking for reading and digesting hundreds of pages of briefs, depositions, and lower court testimony, where one had to be scrupulously careful about trivial points of language...He was working as hard as he had ever worked, but not for great issues or worthy causes.” NIVEN, supra at 376.

33 CHARLES H. COLEMAN, THE ELECTION OF 1868: THE DEMOCRATIC EFFORT TO REGAIN CONTROL 70 (1971 repr., 1933). Coleman believed that Chase probably “was sincere when he considered the Presidency primarily as an opportunity for service and a chance to show his powers to the best advantage.” Id., at 72.
calculated for political advantage. A passionate abolitionist before the war, Chase ardently advocated black suffrage after emancipation, and his efforts to promote civil rights sometimes became entangled with his political ambitions. For example, he toured the South in May 1865 partly for the purpose of encouraging better conditions for the freedmen, but his tour also appears to have enabled him to assess his political prospects in that region. As one scholar has written, Chase corresponded familiarly and indiscreetly with men of the widest possible differences of political opinion” in his efforts to win the presidency.

Since Chase was a Republican, he naturally first sought the nomination of his own party. Still smarting from the party’s preference for the upstart Lincoln in 1860, Chase felt that he once again was the most experienced and prestigious member of the party. Chase’s potential candidacy attracted at least some interest among Republicans during the summer of 1867, when “Grant had not yet broken with Johnson and the Radicals doubted the General’s soundness on reconstruction” and the rights of African Americans.

Chase’s impartiality in presiding over the impeachment trial of Andrew Johnson early in 1868 further diminished his slim chances of obtaining the Republican nomination, since Republican Radicals accused Chase of bias in favor of Johnson, alleging that he had slanted his procedural rulings and even lobbied senators to acquit Johnson, in an attempt to curry favor for the Democratic presidential nomination. Meanwhile, the Democratic revival during 1868 convinced many Republicans that only the nomination of a military hero would ensure victory.

Early in 1868, Chase emerged as a possible Democratic candidate. This was not as far fetched as it seemed, for he had consistently adhered to the egalitarian principles of the original Democratic Party, and he had opposed radical Reconstruction measures. There is evidence that some Democratic leaders cynically encouraged Chase’s candidacy, even though they never had any intention of nominating him, because they hoped that his reputation for probity and his role

34 See Blue, supra at 283. In a letter appraising Chase’s character, Justice Miller remarked that “I doubt if for years before his death, his first thought in meeting any man of force, was not invariably how can I utilize him for my presidential ambition.” Charles Fairman, Mr. Justice Miller and the Supreme Court 251-52 1862-1890 (1939)(quoting letter of Oct. 15, 1876).

35 Blue, supra at 283.

36 Coleman, supra at 72.

37 Id., at 73. During this time, Chase sent agents to the Midwest to ascertain whether party leaders would support him, but the reports disappointed him.

38 Id., at 80-83.

39 Id., at 74-75.

40 Id., at 102.
in helping to win the war would cloak the party with greater moral respectability and help it win votes among moderates who otherwise were repelled by the party’s overt racism and hostility toward Reconstruction.  

Although Chase consistently disavowed any interest in becoming a candidate, he fanned interest in his presidential prospects by providing prominent Democrats with a detailed account of his political opinions, a virtual platform that seemed to signal his availability and offer advice about how the Democrats might secure the presidency. Chase urged the party to accept universal African American suffrage, but he also advocated amnesty for all former Confederate leaders and an end to military reconstruction of the South. Despite his role as Treasury Secretary in raising taxes and issuing the first paper money in order to finance the war, Chase also appealed to Democrats by advocating lower taxes and “sound money” in the form of hard currency. As one historian has observed, Chase “was a Republican where the [N]egro was concerned and a Democrat on other issues.”

In a private letter in June 1868, Chase admitted that he would not “feel at liberty to decline” a nomination representing “the wishes of the masses.” By the middle of June, Chase began to retreat from his long cherished wish for universal suffrage, informing Democratic leaders that while universal suffrage remained a democratic principle, the Constitution allowed the states to decide who should be permitted to vote. Chase included this in a fifteen-point proposed Democratic platform that he permitted to be published days before the convention began. Although Chase appears to have allowed his presidential ambition to interfere with his long-held support for universal suffrage, some historians have pointed out that Chase’s retreat gave him an opportunity to move the Democratic Party forward on this issue.

41 NIVEN, supra at 431.
42 BLUE, supra at 288, 290; COLEMAN, supra at 106; NIVEN, supra at 427.
43 COLEMAN, supra 116, 119.
44 Id., 107, 121.
45 Id., at 117.
46 Id., at 115.
47 Id., at 121-26.
48 BLUE, supra at 290; COLEMAN, supra at 136-39.
49 See COLEMAN, supra at 126. Cole charitably speculated that Chase may have “thought that if he were once in the White House with the backing of the Democratic party, he could use the executive power to foster a broadening of the suffrage by those white men who would be in control in the South in the event of Democratic victory.” COLEMAN, at 126. Similarly, another historian has suggested that Chase’s new position provided Chase with an opportunity to make Democrats more amenable toward black suffrage. BLUE, supra, at 290. The same historian has
Chase won the support of many prominent Democrats, including Governor Horatio Seymour of New York, who later became the Democratic presidential nominee in 1868. Numerous friends and supporters of Chase went to the Democratic convention in New York City in July 1868 to lobby for his nomination. A Chase Executive Committee of one hundred prominent men worked openly for his nomination, while a smaller circle of friends pulled strings behind the scenes. Meanwhile, Chase’s daughter, Kate Chase Sprague, “was tireless in her efforts for her father’s nomination” and used her Manhattan home as “a center of Chase agitation.”

Chase’s supporters agreed that they would not immediately present his name at the convention but rather would wait for a deadlock. When the convention deadlocked after several days, however, Chase’s supporters failed to persuade party leaders to swing their support to Chase. On the twenty-third ballot, Seymour suddenly emerged as the compromise candidate. Chase received a half vote on five of the twenty-three ballots, and four votes on one.

Early in 1868, Chase also had been prominently mentioned as a possible leader of a new third party that presumably would have drawn support from moderate Democrats and conservative Republicans. After the convention, there was more speculation that Chase might lead a third party. As the American correspondent of a London newspaper wrote, Chase “really pointed out that Chase’s consignment of the issue to the issue to the states was not hostile toward blacks in the context of the times because it was consistent with the understanding of the Framers of the Fourteenth Amendment and with the Republican platform in 1868. Id. Professor Niven, however, has written that Chase’s ambition caused him to ignore his long commitment to human equality and to swing “slowly to the dark side of political expediency.” NIVEN, supra at 42.
seems ready to accept a nomination from anybody on any platform.”  

Shortly after the convention and again when Democratic prospects wilted in October, various Democrats urged their party to dump Seymour in favor of Chase or another candidate. Although Chase privately urged his supporters to remain loyal to Seymour, he could not resist pointing out that the conservatism of the Democratic platform had encouraged wayward Republicans to return to their party.

Chase’s presidential ambitions in 1868 were hobbled by many factors, including the failure of supporters to effectively organize and coordinate their efforts; the superior organizational skills of his opponents; his inability to openly promote his own candidacy; his failure to obtain solid support in his home state of Ohio; and by his disagreements with both parties regarding key political issues.

Shortly after the Democratic convention of 1868, The Nation declared that Chase had “destroyed popular confidence in his decisions” and that “no weight whatever will hereafter attach to any judgment of his on any one of the great constitutional questions arising out of the rebellion and reconstruction.” One of Chase’s recent biographers has concluded that Chase’s vacillations during the campaign left him “identified as a weak and contradictory person before the public. His reputation had suffered badly.” Similarly, another historian has concluded that Chase “lost something of the respect of his contemporaries and consciously lowered the dignity of his office” as the result of his 1868 presidential aspirations. Writing early in the twentieth century, the historian James Ford Rhodes expressed a view that appears to have withstood the test of time:

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58 Id. at 275, quoting Edwin L. Godkin to London Daily News, July 28, 1868.


60 BLUE, supra at 299. Blue has explained that “Chase and his partisans did not instigate the movement to change the Democratic ticket, although some of the chief justice’s more zealous followers did try to capitalize on it.” Id.

61 Id., at 284, 295, 296, Professor Blue believes that the fact that “Seymour’s name rather than Chase’s was placed in nomination suggests that the chief justice and his supporters were out of touch with the mood of the convention and that his nomination had never been realistic.” Id. at 295.

62 FAIRMAN, RECONSTRUCTION AND REUNION, supra at 548, quoting The Nation, July 16, 1868.

63 NIVEN, supra at 432.

64 COLEMAN, supra at 72. Coleman has observed that Chase “realized the impropriety of his ambition for the Presidency and struggled against the Presidential disease – but in vain.” Id.
“The nomination of Chase would have been the condonation of a grossly improper action. That a Chief Justice...should have gone a-begging and a-scheming after political power is enough in itself to sicken recollection. Men at the time said that he had dragged his silk gown in the mire. And muddied, he must proceed to wallow. If these Republicans won’t have me for a President – Oh, very well, come on you others; I’ll be a Democratic candidate. Nothing in his life has so detracted from his fame.”

In 1872, Chase was widely regarded as a potential presidential nominee of the newly formed Liberal Republican Party, and Chase probably would have attracted substantial support if his health had not been in visible decline. Although Chase once again disclaimed ambition, he privately acknowledged that he would not decline the nomination. At its convention in May, Chase received votes on several ballots, receiving a high of thirty-two votes on the sixth ballot before the convention nominated Horace Greeley.

Chase’s presidential aspirations naturally have generated suspicion that Chase allowed his ambition to influence his performance as chief justice. Chase’s efforts to obtain the presidential nominations of as many as four political parties makes these charges more difficult to assess than if Chase had hankered after the nomination of only party. On the whole, however, there is little evidence that Chase’s intense political ambitions directly affected his work on the Court. Chase’s votes and his majority and dissenting opinions are largely consistent with his long term political philosophies, and sometimes even may have been at odds with his short-term political advantage.

In cases concerning Reconstruction, the dominant issue that came before the Court during Chase’s judicial tenure, the chief justice’s opinions generally favored the positions and principles of the Republican Party in a manner that was consistent was Chase’s ardent support of the Union cause as Secretary of the Treasury during the Civil War and as a lifelong opponent of slavery. In cases that came before the Court before he became a candidate for the Democratic nomination in 1868, Chase dissented from decisions of the Court that invalidated state and federal loyalty oaths for former Confederates, and he wrote the Court’s opinion denying an injunction to restrain President Johnson from enforcing the Military Reconstruction Acts. When the Court held that military trials of civilian Confederate sympathizers were unconstitutional in areas in which civil

65 RHODES, supra.

66 BLUE, supra at 316-17; NIVEN, supra at 447.

67 BLUE, supra at 317.

68 Cummings v. Missouri, 4 Wall. 277 (1867) (state oath); Ex parte Garland, 4 Wall. 333 (1867) (federal oath).

69 Mississippi v. Johnson, 4 Wall. 475 (1867).
courts were functioning, Chase wrote a concurring opinion arguing that Congress at least had the power to authorize military courts under such conditions. After 1868, Chase wrote the opinion for the Court in *Ex parte McCordle*, holding that Congress could withdraw at least some of the Court’s habeas corpus jurisdiction, and his opinion for the Court in *Texas v. White* in 1870 had the effect of further validating congressional policies of Reconstruction. As chief justice, Chase also remained a champion of the rights of African-Americans. Chase incurred the wrath of Democrats when he admitted the first black to practice before the Court in 1865, and he was the sole dissenter in an 1872 decision sustaining a contract for the sale of a slave before the Civil War.

The only case in which Chase’s behavior might have been questionable was *Hepburn v. Griswold*, in which Chase wrote the Court’s opinion that the statute authorizing the issuance of paper money during the Civil War did not require the acceptance of paper for debts incurred before the statute’s enactment. Since Chase as treasury secretary had urged the enactment and since the Court’s decision was highly popular among Democrats and was widely criticized by Republicans, Chase has been vulnerable to allegations that he allowed his presidential ambition to influence his vote. Chase, however, always had been an advocate of “hard money” and only the extreme exigencies of the war had persuaded him to advocate the issuance of greenbacks when he was treasury secretary. Moreover, by 1870, Chase, as we have seen, probably was pinning any remaining political hopes more on the Republicans than on the Democrats.

Next to Chase, the most politically ambitious Gilded Age Justice was the rambunctious Field, who was a candidate for the presidency at least three times during his thirty-four year tenure on the Court. Although Field’s ambitions generated considerable support, he never came

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70 Ex parte Milligan, 4 Wall. 2 (1866).

71 7 Wall. 506 (1869). Professor Fairman has suggested that Chase may have contrived unsuccessfully to convince his associate justices to expedite its consideration of the controversial *Ex parte McCordle* case so that it could be heard before the Democratic convention because a ruling that Congress did not divest the Court of jurisdiction over the case would have “enormously enhanced” his prospects of nomination. FAIRMAN, RECONSTRUCTION AND REUNION, supra at 485. Since Chase’s opinion for the Court during the following year was precisely the opposite, this allegation seems unjust.

72 7 Wall. 700 (1870). Chase took the same position in dissent when the Court reversed the decision in *The Legal Tender Cases*, 12 Wall. 457 (1871).


74 8 Wall. 603 (1870).

75 BLUE, supra at 304.

76 NIVEN, supra at 297.
close to receiving a presidential nomination. As one historian has observed of Field, “[w]hile maintaining a proper appearance of aloofness, he really cherished expectations greater than the event warranted.”  

Like most Justices of his era, Field had been active in politics before taking his seat on the Court, having served in the California assembly and unsuccessfully sought seats in the California senate and the United States Senate. He was an elected member of the California Supreme Court when Lincoln appointed him to the U.S. Supreme Court in 1864.

In 1868, Field received fifteen votes from the California delegation at the Democratic convention, where the California delegation hailed Field as “the guardian of the Constitution of his country against all the power of the Radical party.”  

In 1880, Field contrived to win the Democratic nomination, engaging in one of the most egregious examples of politicking from the bench in Supreme Court history. Both of Field’s biographers agree that his political ambitions may have influenced his opinions, if not his votes, in important cases.  

Field’s motives for seeking the nomination in 1880 are unclear. Like a number of other Justices who have sought the presidency, Field was dissatisfied on the Court because he was increasingly in the minority in cases in which the Court decided cases that expanded the scope of federal power and the sustained the constitutionality of economic regulatory legislation; Field’s theory of substantive due process did not achieve its partial triumph until after Field had retired. Field also may have wanted to block the candidacy of Samuel J. Tilden, who had been a political rival of Field’s brother, David Dudley Field, and a business rival of Field’s brother Cyrus Field.  

Another motivation may have been Field’s desire to re-structure the Supreme Court and to appoint Justices who would promote Field’s theories of constitutional interpretation. Field’s legendarily large ego also must have stoked his presidential dreams.

Like so many other Justices who campaigned for the presidency from the bench, Field

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77 FAIRMAN, MR. JUSTICE MILLER, supra at 297.

78 FAIRMAN, RECONSTRUCTION AND REUNION, supra at 545-46.


80 KENS, id., at 172-73.

81 Howard J. Graham, Justice Field and the Fourteenth Amendment, 52 YALE L.J. 851, 877-78 (1943). Wanting to expedite the Court’s caseload, Field advocated expanding number of Justices to twenty-one. Id. The Court would then be divided into three parts for adjudication of routine cases, while the full Court would hear cases of major constitutional importance. Id. At 878. One historian has concluded that Field’s “hopes of reversing majority holdings eventually colored the entire scheme.” Id.
lacked an effective organization. Like other judicial aspirants for the presidency, Field also lacked a coherent platform. As Paul Kens has explained, “A political record did not flow naturally from his duties as a judge. The high court was an awkward place from which to take a stand on currency issues, attack opponents, or try to fit into the popular mood.” Moreover, Field, like other Justices, was crippled in his presidential ambitions by the widespread belief that Justices should not involve themselves in politics. As Kens has explained, “the sense of impropriety lingered,” despite Chase’s recent campaign for the presidency, and “it was employed against Field as the campaign progressed.” Accordingly, Field, like virtually all other Supreme Court justices who have sought the presidency, did not formally announce his candidacy. This did not, however, prevent Field from obtaining campaign funding. His brothers and other members of his wealthy family provided substantial financing, and Field also may have received funding from wealthy businessmen and financiers, including railroad barons Jay Gould and Leland Stanford. Field’s backers flooded the nation with copies of campaign biographies and various pamphlets touting his candidacy and they even started a Richmond newspaper to act as a cheerleader for Field in the South.

Since Field apparently hoped that Southern support would propel his campaign, he was fortunate to be able to participate in several civil rights cases during the months preceding the Democratic convention that enabled him to demonstrate his commitment to states’ rights and his disregard of the rights of African Americans. In two cases, he dissented from the Court’s decisions sustaining the convictions of state election officials who violated federal law by engaging in fraud in order to help Democratic candidates who sought to deprive African Americans of their civil liberties. In lengthy dissents, Field passionately argued that Congress had no power over these state officials even though the elections in which they interfered were federal. Since Field apparently hoped that Southern support would propel his campaign, he was fortunate to be able to participate in several civil rights cases during the months preceding the Democratic convention that enabled him to demonstrate his commitment to states’ rights and his disregard of the rights of African Americans. In two cases, he dissented from the Court’s decisions sustaining the convictions of state election officials who violated federal law by engaging in fraud in order to help Democratic candidates who sought to deprive African Americans of their civil liberties. In lengthy dissents, Field passionately argued that Congress had no power over these state officials even though the elections in which they interfered were federal. [add note]

Several days later, Field had an additional opportunity to demonstrate his solicitute toward southern whites and the Democratic Party’s states’ rights principles in three cases

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82 Kens, supra at 171, 174.

83 Id., at 175.

84 Id. [175]. As one critic complained, his candidacy was “in bad taste, and worse morals.” Id.

85 Id. [175]

86 Id., at 179.

87 Fairman, Reconstruction and Reunion, supra, at 1373-74; Kens, supra, at 176-78. Field himself had laid the groundwork for this blizzard of publicity in 1877, when he published an autobiography of his years in California, Personal Reminiscences of Early Days in California. One of Field’s biographers notes that this book “had excellent possibilities as a campaign biography” and that it may have been intended as a preliminary step in his presidential campaign. Swisher, supra at 285.

88 Ex parte Siebold, 100 U.S. 371 (1880); Ex parte Clarke, 100 U.S. 399 (1880).
involving the exclusion of African Americans from juries. In the most famous of these cases, *Strauder v. West Virginia*, Field and Nathan Clifford were the only justices who dissented from the Court’s opinions that deliberate exclusion violated the Fourteenth Amendment’s equal protection clause. 89 Field contended that jury service was not protected by the equal protection clause because it was a political right rather than a civil right. Field and Clifford likewise dissented from a companion case in which the Court held that systematic exclusion of blacks from juries gave rise to an action under the Civil Rights Act of 1875. 90 Field also vigorously championed the right of states to exclude blacks from juries in a long concurring opinion in a decision in which the Court held that exclusion of blacks was not unconstitutional if it was not deliberate. 91 In that opinion, Field narrowly defined state action to exclude the actions of state officials who were not acting pursuant to the express authorization of the state. Professor Kens has concluded that “Field’s 1880 decisions definitely were intended to provide a boost to his political campaign,” although Kens acknowledges that it is unclear whether “they were merely a political expedient or part of a broader theory of jurisprudence.” 92

Field’s well-timed opinions in these cases involving the civil rights of blacks appear to have helped Field win support in the South. 93 It is therefore ironic that his various decisions protecting the rights of Chinese workers in the West may have cost him critical support in his home state of California, where opposition to rising Chinese immigration was a potent political issue. One biographer has explained that “it is commonly thought that Field’s Chinese decisions doomed his candidacy for the presidency.” 94

In particular, many opponents of Chinese immigration were infuriated by Field’s 1879 opinion as a circuit judge nullifying a San Francisco ordinance that directed jailors to crop the hair of prisoners, a law that presumably was intended to humiliate Chinese men who for religious reasons wore their hair in long queues. 95 Field contended that the discriminatory ordinance

89 100 U.S. 303 (1880).

90 *Ex parte Virginia*, 100 U.S. 339 (1880).

91 *Virginia v. Rives*, 100 U.S. 313 (1880).

92 KENS, *supra*, at 190.

93 Hailing Field for carrying on the states’ rights tradition of Thomas Jefferson, *The Washington Post* praised his opinions as “like a bugle blast of the Monticello statesman.” KENS, *id.* at 188. Meanwhile, the *Richmond State* reported that “Democrats are delighted with the able and exhaustive opinions of Justices Field and Strong” and that several Democratic congressmen believed that they would provide Field with “a tremendous boom for the presidency.” *Id.*

94 KENS, at 216. As another biographer pointed out, “[i]t was a discouraging task” for Field’s supporters “to play up the qualifications of a man whose own state was against him.” SWISHER, *supra* at 292.

violated a treaty between the United States and China and that it deprived Chinese of substantive
due process in violation of the Fourteenth Amendment. Outrage over Field’s opinion was
exacerbated by his position in two earlier cases. In an 1875 U.S. Supreme Court decision, Field
had voted with the majority to grant habeas corpus to a Chinese woman who challenged the
constitutionality of a state statute permitting the state commissioner of immigration to deny entry
to foreigners on vessels coming into the state if he believed that they were likely to become
public charges or if they were diseased or debauched. 96 Miller’s opinion for the Court held that
the state had intruded upon federal power over international relations. In a decision as a circuit
court judge the previous year, Field had granted habeas corpus to another Chinese woman on the
ground that the statute interfered with a treaty with China and with congressional power to
regulate commerce with foreign nations. 97

Field apparently hoped, in vain, that his ardent opposition to Chinese immigration would
counteract the unpopularity of these decisions. Field declared in one of his campaign statements
in 1880 that he always had “regarded the immigration of Chinese in large numbers into our state
as a serious evil, and likely to cause great injury to the morals of our people,” and that
Californians had a duty to “defend American institutions and republican government from the
oriental gangrene.” In a possible reference to his judicial decisions, however, he warned that ‘no
good can come of a resort to small vexations against the Chinese.” 98

Field also aroused antagonism in California by supporting the position of the Union
Pacific and Central Pacific railroads in a dissent from an 1879 decision in which the U.S.
Supreme Court sustained the constitutionality of a federal statute that unilaterally restructured the
process by which the railroads repaid their debt to the government for the loans that they
received in connection with their construction of the first transcontinental railroad. 99 Although
Field largely based his dissent upon the same theories of sanctity of contract that he espoused in
so many other cases during his long tenure on the Court, his rhetoric was so extravagant that
critics then and now have contended that his opinion was calculated to stimulate political support
among powerful corporate interests. Field, also, however, may written his opinion with at least
one eye toward populist sentiment insofar as he also warned that “[t]he law that protects the
wealth of the most powerful, protects also the earnings of the most humble.” 100

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96 Chy Lung v. Freeman, 92 U.S. 275 (1875).
97 In re Ah Fong, 1 Fed. Cas. 213 (C.C.D. Cal, 1874).
98 KENS, supra, at 205.
100 99 U.S. at 767 (Field, J., dissenting). As Kens has observed, however, this logic “was unlikely
to convince the Workingmen and farmers who had participated in the California constitutional
convention. The contrast between their values and Field’s could not have been more glaring.
While Field’s concern was corporate liberty, they were concerned about corporate power.”
KENS, supra at 223-24.
As Kens has observed, Field’s characteristic “pennant for sweeping language and visionary reasoning” make it “difficult to say where in the Sinking Fund Cases his judging may have ended and his campaigning begun. Nevertheless, several long paragraphs at the end of his dissent bore the markings of a campaign speech.” Similarly, many contemporary commentaries castigated Field for allowing politics to affect his dissent. As The San Francisco Examiner complained, “[t]he prurient desire for the presidency is a bee in a bonnet, and wildly afflicts the head it attacks. No man who aspires to the exalted station ought ever to be upon the Supreme Bench.” Field, however, had little need to assure corporate interests of his support, and his opinion clearly antagonized liberals and workers who opposed the monopolistic practices of railroads and other corporations.

Since Field’s opinions in the cases involving African Americans, Chinese immigrants, and railroads were consistent with his opinions in earlier and later cases, there is little reason to suppose that Field’s presidential ambitions changed his votes. Professor Kens believes, however, that Field’s ambitions affected the manner in which he wrote his opinions and that his “campaign efforts undoubtedly had a long-term effect on constitutional law” involving state action, equal protection, and the rights of corporations.

Field’s supporters arrived with much fanfare at the Democratic national convention in Cincinnati in June 1880, touting their candidate with newspaper advertisements, bright banners, horse-drawn wagons, and a brass band in a campaign that was much more visible and colorful than that of any other candidate. At the convention, his name was placed in nomination but he never ranked higher than fifth among the candidates, receiving only 65 of the 728 votes on the first ballot and sixty-five and a half on the second ballot before the convention stampeded to Winfield S. Hancock.

101 Kens, supra at 223.
102 Id., at 225.
104 Id., at 232. As Kens explains, Field’s narrow construction of the state action doctrine provided a constitutional basis for political opposition to the rights of African Americans. Id. Field’s opinions in the Chinese cases, according to Kens, “defined both class and privilege in a new way that eventually would give federal courts oversight of most types of legislation.” Id., at 233. And his Sinking Funds Case opinion, in Kens’s view, “with its emphasis on economic rights, the limits of state power, and an introduction to the notion that corporations had the same rights as persons – gave some sense of the direction judicial oversight of economic regulation would take.” Id.
105 Swisher, supra at 290-92.
106 Kens, supra at 271; Swisher, supra 298-99.
Field conducted no serious campaign in 1884, although his rousing support for substantive due process in his concurring opinion in *Butcher’s Union Co. v. Crescent City*,\(^{107}\) two months before the Democratic national convention, appears to have been calculated to win political support.\(^{108}\) Professor Fairman has observed that this paean to liberty of contract, along with Field’s implied criticism of the Fourteenth Amendment’s imposition of legal disabilities on some former Confederates, “expressed just the sentiment that Democrats delighted to hear.”\(^{109}\) Field’s decisions protecting the rights of the Chinese and the prerogatives of the powerful railroads, however, continued to rankle the dominant populist sentiment of the California Democratic Party. As Kens has explained, “with antimonopolists in control of the party, Fields’s presidential aspirations were resoundingly crushed before his campaign even left California.”\(^{110}\) One month before the Democratic national convention, the state convention formally repudiated Field’s “presidential aspirations” by a vote of 453 to 19.\(^{111}\) Moreover, at age sixty-eight, Field by 1884 was perhaps too old by the standards of nineteenth century presidential candidates. Field later privately admitted to a friend that he regretted that he had not openly sought the presidency in 1884.\(^{112}\)

Another of the most politically ambitious Justices was Samuel Freeman Miller, another Lincoln appointee who was mentioned as a possible presidential nominee in several elections during the 1870s and 1880s, and who was active as a candidate at least once. Although Miller never held elective office, he was an unsuccessful Republican candidate for the state senate in Iowa and later made a failed attempt to obtain the Republican Party’s gubernatorial nomination in that state.\(^{113}\)

Miller’s presidential ambitions were stoked by his growing popularity among critics of the untrammeled capitalism of the Gilded Age, who admired Miller’s judicial decisions favoring populist causes as the Court grew more conservative during the years following the Civil War. As a recent biographer has written, “Miller, with his critical view of eastern financiers, became a minor folk hero in the West.”\(^{114}\) Some liberal Republicans who had grown disillusioned with

\(^{107}\) 111 U.S. 746 (1884).

\(^{108}\) *Fairman, Reconstruction and Reunion*, supra at 1382.

\(^{109}\) Id., at 1384.

\(^{110}\) *Kens*, supra, at 234. In advance of the national Democratic convention, California’s state Democratic convention expressed explicit opposition to Fields’s nomination. *Id.*

\(^{111}\) *Swisher*, supra at 304-07.

\(^{112}\) *Swisher*, supra at 318.

\(^{113}\) *Fairman, Mr. Justice Miller*, supra at 28-32, 36-37.

\(^{114}\) *Michael A. Ross, Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era* 236 (2003).
President Grant hoped that Miller would challenge Grant for re-election in 1872, but Miller rejected their overtures because he remained supportive of the President. \footnote{115} Miller’s friends issued a statement in March 1872 denying that he was a candidate for president and emphasizing that Miller believed that his position on the Court demanded the subordination of all political ambition. \footnote{116}

In 1880, Miller neither encouraged nor discouraged a plan by Iowa Republicans to nominate Miller as a compromise candidate if the Republican convention deadlocked between Grant and Senator James G. Blaine. Before Miller’s advocates were able to generate enough support to place his name into nomination, the Wisconsin delegation, which had leaned toward Miller, voted for James Garfield, starting a steamroller that ended in Garfield’s nomination. \footnote{117}

Finally, in 1884, Miller appears to have encouraged his own candidacy, although by then he was 68 years old and he was concerned that he would suffer financially if he resigned from the bench and lost the election. He received the ardent support of many western Republicans, who hoped that Miller “could reclaim the soul of their party from corporate conservatives,” as well support from some eastern conservatives who believed that he could unite various Republican factions. \footnote{118} Miller’s hopes had been raised in 1883 when Blaine told Miller that party leaders favored his nomination because he was the only Republican who was strong among all wings of the party. \footnote{119} Like so many other Justices, Miller professed to be content on the Court, but admitted that he would not refuse the nomination. \footnote{120}

After Blaine again became a candidate, at least some supporters of Miller and Blaine agreed that Miller’s supporters would support Blaine, and that Blaine’s delegates would throw their support to Miller if Blaine’s candidacy collapsed, as it had in 1876 and 1880. \footnote{121} This agreement became moot when Blaine received the nomination on the fourth ballot. According to one historian, Blaine never actually intended to throw his support to Miller or any minor candidate if he could not himself be nominated. \footnote{122} In correspondence shortly after the convention, Miller revealed that he would have been willing to accept the nomination if, as he

\footnote{115} Id. [Ross, 236]
\footnote{116} FAIRMAN, MR. JUSTICE MILLER, supra at 297 (quoting The New York Times, Mar. 29, 1872).
\footnote{117} ROSS, JUSTICE OF SHATTERED DREAMS, supra at 237; FAIRMAN, id., at 302.
\footnote{118} ROSS, id., at 237.
\footnote{119} FAIRMAN, MR. JUSTICE MILLER, supra at 303 (quoting letter from Miller to William Pitt Ballinger, May 9, 1883).
\footnote{120} ROSS, JUSTICE OF SHATTERED DREAMS, supra at 238.
\footnote{121} Id., [Ross] at 238.
\footnote{122} FAIRMAN, MR. JUSTICE MILLER, supra at 306.
believed, Blaine would have thrown his support to him if Blaine could not have been nominated. Miller, who had refused to allow his supporters to place his name before the convention explained that his candidacy “had but that one chance and it was not to be frittered away. No one can say now that I have ever sought the place or brought reproach or folly to the judicial ermine.” He suggested, however, that he had taken satisfaction in the honor of his candidacy, which he described as “the nicest and quietest little scheme.”

A fourth Lincoln appointee, David Davis, was also involved in presidential politics during his years on the Court, although his level of activities and expectations, if not his hopes, were less than those of his brethren Chase, Field, and Miller. Davis, a Republican activist, had helped secure the Republican nomination for Lincoln. After the National Labor Reform Committee nominated Davis for the presidency at its convention in February 1872. Davis responded with a cryptic assertion that the presidency should neither be sought nor declined by any citizen. Two months later, Davis’S friends attempted to secure his nomination by the Liberal Republican Party, but he ranked only fifth on the first ballot and his support fizzled on later ballots, as the number of votes for Chase increased.

Later in 1872, Davis became the only sitting Justice ever to receive a presidential electoral vote, obtaining one in Missouri won by Greeley, who had died after the election but before the electoral votes were cast. Since Davis resigned from the Court in 1877 after the Illinois legislature elected him to the U. S. Senate, he presumably would have had little compunction about surrendering his Supreme Court seat for the presidency. In 1880, Davis was a “dark horse” candidate for the presidency.

Like other presidential aspirants on the Court, Davis provoked criticism. A famous Thomas Nast cartoon, published on the cover of Harper’s Weekly in April 1872, mocked the presidential ambitions of Chase and Davis. Labeled “The Presidential Fever on the Supreme Bench,” it depicted a chastened Chase admonishing a fidgety Davis to “fling away” the ambition that had so embarrassed Chase.

During the same years that Chase, Field, Miller, and Davis entertained presidential ambitions, Justice Samuel Nelson, an older Justice who had served since 1845, also may have harbored presidential hopes. Nelson discouraged efforts by friends to encourage him to seek the

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123 Id. at 306 (quoting letter from Miller to William Pitt Ballinger, June 15, 1884).

124 Id. at 296.

125 Id. at 297.

126 See e.g., A Democratic Dark Horse: Senator David Davis Places His Views on Paper, NEW YORK TIMES, May 24, 1880 (online).

127 See FAIRMAN, RECONSTRUCTION AND REUNION, supra at leaf following 1192 (reprinting cartoon from Apr. 6, 1872 edition of Harper’s Weekly).
Democratic nomination in 1868, but his lack of interest appears to have stemmed not from fear of diluting the Court’s integrity but from lack of interest and fear that he would be a mere pawn of party leaders. At age 76, however, it is unlikely that Nelson would have attracted much support even if he had wanted the nomination.

At least three other members of the Court during the late nineteenth century, Chief Justices Morrison R. Waite and Melville W. Fuller and Associate Justice John Marshall Harlan, also were prominently mentioned as a presidential candidates. Unlike several other Justices of this era, however, Waite, Fuller, and Harlan strongly discouraged such speculation.

Shortly after Waite became Chief Justice in 1874, newspapers throughout the eastern and midwestern states began to mention him as a possible Republican nominee in 1876, when Grant was not expected to seek a third term. Although Waite had little political experience, his political obscurity was actually an asset because, as one of his biographers has explained, he “was not plagued by a record of past commitments” and was not “tainted by the scandals which left a cloud of doubt hanging over the careers of so many public men in the 1870s.” Waite also was attractive to many Republicans because he favored sound money and supported the Civil War amendments to the Constitution.

In various correspondence during 1875 and 1876, Waite disavowed any interest in becoming a presidential candidate. In a long letter to his nephew, a Republican congressman, in November 1875, Waite explained that “one who occupies this position should keep himself above suspicion...[I]t is dangerous to have a judge who thinks beyond the judicial in his personal ambitions.” “The Court,” Waite observed, “is now looked upon as the sheet anchor. Will if be if its Chief Justice is placed in the political whirlpool?” Waite declared that the office of Chief Justice “came to me covered with honor, and when I accepted it my chief duty was not to make it a stepping stone to something else, but to preserve its purity.” In another letter written on the same day, Waite declared that “I am one of those who know that a Chief Justice cannot be a


129 FAIRMAN, RECONSTRUCTION AND REUNION, supra at 549.


131 Waite had never served in elective office, aside from a brief stint on the Toledo City Council and a single term in the Ohio legislature. He was twice an unsuccessful candidate for the U.S. House of Representatives.


133 Id., at 283.

134 Waite to John Turner Waite, Nov. 7, 1875, quoted in TRIMBLE, supra at 142.
candidate for the Presidency without damaging the office he holds and himself too."  

Similarly, Waite privately expressed his belief that such a candidacy would remove “at least one stone from the foundations that uphold the government.”

Waite believed that he needed to unequivocally withdraw his name from contention, less suspicions about his political ambitions discredit his judicial decisions. He believed that Chase had “detracted from his name by permitting himself to think he wanted the presidency” insofar as “[w]hether it was true or not, it was said that he permitted his ambitions...to influence his judicial opinions.” In addition to fearing that the political ambitions of a Justice could diminish public faith in the integrity of the Court, Waite also believed that he would demean the Chief Justiceship if he were an unsuccessful president. Although Waite originally expressed these sentiments only in private because he feared that public statements would only fan interest in his potential candidacy, Waite eventually allowed his letters to be published in order to quash growing speculation about his availability for the Republican nomination.

Waite’s refusal to become a presidential candidate generated widespread plaudits. The Nation, for example, hailed Waite for “pointing out the gross impropriety of making the bench of the Supreme Court a stepping-stone to something else.” Waite’s resistance of political intrigue continues to inspire admiration. As Chief William Rehnquist, pointed out, “Waite felt that it would sully the office he held to aspire to any other one, and this firm determination on his part helped to restore the prestige of the Court,” which was still recovering from the ignominy of its Dred Scott decision.

Waite’s steadfast refusal to become a presidential candidate was emulated by his successor, Fuller. Although Fuller never held any elective office except for a brief stint in the Illinois legislature, his stature as chief justice helped to ensure that he, like so many other chief justices, would be mentioned as a possible presidential candidate. During the spring of 1892, four years after Cleveland had appointed Fuller to the chief justiceship, several of Fuller’s politically powerful friends in Chicago urged him to seek the Democratic nomination. Although former President Cleveland was the front-runner, many Democrats feared that Cleveland’s quarrel with Tammany Hall and New York’s Governor Hill would prevent Cleveland from

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135 Waite to H.L. Bond, Nov. 7, 1875, quoted in MAGRATH supra at 280.

136 Id., at 285, quoting letter from Waite to Clark Waggoner, Dec. 4, 1875.

137 TRIMBLE, supra at 141-42, quoting letter from Waite to John Turner Waite, supra.

138 Id., at 142, quoting letter from Waite to John Turner Waite, id.

139 MAGRATH, supra at 282-84.

140 Id., at 146.

carrying the critical state of New York. In contrast, Fuller had no apparent political enemies, and his midwestern ties could help the ticket. By May 1892, there were reliable reports that Democratic leaders had persuaded him to withdraw in favor of Fuller. When Fuller learned this, he immediately wrote to Cleveland to assure him that "you are the only nominee absolutely certain of success." 142

Shortly after the 1892 election, Cleveland asked Fuller to resign from the Court to become secretary of state. Although Fuller seems to have given the offer serious consideration, his stated reason for rejected closely resembled the reasons why other justices have refused to become presidential candidates. Fuller explained to Cleveland that "the effect of the resignation of the Chief Justice...would be distinctly injurious to the court. The surrender of the highest judicial office in the world for a political position, even though so eminent, would tend to detract from the dignity and weight of the tribunal. We cannot afford this." 143 Felix Frankfurter once described this letter as "[a]n important document in the history of the judiciary, and... in the history of the law." 144

Like Waite and Fuller, John Marshall Harlan seemed determined to avoid any appearance of presidential ambition. Although Harlan had been active in Kentucky politics before becoming a Justice, he never held any significant elective office other than state attorney general, and his presidential prospects appear to have emanated from his eminence as a Justice. In 1888, when Harlan was mentioned as a presidential candidate, he was so fearful of encouraging speculation about his candidacy that he deliberately refrained from traveling to Chicago during the Republican convention there even though he wished to meet there with counsel in a case in which he was presiding as circuit judge. 145

The Supreme Court’s role as a recruiting ground for presidential candidates faded for two decades after Fuller resisted overtures in 1892, but speculation about the nomination of a Justice reemerged again in 1912, when many Republicans urged the dynamic young Charles Evans Hughes to seek the presidency.

As governor of New York in 1908, Hughes had been a candidate for the Republican nomination for president. 146 In 1912, two years after Hughes became a Justice, many


144 Felix Frankfurter, Chief Justices I Have Known, 39 VA. L. REV. 883, 889 (1953).


146 BETTY GLAD, CHARLES EVANS HUGHES AND THE ILLUSIONS OF INNOCENCE: A STUDY IN DIPLOMACY 72 (1966). Although he refused to actively campaign, he did not disavow attempts to promote his candidacy by supporters who found his passivity increasingly frustrating. Hughes
Republicans hoped that the Republican Party could unite behind Hughes in order to avoid the continuation of the internecine battle between Taft and Roosevelt that paved the way for Wilson’s election. On the eve of the Republican convention, Taft privately admitted his willingness to stand aside for Hughes in order to prevent a rift in the party, which was torn between Taft and former President Theodore Roosevelt.  

When New York Republican leaders urged Hughes to allow the convention to nominate him, Hughes flatly refused to become a candidate. When pressure mounted on Hughes during the acrimonious convention, he issued a public statement declaring that “no man is as essential to his country’s well being as is the unstained integrity of the courts.” Hughes explained that a Justice’s resignation from the Court to seek political office would impair judicial independence and public confidence in the courts because political parties would make partisan use of judicial decisions and judges might be tempted to render decisions in order to promote their political ambitions. In a letter to Elihu Root, the chair of the convention, Hughes explained that “[t]he highest service that I can render in this difficult situation is to do all in my power to have it firmly established that a Justice of the Supreme Court is not available for political candidacy. The Supreme Court must be kept out of politics...[E]ven if nominated, I should decline.”  

Observing Hughes from a close distance on the Court, however, Oliver Wendell Holmes was so not so certain that Hughes was so averse to presidential ambition. In a private letter in April 1912, Holmes remarked that while “he says he won’t be a candidate unless the President asks him to be – or something like that,” Holmes had “noticed a certain reserve in his speech that seems to leave possibilities open.” Holmes averred that “a judge should extinguish such thoughts when he goes on the Bench.”  

Four years later, however, Hughes did not resist the call of his party. He accepted the Republican nomination and narrowly lost the election to Woodrow Wilson for reasons that appear to have little to do with any revulsion over his willingness to leave the bench. 

refused to release New York delegates pledged to him even after Taft’s nomination had become inevitable. Id.  

147 MERLO J. PUSEY, CHARLES EVANS HUGHES, VOL. I 300 (1951).  

148 Id. [Pusey, 300]  

149 Id., at 300.  

150 Id., at 301. After the convention, Root assured Hughes that “you took a wise and patriotic course” because “keeping the Supreme Court out of politics is more important than the Presidency.” Id.  


152 Since the election was so close that it ultimately hinged upon a few thousand votes in
Historians generally have accepted Hughes’s protestations that his nomination was a genuine draft. As Hughes declared in his autobiographical notes, “I did not wish to be nominated. In view of the war in Europe, the responsibilities of the Presidency were heavier than ever and, knowing well what they meant, I had no desire to have the burden placed on my shoulders. The idea of a Justice of the Supreme Court taking part in politics, promoting in the slightest degree his selection as a candidate for the office of President, was abhorrent to me. I strongly opposed the use of my name and selection or instruction of any delegates in my interest.” 153 Torn between what he described as “two profound desires, one to keep the judicial ermine unsullied, and the other not to fail in meeting what might be a duty to the country,” Hughes finally felt that he “could not refuse” his party’s call to serve his country. 154

Hughes left the Court with the blessings of his colleagues. Holmes privately wrote that “[i]t was not preference but simply and solely, as I believe, a sense of duty, that led Hughes to accept the nomination.” 155 Although Chief Justice White expressed fear that Hughes’s nomination was a great blunder from which it would take the Court years to recover, he nevertheless blamed the Republican Party rather than Hughes, and he encouraged Hughes to respond to his party’s call. 156

Hughes’s resignation to accept the nomination at first generated understandable indignation. Deploiring “the celerity with which... Hughes has ceased to be the Supreme Court Justice and become Busy Charlie the Candidate,” the New York Evening World observed that “[t]he nation has grown to think of its highest judicial tribunal as something stable and permanent, wherein men sat as with a final dignity befitting ultimate honor. The new view is something of a shock. Not all of us will get used to it – or even wish to.” 157

California, however, it may be possible that Hughes’s willingness to doff his judicial robes may have been one of many factors that explain his defeat. Complaining that Hughes’s candidacy threatened to corrupt the “integrity and reputation of the Court,” The New York Times interpreted Hughes’s defeat as “a guarantee that the freedom of the Supreme Court from playing to the galleries...is to be maintained.” The Supreme Court and the Presidency, NEW YORK TIMES, Nov. 11, 1916, at 8.


154 Id., at 180-81.

155 Oliver Wendell Holmes to Frederick Pollock, July 12, 1916, in HOWE and PALFREY, supra at 237.

156 PUSEY, supra at 332.

Within days of Hughes’s resignation, Democratic senators introduced resolutions for constitutional amendments to prevent Supreme Court justices from becoming candidates for public office within five years after leaving the Court.\footnote{Stone Raps Hughes and the Platforms, NEW YORK TIMES, June 13, 1916, at 1.} In a speech that coincided with Hughes’s acceptance of the nomination, Democratic Senator Thomas J. Walsh of Montana alleged that Hughes’s election would forever cause Americans to distrust of the motives of federal judges.\footnote{159 51 CONG. REC., 63rd Cong., 2d sess., July 31, 1916, at 11851.}

Ultimately, however, Hughes’s the circumstances of Hughes’s resignation from the bench and his judicial record did not become campaign issues. Wilson refused to permit the Democratic platform to condemn Hughes for leaving the Court to become a candidate,\footnote{160 WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 162 (1994).} and even many liberals refused to assail Hughes’s motives. As \textit{The Nation} observed, “[n]o man can point to a single decision, a single gesture, of his on the bench and say that it was animated by political ambition.”\footnote{161 The Nomination of Hughes (editorial), \textit{The Nation}, June 15, 1916, at 635.} This probably was wise since Democratic attacks on Hughes could have seemed hypocritical since Alton B. Parker had resigned from the New York Court of Appeals in 1904 to accept the Democratic presidential nomination. Moreover, the circumstances of Hughes’s resignation and his judicial record did not emerge as major campaign issues insofar as the principal issue was whether the United States should remain neutral in the World War.\footnote{162 LIPPMANN, \textit{supra} at 278.}

As one historian has concluded, the hazards that Hughes’s candidacy posed for the Court were “negotiated with singular success and luck.”\footnote{163 ALEXANDER M. BICKEL and BENNO C. SCHMIDT, JR., THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. 9, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921 397 (1984).} There is little evidence that Hughes’s transition from Supreme Court justice to presidential candidate significantly exacerbated hostility toward the Court among progressives and trade union leaders who objected to its decisions striking down economic regulatory legislation, or that it encouraged the burgeoning movement to curb the Court’s powers.\footnote{164 ROSS, A MUTED FURY, \textit{supra} at 163.} Although some opponents of Hughes’s nomination to the chief justiceship in 1930 complained about his resignation from the Court in 1916 to run for the presidency, this was not a major issue in the substantial controversy over his fitness for the chief justiceship.\footnote{165 WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES 1930-1941 15 (2007).}
After Hughes’s resignation from the Court, another two decades passed with little or no speculation about presidential ambition among the Justices. Although the relatively scant controversy over Hughes’s nomination might have encouraged such ambition, the men who served on the Court during these years generally were too old to aspire to the presidency or lacked any political constituency. Perhaps the most obvious choice during this period would have been Brandeis, who was politically involved even during his years on the Court even though he never held public office, and who was held in high esteem by progressive activists. In 1924, Brandeis was Senator Robert M. LaFollette’s first choice as his vice presidential running mate in LaFollette’s bid for the presidency as an independent progressive. Even though Brandeis rejected LaFollette’s invitation, he may have given it at least some consideration. 166

The Court re-emerged as a potential recruiting ground for presidential candidates during the middle 1930s and remained so for the next two decades. Two Justices, Stone and Roberts, were widely touted as Republican presidential prospects after the G.O.P. debacle in the 1934 mid-term elections, which swept from office many Republican congressmen and governors. Bereft of any obvious front runner, various Republican elders who hoped to nominate an experienced and prestigious candidate set their sights on these two distinguished members of the Court. Although both Justices consistently disclaimed any presidential ambitions, it is not clear that these jurists, especially Roberts, would have resisted a draft.

The hazards of plucking a candidate from the Court, however, has rarely been more acute than in 1936 because the Court itself was involved in political controversy that was as intense as at any time in the Court’s history. Although public respect for the judiciary made the Democrats loath to openly criticize the Court during the 1936 presidential campaign, the nomination of Roberts by the Republicans almost certainly would have transformed the Court’s decisions and its institutional powers into an election issue. Stone’s nomination probably would have had much the same effect, although Stone’s nomination would have been more problematic since Stone had generally voted to sustain the constitutionality of New Deal legislation.

Since the Court’s decisions striking down New Deal legislation during 1935 and 1936 had generated numerous proposals to curb the Court’s powers, the resignation of a Justice to run for the presidency could not have occurred at a worse time for the Court. By enhancing the perception that the Court was unduly political, the candidacy of any former Justice would have bolstered public support for the multitude of Court-curbing proposals that percolated in Congress and in academe. Assuming that Roosevelt had defeated Roberts or Stone, the politicization of the Court during the campaign might have encouraged Roosevelt to propose legislation to restrict judicial review rather than the measure to pack the Court that he proposed three months after his

166 ROSS, A MUTED FURY, supra, at 255, citing BELLE CASE LAFOLLETTE and FOLA LAFOLLETTE, ROBERT M. LAFOLLETTE, vol. 2 1115 (1953). Predicting that LaFollette would mount “a grand fight,” Brandeis privately acknowledged that “if I had several watertight compartment lives, I should have been liked to be in it. The enemies are vulnerable and the time is ripe.” MELVIN UROFSKY and DAVID W. LEVY, eds., LETTERS OF LOUIS D. BRANDEIS, vol. 5 134 (1978) (Louis D. Brandeis to Arthur Brandeis, July 19, 1924).
re-election. Since the ultimate defeat of Roosevelt’s Court packing plan was not inevitable, the candidacy of either Roberts or Stone might have provided the additional anti-Court animus that would have enabled it to succeed. The controversy over the Court packing measure must have discouraged Republican leaders from encouraging Roberts and Stone to seek the presidency in 1940 because Republicans in opposing the Court packing bill had complained so vociferously about Roosevelt’s attempt to politicize the judiciary. Even in politics, there are limits to hypocrisy.

Roberts’s principal allure was that he was widely regarded as a moderate who could appeal to both moderate and conservative factions in the G.O.P. insofar as he had been the “swing vote” in many of the Court’s rulings on the constitutional of social and economic regulatory legislation since he became a Justice in 1930. As the columnists Drew Pearson and Robert S. Allen pointed out shortly after the 1936 election, interest in Roberts also stemmed from his “handsome, virile appearance, his impressive record as a Teapot Dome prosecutor,” and “the favorable geographical position” of his home state, Pennsylvania, which at that time commanded more electoral votes than any state other than New York. 167 Although Roberts never had held elective office, his very lack of political experience may have been an asset because Republicans could present him as a non-politician who was above the fray of petty politics.

Roberts’s status as a Justice also boosted his appeal insofar as many Republicans wanted to generate and exploit public indignation over what they perceived as the constitutional depredations of the New Deal.168 As Walter Lippmann explained in a column in June 1935, “[t]he idea is that Mr. Justice Roberts, having decided against New Deal measures, is to run as the savior of the Constitution.” Lippmann pointed out that this was “certain to cause acute embarrassment to the Supreme Court as a whole and to Mr. Justice Roberts in particular,” particularly since Roberts would continue “to sit in judgment upon much of the New Deal.” 169 Praising Roberts as “a man of the highest judicial integrity and sensibility,” Lippmann warned that “[i]f the boom is not first destroyed by responsible leaders, his choice will be to destroy it himself or resign from the bench.” 170 Writing at a time when widespread dismay over the Court’s invalidation of New Deal legislation had generated a plethora of proposals to curb the Court’s power of judicial review, Lippmann declared that “[n]ow is a very good time to put to an end once and for all to the idea that justices of the Supreme Court are available candidates for public office. This would make a very good first plank in a program to defend the Constitution


169 LIPPMANN, supra, at 278.

170 Id., at 279.
and the Supreme Court as its final arbiter.” ¹⁷¹

In 1954, nine years after his retirement from the Court, Roberts publicly disavowed having had any interest in the presidency. Testifying before the Senate Judiciary Committee in favor of a constitutional amendment that would have barred members of the Court from serving as president or vice president within five years of termination of their service on the Court, Roberts acknowledged that “enthusiastic friends” had importuned him to become a candidate twice, presumably in 1936 and 1940. “Of course, I turned a hard face on that thing,” Roberts testified. “I never had the notion on my mind.” ¹⁷² Although Roberts expressed hope that he would be excused from “naming names,” he explained that “it is a matter of common knowledge that ambition to go from the Court to the Chief Executive...has hurt the work of a number of men on the Court.” ¹⁷³ Roberts testified that a number of chief justices and associate justices “have had in the back of their minds a possibility that they might get the nomination for President. Now, that is not a healthy situation because, however strong a man’s mentality and character, if he has this ambition in his mind it may tinge or color what he does, and that is exactly what the Founding Fathers wanted to remove from the minds of the Supreme Court, to make them perfectly free knowing that there was no more in life for them than the work of the Court.” ¹⁷⁴

Pearson and Allen, however, reported that “Roberts considered the possibilities most seriously,” and that he ultimately rejected overtures from party leaders because his wife, Elizabeth Rogers Roberts, was unwilling to risk the loss of her cherished role as a leading Washington socialite. An ardent opponent of the New Deal, she also reportedly told members of her family that her husband should not hazard his opportunity to continue to safeguard the Constitution. Moreover, both Roberts and his wife may have felt that his position as the swing vote on the Court made him nearly as powerful as the President. ¹⁷⁵

Unlike Roberts, Stone appears to have been sincere in his renunciation of political ambition. Like Roberts, Stone never had held elective office. Before his appointment to the Court, Stone had served briefly as attorney general and as dean and professor at Columbia Law School. His easy-going, bluff personality seems to have been more suited to the contemplative

¹⁷¹ Id., at 279-80.


¹⁷³ Id., at 8.

¹⁷⁴ Id., at 9. Similarly, Roberts testified before the House Committee on the Judiciary that “I think it is much better for a judge not to have any thought that he would ever be anywhere except where he sits, in the Supreme Court. Hearing Before Subcomm. No. 4 of the House Comm. on the Judiciary on S.J. Res. 44, H.J. Res. 194, H. J. Res. 27, and H.J. Res. 91, 83rd Cong., 2d Sess.22 (1954).

¹⁷⁵ PEARSON and ALLEN, supra at 161-62.
life of academia and the judiciary than to the hurly burly of politics. Stone does not appear to have had any particular desire to be President, although he maintained personal friendships with three Presidents, the strange trio of Coolidge, Hoover, and Franklin Roosevelt. Although he had no compunction about providing private advice to these presidents on sundry affairs of state, Stone had an especially ardent belief that judges should avoid public extra-judicial activities that distracted them from their judicial duties and cast doubts on their objectivity.

As early as 1927, two years after Stone became an associate justice, at least one of Stone’s friends, Sterling Carr, privately suggested that he should set his sights on the presidency. In reply, Stone expressed reluctance to leave a position for which he felt was “supremely interested.” In 1929, when President-elect Hoover invited Stone to become secretary of state, Carr admonished Stone that he was “too young, too energetic, too full of leadership...to remain in the cloister.” Stone replied that “I owe something to the institution of which I am a part, and there are battles to be carried on here and won, as elsewhere.”

During 1935 and 1936, many liberal Republicans urged Stone to become a candidate for the G.O.P. presidential nomination. The chair of New York’s Republican Party advocated Stone’s candidacy, the popular columnist Mark Sullivan declared that “[t]here is not...a better man for President than Justice Stone,” and the editor William Allen White publicly proclaimed that “Stone would make an ideal candidate.” Stone steadfastly resisted their encouragement, explaining to one friend who urged his candidacy that Justices “should keep out of politics.” Stone refused even to address the American Bar Association at its 1935 convention because he feared that his appearance would stimulate speculation that he would become a candidate. In 1940, numerous Republicans again urged Stone to become a candidate, but Stone remained adamant in his refusal to seek the nomination.

Since Franklin Roosevelt deliberately appointed highly political persons to the Court in order to help ensure that they would provide judicial support for his New Deal policies, it is not surprising that several of Roosevelt’s nominees would harbor presidential ambitions or would be mentioned as possible candidates. At least five – Hugo Black, James F. Byrnes, William O. Douglas, Robert H. Jackson, and Stanley Reed – were mentioned to one extent or another as


177 Id., at 268 [Mason]

178 Id., at 403. [Mason]


180 MASON, supra at 402.

181 Id., at 705.
potential nominees.

Jackson was mentioned as a candidate only before he became a Justice. Shortly after Jackson became U.S. Attorney General in January 1940, he was prominently touted by various journalists as a contender for the 1940 Democratic presidential nomination. According to various press reports, Jackson was Roosevelt’s favorite choice as a successor. Jackson did not discourage such speculation, but he made no serious effort to seek the nomination and whatever hopes he entertained were dashed when Roosevelt decided to seek a third term. In making plans for a bid for a third term Roosevelt may have been instrumental in preventing the selection of Jackson to serve as a delegate to the Democratic national convention from New York. Jackson, who was regarded as a potential vice presidential nominee during the Democratic convention, made a series of public speeches during the autumn of 1940 in which he vigorously urged Roosevelt’s re-election. After he became a Justice in 1941, Jackson was not prominently mentioned as a presidential candidate despite his stature.

In addition to considering Jackson as a running mate in 1940, Roosevelt also may have given at least passing thought to the selection of Reed, whom he had appointed to the Court in 1938. Roosevelt, however, apparently dismissed him because he lacked a vibrant public personality.

Black, who had served as a senator from Alabama for a decade before Roosevelt appointed him to the Court in 1937, appears to have had presidential aspirations. During the year before Roosevelt decided to seek a third term in 1940, Black apparently considered becoming a presidential candidate if Roosevelt did not run again, and for a brief time in 1940 he may even have thought about challenging Roosevelt for the Democratic nomination. After Roosevelt wrapped up the nomination, Black quietly let prominent Democrats know that he was available for the vice presidential nomination, and he even wrote to Roosevelt in July 1940 to offer to resign from the Court “should you conclude you need my services,” presumably as a running mate. According to Newman, Black “never lost his desire to be president.”

183 Id., 199, 201.
184 Id., 199, 201, 204-05.
185 Id., 205, 206-09.
187 Id., at 306-07.
188 Id., at 307.
189 Id., at 306.
In 1944, when Vice President Henry A. Wallace’s increasingly erratic personal and political behavior jeopardized his chances of re-nomination as Roosevelt’s running mate, Black angled again for the vice presidency and received encouragement from some prominent Democrats, particularly former Roosevelt advisor Thomas Corcoran, who went so far as to assure Black that “[w]e’ve got liberals and labor lined up for you” and that the nomination “is yours if you want it.” Black reportedly declined Corcoran’s offer of support because of his wife Josephine’s poor health. According to Roger Newman, one of Black’s biographers, Black “never lost his desire to be president.”

Early in 1948, when President Truman’s prospects for election were bleak and there was widespread uncertainty about whether he would even run, Black discreetly contacted political leaders in his home state of Alabama in order to determine whether they would support him if he sought the presidency. As Newman explained, “[t]he odds were small, but Black’s dream was too strong not to try...The responses were uniformly negative.” Although some prominent Alabama liberals, particularly Senator Lister Hill, believed that Black would have made an excellent president, conservative forces in the state made his candidacy impossible.

Black recognized that his brief membership in the Ku Klux Klan in Alabama during the 1920s impeded his presidential prospects. His association with the Klan created a furor when it was publicly revealed shortly after his nomination as a Justice in 1937, and his opponents were bound to use it as a political weapon against him if he sought either the presidency or the vice presidency. Black’s candidacy also might have encountered indifference if not hostility from liberals and labor leaders who appreciated Black’s support for many of their causes, but who remained suspicious of his rural populist roots. Black therefore may have hoped that his many decisions in support of the rights of African Americans and organized labor might enhance his presidential prospects. Since there is powerful evidence that Black’s decisions were motivated by long-standing convictions, there is no reason to suppose that his political ambitions affected his votes. His presidential aspirations, however, may occasionally have influenced the way in which he wrote majority or dissenting opinions, or perhaps encouraged him to wangle writing assignments.

After Hughes, William O. Douglas was the only Justice who became a significant contender for places on presidential tickets. Roosevelt appears to have seriously considered offering him the vice presidential nomination in 1940 and 1944, and Truman invited Douglas to run with him in 1948. Douglas also was prominently mentioned as a presidential candidate in

190 Id., at 309.
191 Id., at 306.
192 Id., at 383-84.
1948 and 1952. While Douglas never had held elective office, his keen political instincts and interests and his youth during his early years on the Court – he was only forty when appointed – made him in many ways a natural prospect for the presidency.

Although one of Douglas’s biographers probably is correct that Douglas “cared much more about politics than about his work on the Court” within a year of his appointment in 1939, he made no apparent effort to seek the 1940 Democratic nomination for vice president even though he was widely mentioned as a possible running mate for Roosevelt in his bid for a third after it became clear that Vice President John Nance Garner would not be on the ticket a third time. Douglas privately disclaimed any interest in the nomination. In a letter to Felix Frankfurter, he described talk about his candidacy as “disturbing because I want none of it,” urging Frankfurter to help “scotch it” because “I want to stay where I am.” To a friend, he insisted that “I have no political ambitions. My sole desire is to give a life time of service here in an endeavor to fill the shoes of my illustrious predecessor,” Brandeis. After Roosevelt reportedly told his advisors shortly before the Democratic convention that Douglas and Secretary of Agriculture Henry A. Wallace were becoming his favorite choices, Democratic leaders urged Wallace’s selection because Douglas lacked a political base and experience as a campaigner. Douglas expressed relief that the nomination passed him by.

Douglas came much closer to the vice presidency four years later, when Roosevelt expressed enthusiasm for Douglas after Democratic leaders convinced Roosevelt that Democrats needed to deny the vice presidential nomination to the increasingly left-wing and eccentric Wallace. A week before the national convention, Roosevelt mentioned Douglas as a potential running mate, and there is evidence that he preferred Douglas to Missouri Senator Harry Truman, who was emerging as the favorite of party leaders. When Democratic National Chairman Robert Hannegan and other party leaders expressed their preference for Truman at a meeting with Roosevelt on July 11, Roosevelt gave Hannegan a handwritten note stating that he believed that Douglas had greater public appeal.

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196 Murphy, supra, at 189.

197 Id. [Murphy, 189]


request of Hannegan, who argued that Douglas was not a viable candidate, Roosevelt re-wrote his note to place Truman’s name first.  

Hannegan kept the letter private until the eve of the balloting in order to prevent the Douglas forces from organizing.  

This was wise because Douglas’s nomination would have been difficult to arrange without the open candidacy of Douglas, who probably would have felt obliged to resign from the Court if he had publicly sought the nomination, which he would not have done unless he believed that his chances were excellent. Although Douglas’s supporters worked vigorously behind the scenes at the convention to woo delegates, the release of the letter produced a stampede for Truman, and Douglas won only two votes. While Douglas later disavowed having had any interest in the nomination, there is considerable evidence that he actively encouraged efforts to secure his selection. Assured by his political allies that they could secure his nomination, Douglas appears to have been keenly disappointed, particularly because he knew that Roosevelt’s health was so poor that he had little chance of surviving a fourth term.  

Despite strong evidence to the contrary, Douglas claimed in his memoirs that “I never had the Potomac Fever and could not be excited about catching it.” Douglas contended that Roosevelt never discussed the 1944 nomination with him and that before the convention he gave a letter to Senator Frank Maloney refusing the nomination. He was in the Oregon mountains at the time of the convention and claimed that he did not know about Roosevelt’s note to the convention. He admitted, however, that “[a]n FDR ‘draft’ would have been difficult to resist. I am glad I never had to face up to it in 1944.”  

In 1948, Douglas worked privately with members of the liberal Americans for Democratic Action (ADA) to promote his candidacy at a time when nomination of the unpopular President Truman remained uncertain. Douglas privately criticized Truman for surrounding himself with too many conservatives and for appointing administrators who had emasculated federal regulatory agencies. Douglas shared Truman’s fear of Soviet expansionism, but, as

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200 Id. at 276-77. The note stated that: “You have written me about Harry Truman and Bill Douglas. I should, of course, be very glad to run with either of them and believe that either one of them would bring real strength to the ticket.” Id., at 276. After Roosevelt wrote the note in longhand, his secretary typed it on White House letterhead and the President signed it. Id.

201 MURPHY, supra at 223.

202 Id., at 218, 228-32.


204 Id. [283]

205 Id., at 283-84.

206 ALONZO L. HAMBY, BEYOND THE NEW DEAL: HARRY S. [sic] TRUMAN AND AMERICAN
one historian has explained, Douglas’s “public addresses carried the promise of a more inspiring, positive, and democratic foreign policy, oriented to the common people of the world and seeking, as he put it, to win the Cold War in the ricefields rather than the battlefields.” 207 A prominent journalist argued that Douglas, who had been a “tough, resourceful, and courageous” SEC director when enthusiasm for the New Deal was flagging, “would restore direction to the liberal ranks.” 208

Convinced by his advisors that he needed Douglas on the ticket to win support among liberals, Truman offered Douglas the vice presidential nomination on the eve of the convention. 209 Douglas at first may have hesitated because he had not yet given up hope that the convention would nominate him for president. 210 After the ADA threw its support to Truman, Douglas finally told Truman, who had ended up pleading with Douglas to serve as his running mate, that he refused to “use the Court as a stepping stone.” 211 In fact, however, Douglas presumably rejected the nomination because he accepted the conventional wisdom that Truman couldn’t win. 212 According to some accounts, Douglas, whose finances were troubled, was particularly reluctant to give up the security of his judicial position. Although he could make more money in private practice, being a lawyer had little appeal for him. According to another account, however, Douglas said that he expected Truman to win and that he would have run if he thought that Truman would lose, thereby enabling him to avoid the indignity of four years in the vice presidency and positioning him for a good shot at the top of the ticket in 1952. 213 Douglas himself explained in his memoirs that he believed that Truman could win but that he wanted to remain on the Court in order to help to continue to work with Murphy, Rutledge, and Black in support of civil liberties. “It seemed to me,” Douglas recalled, “that only very special reasons would justify breaking up that foursome.” 214

LIBERALISM 229 (1973).

207 Id. [Hamby, 229]

208 James A. Wechsler, Douglas: The Best Hope, THE NATION, July 10, 1948, at 35-36. Wechsler believed that “Douglas’s continued grip on political imaginations probably stems from the quality which he most conspicuously shared with Franklin D. Roosevelt – an authentic idealism combined with an instinctive sense of the time to take action.” Id., at 35.

209 MURPHY, supra at 257-58; SIMON, supra at 273.

210 Id., at 258, 263.

211 Id., at 263.

212 SIMON, supra at 274.

213 MURPHY, supra at 258.

Only forty-nine when he rejected Truman’s offer, Douglas appears to have entertained hope that he could be elected president in another four or eight years. In 1952, several prominent Democrats encouraged Douglas to seek the presidency, and Douglas was the first choice of an astonishing 67 percent of 3600 readers of the liberal Nation who responded to a poll in April 1952. Expressing the view of many liberals who wanted Douglas to seek the presidency in 1952, Yale Law Professor Fred Rodell praised Douglas for having “etched out a clear and militantly liberal political credo” in his “ringing defense of civil liberties at home” and “his castigation of a military-minded foreign policy that would try to stop communism with guns (and dollars) alone.” Denying that Douglas had subtly crafted his judicial opinions to win political support, Rodell argued that Douglas had expressed “precisely the views that no elective office seeker in his right mind would utter in the face of the conform-or-else anti-Communist atmosphere of the times.”

Douglas concluded in 1952 with much regret that his recent divorce made his prospects too slim. Corcoran, who warned Douglas in 1952 that his divorce would ruin his political prospects, believed that Douglas would have been president if he not divorced his wife of twenty-nine years. Similarly, another biography of Douglas concludes that any political ambitions he might have had were destroyed by this divorce and by his public support for U.S. diplomatic recognition of Communist China.

In 1960, bitten again by the presidential bug, Douglas told Lyndon Johnson that he was willing to resign from the Court to promote Johnson’s candidacy for the Democratic nomination, apparently believing that Johnson would offer the vice presidential slot to him. When Johnson himself became the vice presidential nominee after the Democrats nominated Kennedy for the presidency, Douglas lapsed into a severe mental depression because he knew that his last chance

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215 Murphy, supra at 314.


218 Id.

219 Murphy, supra, at 314.

220 Simon, supra, at 286.

221 Howard Ball and Phillip J. Cooper, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA’S CONSTITUTIONAL REVOLUTION 82 (1992). The assessments of the impact of Douglas’s divorce may be exaggerated. As early as 1920, the Democrats had nominated a divorced man, James M. Cox, and the 1952 Democratic presidential candidate, Adlai Stevenson, was divorced. Although both Cox and Stevenson were defeated in landslides, there is little reason to suppose that their marital status was a major factor in their defeat. Unlike Stevenson and Cox, however, Douglas had divorced his first wife to marry another woman.
had passed. He appears to have remained embittered until the end of his days, for, as one biographer has explained, “he had now been buried alive, trapped forever on the Supreme Court.”

At age seventy, he shocked a group of law clerks by emphatically declaring that he regretted his service on the Court, which he described as “peripheral” and as a “backwater” that was too far from “all of the action.”

In addition to Douglas, at least one other Justice appointed by Roosevelt had serious political ambitions. James R. Byrnes, who served on the Court from October 1941 to October 1942, was a member of the House of Representatives for fourteen years and spent ten years in the Senate, where he was serving when Roosevelt placed him on the Court. Byrnes, who later was secretary of state from 1945 to 1947 and governor of South Carolina from 1951 to 1955, was an intensely political man who found his judicial duties boring and confining. He frequent conferred with Roosevelt on affairs of state even while he was a Justice, and he resigned to lead the wartime Office of Economic Stabilization, a post in which he often was called the “assistant president.”

Byrnes, who harbored presidential ambitions for decades, tried to obtain the Democratic vice presidential nomination in 1944, but he was unacceptable to Roosevelt because he was an ardent racial segregationist. Temperamentally unsuited to the Court, Byrnes had the good grace to resign after only one term in order to return to active politics rather than trying to use the Court as a platform upon which to build his presidential ambitions.

Truman, who had offered the vice presidency to Douglas, later tried to anoint Chief Justice Fred Vinson as his successor. During his final years as president, Truman repeatedly urged Chief Justice Vinson to seek the presidency and assured Vinson of his full support if he became a candidate. Truman, who believed that he had a duty to recommend a successor, was a personal friend of Vinson and had appointed him to the Court in 1946. Truman admired Vinson’s record as a member of Congress during the 1920s and 1930s and as a high ranking administrator in federal agencies during World War II and he believed that a Vinson presidency would remain faithful to Truman’s own policies and politics. Like Truman, Vinson was moderately liberal on domestic issues and supported a strong American role in international affairs.

Truman broached the idea with Vinson as early as 1949 or 1950, but Vinson reportedly

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222 Murphy, supra at 350.
223 Id., at 351.
225 Id., at 311-21.
226 Id., at 332-62.
227 Hamby, supra, at 481-82.
rejected Truman’s overtures. 228 In meetings in October and November 1951, several months before Truman announced that he would not seek another term, Truman again exhorted Vinson to become a candidate for the Democratic nomination in 1952. When Vinson expressed reluctance to use the chief justiceship as a stepping stone to the presidency, Truman urged Vinson’s wife, Roberta, to encourage her husband to run. 229 Vinson waited several weeks before informing Truman that he definitely would not become a candidate. Although the sixty-one year old Vinson told Truman that his “physical condition” was why he was rejecting Truman’s proposal, 230 Vinson also appears to have worried that his candidacy would harm the Court’s reputation. 231 Vinson’s refusal to run surprised Truman, who had no second choice.232

It is not surprising that Truman is the only President to offer the vice presidency to a Justice or to importune a (Chief) Justice to run for President, for few Presidents have displayed less respect for the Court’s institutional integrity. None of the four men he appointed to the Court had particularly outstanding qualifications for the high bench, and historians rank at least three of them as poor or mediocre Justices. Three were Truman’s personal friends, and all continued to act as political advisors to one extent or another after they joined the Court. When one of them, Tom Clark, voted with the majority to invalidate Truman’s seizure of the steel mills during the Korean War, Truman appears to have felt personally betrayed, although he resumed his friendship with Clark after fulminating against the Justice for a while.

Aside from Douglas, Chief Justice Earl Warren probably was the member of the Court who came the closest after Hughes to resigning from the Court to become a presidential candidate. Warren was a natural prospect for the presidency even after he became Chief Justice in 1953 because he had been such a prominent politician before he joined the Court. Warren was elected three times as governor of California, the post from which he resigned to take his seat on the Court. Widely commended for his honest, progressive, and efficient governorship during a time of explosive growth in California, Warren was a leading candidate for the Republican presidential nomination in 1948 and 1952. Warren nearly was elected to the vice presidency in 1948 when he was the running mate of Thomas E. Dewey on a ticket was defeated in one of history’s closest elections. In 1952, Warren stayed in the race until the Republican convention,


229 Id.

230 HARRY S TRUMAN, MEMOIRS, VOL. 2 490 (1956).

231 ST. CLAIR and GUGIN, supra at 195-96. Although Vinson died of heart trouble the following year at age 63, he apparently was not aware that his health problems were serious when he rejected Truman’s offer of support. Id., at 196, 336.

when he threw his support to Eisenhower, who, according to some accounts, promised to appoint Warren to the Court in exchange for his support.

Although Warren had substantial legal experience as a former district attorney and former attorney general of California, he was widely regarded at the time of his appointment as much more of a politician than a judge. Even Warren himself was not sure how well he would adapt to the cloistered life of the Court. Less than a year after Warren became Chief Justice, the Court’s decision in *Brown v. Board of Education* generated support for another presidential candidacy by Warren because Americans outside the South widely hailed *Brown* and appreciated Warren’s important role in shaping it. For example, on the day after the *Brown* decision, the *Sacramento Bee* editorialized that “the Republican Party will consider him among the very eligible persons when the time comes to nominate a successor to President Eisenhower.”

According to one account, a frustrated Warren exclaimed at a dinner party, “Do people have so low a regard for the Supreme Court that they think all they need do is tap a justice on the shoulder and he will run for the presidency? If so, it’s time they learned better.”

Speculation continued to grow because of uncertainty about whether Eisenhower would run again. The prospect that a chief justice would resign to seek the presidency generated considerable dismay. For example, *The Washington Post* warned that Warren’s candidacy “would inflict incredible harm upon the Supreme Court as an institution.” Warren publicly disavowed presidential aspirations on April 15, 1955 in the wake of a Gallup poll that indicated that Warren was the favorite choice of Republicans if Eisenhower did not seek re-election.

Warren declared that speculation about his candidacy had become “a matter of some embarrassment to me because it reflects upon the performance of my duties as Chief Justice of the United States. When I accepted that position, it was with the fixed purpose of leaving politics permanently for service on the Court. That is still my purpose. It is irrevocable. I will not change it under any circumstances or conditions.”

Warren’s statement received widespread praise. As one historian has explained, “Warren had raised the stature of the Court by removing it and himself from electoral politics and by making it clear that the presidency was not an office worth

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234 Id. [Cray, 313]


236 William P. Hansen and Fred L. Israel, eds., *The Gallup Poll: Public Opinion 1935-1971*, VOL. 2 1325 (1972). In this poll, Warren was the choice of 25 percent of Republicans and 31 percent of independents. Vice President Richard Nixon ranked second, as the choice of 19 percent of Republicans and 11 percent of independents. Id.

leaving the Court to pursue. Speculation about a Warren candidacy became more intense after Eisenhower suffered a heart attack in September 1955. During the following month, 62 percent of persons polled by George Gallup said that they did not expect Eisenhower to run for re-election in 1956. Despite renewed speculation that Warren would become a candidate, Warren did not reiterate his refusal to seek the presidency. Apparently interested in the possibility, Warren informed a friend, the prominent syndicated columnist Drew Pearson, that he might run. Meanwhile, Warren reportedly told a longtime aide in December 1955 that he would run for President if he thought that his old nemesis Nixon otherwise would become President.

Public opinion surveys conducted by George Gallup during late 1955 and 1956 continued to indicate that Warren would command impressive support for the Republican nomination if Eisenhower did not seek re-election. In four surveys between October 1955 and January 1956, support for Warren among Republicans ranged from 23 percent to 30 percent. Warren was the most popular choice in polls conducted in December 1955 and January 1956, when he out-placed even Vice President Nixon. In one poll during the autumn of 1955, 38 percent of respondents expressed an expectation that Warren would be the Republican nominee in 1956, and 50 percent – including 58 percent of Republicans – said that they would like to see Warren run for president in 1956.

When a reporter asked Eisenhower at a press conference on January 25, 1956 whether it would be “bad policy” for Warren to seek the presidency if he chose not to seek re-election, Eisenhower replied that “[w]e shouldn’t get too great a confusion between politics and the Supreme Court” and that maintenance of the distinction would enable each branch to remain “respected in the eyes of the people.” Eisenhower also suggested that Warren should resign from the Court if he became a candidate.

A few days later, Warren surprised Eisenhower’s press secretary, James Hagerty, by expressing annoyance over Eisenhower’s remarks when Warren saw Hagerty at a party.

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238 Id. [Newton]

239 HANSEN and ISRAEL, supra at 1367.

240 NEWTON, supra at 334-35.


242 HANSEN and ISRAEL, supra at 1949-1958 1368, 1372, 1395.

243 Id., at 1374-75.

Eisenhower observed in his personal diary “that the first time he indicated himself as receptive to the nomination, he should resign from the Supreme Court. I think it would be possibly feasible and ethical for him to say nothing until the time of the Convention. At that time, if literally drafted, he could submit his resignation and accept the nomination.” Eisenhower mused, however, that he could not step aside in favor of Warren unless he had assurances from Warren in advance of the convention that he would respond to a draft. 245

When asked at a press conference on February 8, 1956 whether his comments at the previous press conference indicated that he would oppose Warren’s nomination if he did not run again, Eisenhower replied, “Opposed? For goodness sake, I appointed him as Chief Justice of the United States; and there is no office in all the world that I respect more.” 246 Privately, Eisenhower told his press secretary that he did not believe that Warren would seek the presidency because he was happy to serve as Chief Justice, did not want to give up a position that had life tenure, and wanted to become one of the great chief justices. 247

During the early weeks of 1956, when Eisenhower considered dumping Nixon from the ticket if he sought re-election, there also was widespread speculation that Eisenhower might offer Warren the vice presidential nomination. Although Eisenhower might have preferred Warren to any other running mate, Eisenhower was convinced that Warren would not resign from the chief justiceship to seek the vice presidency. 248 Speculation about a Warren candidacy finally ended on February 29, 1956, when Eisenhower announced that he would seek a second term.

Warren does not appear to have been widely considered as a potential nominee in 1960, partly because Nixon and Rockefeller had emerged as strong contenders, and also because Warren would have been nearly seventy years old by inauguration day. Even so, the United Automobile Workers President Walter Reuther stated in a television interview in October 1958 that organized labor would support Warren for the presidency, perhaps because Reuther feared Nixon’s candidacy. 249

During the past half century, Sandra Day O’Connor is the only Justice who has been mentioned even half seriously as a possible presidential or vice presidential candidate. Speculation that Republicans might nominate O’Connor for the presidency or vice presidency


246 The President’s News Conference of February 8, 1956, AMERICAN PRESIDENCY PROJECT, supra at 10726.

247 CRAY, supra at 314.


249 POLLACK, supra at 10.
occurred mostly in 1988, when Reagan was retiring from the presidency. In a written statement released on May 27, 1988, O’Connor quashed most speculation by declaring that ‘I must assuredly am not considering any other position in or out of government and do not expect to do so in the future.”  

Although O’Connor was the only Justice at the time who had been closely connected with partisan politics and who had elected office – she had been the majority leader of the Arizona senate and an elected trial court judge – she appears to have been considered for the presidency more because she was a prominent personality rather than because she once had been a prominent politician. As the first woman member of the Court, she naturally attracted much publicity, and she probably was more familiar to voters than any other Justice at the time. O’Connor was not mentioned for the presidency or vice presidency in 1992, when George H. Bush and Dan Quayle were incumbents. By 1996, when she was 66 years old, her age may have excluded her from serious consideration.

III. Hazards of Presidential Ambitions Among Supreme Court Justices

There is an obvious danger that presidential aspirations among Supreme Court Justices will encourage Justices to change their votes or at least craft their opinions in a manner to curry favor with voters or political king makers. As Gary Stein observed in assessing the extent to which presidential ambitions may have influenced Black’s performance on the Court, “the influence of ambition on reason is usually...subtle. It can be the puff of wind that imperceptibly pushes analysis in one direction rather than another, the unseen pebble that tilts the scales this way or that.”

The perception that any Justice was trimming her opinions in order to fit her political ambition easily could erode public faith in judicial independence. This would tend to diminish public confidence in the integrity of judicial opinions, which is the ultimate source of the Court’s power and influence. As the syndicated columnist Arthur Krock warned in 1940 when Douglas was mentioned as a possible vice presidential candidate, any opinion written by Douglas “will be weighed on the scale of political ambition. This will damage him and hamper the Court.” Similarly, Professor Peter Bell has pointed out that “Justices who run for office

250 O’ Connor Doesn’t Want Job, NEW YORK TIMES, May 27, 1988, D18.

251 Stein, supra. Stein aptly remarked that “[o]f all the many factors that tug at a judge’s conscience in deciding cases, personal political advantage should not be among them.” Id.

252 In assessing the political ambitions of Chase and Field, for example, Professor Fairman observed that, “Chase’s pursuit of the Presidency had been notorious and enduring, and had with good reason caused his action in significant cases to be suspect. Field’s aberration was short-lived, but while it lasted he made judicial dissents serve as his political platform. With both, want of self-knowledge impaired the Court.” FAIRMAN, RECONSTRUCTION AND REUNION, supra PART TWO, at 485.

253 SIMON, supra at 260.
subject themselves and the Court to the traditional attacks and slurs of campaign politics.” 254 As Walter Lippmann observed in 1935 in response to speculation about the possibility that Justice Roberts would become a presidential candidate, Justices “should be regarded as having forever renounced all other worldly ambitions” because the Court’s prestige “depends upon the people’s own belief that the Court is above all ordinary worldly temptation.” 255

Although even occasional forays by Justices into presidential politics may harm the Court, persistent politicking among Justices could have catastrophic consequences. Yale Law Professor Alexander Bickel warned that “the recurrence of justices with manifest political aspirations would in time destroy an institution whose strength derives from strength based on confidence.” 256 Bickel pointed out that, paradoxically, the Court needs to stand above political involvement precisely because the constitutional issues that it addresses so often have political dimensions. 257

Life tenure, which was intended to help federal judges preserve their independence, also should discourage Supreme Court Justices from seeking the presidency insofar as Justices do not need to stray from the bench in order to enjoy the permanent security of powerful position. As a Tennessee delegate to the 1880 Democratic national convention explained his opposition to Justice Stephen J. Field’s presidential candidacy. “The fathers decided that it was wise to place one branch of the government above temptation and therefore made tenure of office of the judges of the courts a life one. I am not in favor or changing that and giving the judges reason to expect reward for their decisions.” 258 Justices are understandably reluctant to lay down the security of a powerful lifetime appointment for the uncertainties of electoral politics, and this presumably is one of the reasons why even more have not sought the presidency.

In addition to eroding public confidence in herself and the Court itself, any Justice who would allow political ambition to influence his or her work on the Court also might violate Canon 1 of the American Bar Association’s Model Code of Judicial Conduct, which provides that “A Judge Shall Uphold the Integrity and Independence of the Judiciary.” As that Canon points out, “An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the

254 Peter Alan Bell, Extrajudicial Activity of Supreme Court Justices, 22 STAN. L. REV. 587, 595, 595 n.52 (1970). Bell has pointed out that “Justice in the political arena will probably provoke attacks on the Court as on himself by opponents who seek to counteract the institution’s prestige, which apparently has been thrown into battle against them.” Id.

255 LIPPMANN, supra, at 278-79.


257 Id., at 134.

258 KENS, supra at 175 (quoting Rep. Whitthorne in NEW YORK TRIBUNE, June 22, 1880, at 1-1).
judiciary will be preserved.” At the very least, any activities by a Justice in anticipation of a presidential candidacy, or any encouragement that a Justice might provide to speculation that he or she would available as a candidate, would surely violate Canon 2, which declares that “A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities.” Preparations for a presidential campaign also might violate Canon 3, which provides that “A judge shall perform the duties of judicial office impartially and diligently.”

Although political ambition may influence a Justice’s votes in actual decisions, an even more insidious danger is that Justices will allow their presidential aspirations to influence their votes to grant or deny writs of certiorari. Since cert votes usually are confidential unless a Justice chooses to dissent, a member of the Court could conceal his or her political motivations much more easily in voting on a cert petition than on a vote in a case on which the Court renders a decision. A politically ambitious Justice might oppose a writ of certiorari in order to avoid having to vote on a politically controversial issue. On the other hand, such a Justice might vote to grant certiorari in order to enable him to cast a vote and write an opinion for the Court or in concurrence or dissent that would curry favor with individuals, interest groups, or voting blocs that would facilitate the Justice’s political ambitions. Since the Court’s decisions about what to decide are tremendously important in shaping the law, a Justice who permits political ambition to affect the performance of his or her gate-keeping function has committed an ethical violation that potentially is as serious as allowing presidential aspirations to influence her vote or opinion in a decided case. Insofar as it takes the votes of only four Justices to grant a writ of certiorari, improper political motivations can have an even greater impact upon the Court if a Justice votes to grant certiorari for political reasons than if a Justice permits politics to affect his or her vote on the merits.

Another hazard is that efforts by Justices to promote their political prospects also will almost inevitably distract them from their arduous duties on the Court. Even though the Court during the past twenty years has reduced the number of cases it hears from an average of 150 per year to about 80, Justices must spend as many or more hours than ever on the time-consuming task of reviewing certiorari petitions and on various collateral responsibilities. Since there are so many activities that a Justice has no choice but to perform, such as attendance at conferences and oral arguments, politicking is likely to reduce the time that a Justice has for the duty that is the most important but also the most easily dispensable – careful deliberation and reflection. As Felix Frankfurter once observed, the Court’s judgements “presuppose ample time and freshness of mind for private study and reflection in preparation for discussion at Conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions.”

Preparation for a presidential candidacy might therefore violate Canon 3(a) of the Model Code of Judicial Conduct, which provides that “[t]he judicial duties of a judge take precedence over all the judge’s other activities.” As we have seen, presidential aspirations have distracted

some Justices from their judicial duties. The danger of such distraction may be even greater today, when the nomination process has become even more complex. In particular, even a Justice whose only hope was to become a compromise candidate might perceive that he or she needed to line up potential donors in order to convince the party that he or she would be a viable candidate in the general election. Even a surreptitious, discrete, or half-hearted campaign could therefore seriously distract a Justice from his or her duties.

Presidential fever also might encourage an aspiring candidate to make public pronouncements about issues that the Court later might later need to adjudicate. McLean, for example, was rightly criticized for publishing a letter in 1848 in which he discussed his views about congressional power to enact legislation concerning slavery in the territories since his contemporaries recognized that this issue could very well come before the Court260 – as it did nine years later in *Dred Scott*. Such extrajudicial comments by judges naturally creates suspicion of judicial bias, either because the judge appears to have pre-judged an issue or because a judge is loath to contradict his earlier expression of his or her views. Although a Justice who created such suspicion could recuse herself from a case involving an issue about which she had spoken, recusal would deprive the Court of her services, thereby foisting more work onto the other Justices. Moreover, the political motivation to make extrajudicial comment about political issues could cause a Justice to violate Canon 3(10), which prohibits a judge from “making pledges, promises or commitments” regarding “cases, controversies or issues that are likely to come before the court.” Such comments could raise questions about the Justice has an “open mind.”261

Even if a Justice who had presidential ambitions refrained from making statements about issues or cases that might come before the Court, she might be tempted to defend her votes or opinions in cases that the Court already had decided. Moreover, a former Justice who campaigned for the presidency also might feel the need to publicly defend his or her judicial votes and opinions or even to boast of them. In addition to generating questions about whether the Justice had allowed politics to influence the Justice’s work on the Court, such public comments also might detract from the integrity of the Justice’s written opinions by creating confusion about what the Justice – and perhaps the Court – actually intended to say.262 As the

260 [WARREN, supra at 270-71.]

261 The Terminology of the *Model Code of Judicial Conduct* defines “impartiality” within the meaning of Canons 2A and 3(10) as denoting absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.”

262 Justice Brennan aptly observed that “the reasons behind the social policy fostering an independent judiciary also require that the opinions by which judges support decisions must stand on their own merits without embellishment or comment from the judges who write or join them.” Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 633 (1962), quoting Address by William J. Brennan, Jr., Student Legal Forum, Charlottesville, Virginia, Feb. 17, 1959.
columnist Walter Lippmann observed in 1935 when some Republicans were advocating the presidential candidacy of Justice Roberts, “what could be more embarrassing than a political campaign in which a justice of the Supreme Court was defending his judicial opinions from the end of a railroad car?” 263

The presidential ambition of a Justice also is likely to create discord and disharmony on the Court. 264 Acutely aware that they lack the powers of the purse and the sword, Justices tend to be fiercely protective of the Court’s institutional integrity and independence. They are ever mindful that the perception that the Court is above politics is essential in maintaining the public respect that the Court must have in order to retain its authority. Any Justice who threatens to erode this respect by abusing her office as a platform for higher office is likely to encounter stinging disapproval from her colleagues. Any provocation of ill-will, friction, resentment, or suspicion among the Nine cannot help but to interfere with the efficient disposition of the Court’s work. At the very least, the perception that a Justice harbored political ambition might interfere with the manner in which the Court conducts its business. For example, a chief justice or senior dissenting justice might be reluctant to assign a politically significant opinion to such a justice. 265 Justices also are likely to resent a colleague who might not be carrying his or her full work load because he or she is distracted by presidential ambition. 266

Since presidential aspirations among Justices may so severely compromise the Court’s integrity, Presidents should be circumspect about nominating persons who seem likely to use the Court as a stepping stone to the presidency. As the foregoing history indicates, most of the many Justices who harbored presidential ambitions had served in high ranking legislative and judicial offices before joining the Supreme Court, and a handful also had been prominent state jurists. 267


264 For example, Black, despite his own presidential ambitions, was dismayed by the persistent rumors that Douglas would be willing to become a presidential or vice presidential Candidate. NEWMAN, supra, at 329. Similarly. Jackson appears to have been much annoyed by Douglas’s presidential Aspirations. CULVER and HYDE, supra, at 317. Waite privately made sarcastic remarks about Davis’s presidential ambitions and also appears to have been annoyed by Field’s efforts to wangle the Democratic presidential nomination. MAGRATH, supra at 286-87.

265 As Paul Finkelman has observed, “McLean’s quadrennial quest for the White House surely affected his position on the Court. When Chief Justice Taney handed out assignments for majority opinions, he must have understood that allowing McLean to write an important opinion would only heighten McLean’s political profile. Since McLean and Taney were not political allies, the Chief Justice had little reason to support McLean’s aspirations.” Finkelman, supra, at 525.

266 Bell, supra at 597.

267 In deploring the political ambitions among Justices, Frankfurter once alleged that “the most
A President therefore should be particularly careful to take the danger of presidential ambition into account when he nominates a politician to the Court. Although no prominent political leader has been appointed to the Court for nearly sixty years, several such persons are reported to have received consideration for the presidency. In particular, President Clinton reportedly considered the nomination of former Arizona Governor Bruce Babbitt, former New York Governor Mario Cuomo, and Senator George Mitchell of Maine.

The danger of presidential ambition among Supreme Court Justices remains present even though it is virtually unthinkable that any sitting Justice today would openly campaign for the presidency. Such a campaign would severely compromise contemporary expectations of judicial behavior, and it also would violate Canon 5A(2) of the ABA Model Code of Judicial Conduct, which requires a judge to resign upon becoming a candidate for non-judicial office.

Similarly, it would be almost impossible for any Justice today to conduct a covert campaign for the presidency. Such campaigns were possible until the middle of the twentieth century because most delegates until then were selected by party organizations and usually were not pledged to vote for any candidate. Justices such as McLean, Chase, Miller, and Field therefore could quietly line up support among delegates without attracting public attention. Since, however, most delegates today are selected in party primaries in which voters either vote directly for a candidate or select delegates who are committed to a particular candidate, a Justice could not hope to become a serious contender without openly declaring his or her candidacy. The present process of selecting nominees, however, makes because most delegates today are selected in primaries, and require herculean fund-raising efforts that would be impossible to conceal. At the present time, as in the past, age is another reason why more Justices have not sought the presidency. Even at the time of their appointment, many Justices have pushed the outer limits of the acceptable age range for presidential timber, and most Justices at any given time have been far past the average age of presidential contenders.

If a Justice who wanted the presidency were unwilling to resign from the Court, his or her only option therefore would be to surreptitiously build support as a compromise candidate to which a convention might turn if the candidates who ran in the primaries could not obtain the majority vote necessary for nomination. A covert campaign of this nature, however, would be unrealistic today. Long gone is the era in which conventions would nominate “dark horse” candidates or draft a nominee who had not sought the nomination. The juggernauts of front-running candidates and the imperative of party unity have ensured that party conventions have numerous and in many ways the worst offenders” were “men who came to the Court from state courts, in some instances with long service on such courts.” Frankfurter, The Supreme Court in the Mirror of Justices, supra, at 787. Frankfurter, however, provided no examples, and there is little empirical support for his thesis. Aside from McLean, who served three years on the Ohio Supreme Court, Field, who was a justice of the California Supreme Court for four years, Davis, who served for fourteen years as an Illinois circuit court judge, and Black, who served briefly as a municipal court judge, none of the Justices who have harbored serious presidential aspirations have been state court judges.
become coronations rather than convocations for selecting candidates. Not since 1952 has any major party’s convention needed more than one ballot to nominate a presidential candidate. Moreover, since there is today an unwritten understanding that voters rather than politicians should select presidential candidates, it is extremely unlikely that any convention would nominate anyone who had not obtained a mandate from members of his or her political party by winning substantial numbers of votes in presidential primaries, even if a convention were deadlocked.

Despite these formidable odds, however, a Justice might still convince herself that a deadlocked convention might seek her services as a candidate. Even a remote prospect might encourage a politically ambitious Justice to write opinions in a manner that would not offend powerful constituents of her own party. Unscrupulous interest groups that wanted to influence the Justice might help fan the flames of her ambition. As one scholar has observed, “[p]olitical ambitions are of course tempting apples of discord in a judicial Eden. When lobbies form, uninvited but perhaps not sufficiently discouraged, to promote the fortunes of individual justices, additional strain is put upon judicial otherworldliness.”

Moreover, there is a very real danger that a highly political Justice might try to use the Court as a platform for a future presidential bid.

Even many justices who have no political constituency may tend to harbor secret presidential ambitions because their elevation to the Court has catapulted them into political prominence. If any of the Justices appointed during the past half century had sought the presidency before they became members of the Court, their candidacies would have been jokes. Although none of these Justices, with the possible exception of O’Connor, would likely have had the ability to raise sufficient capital and attract a sufficient number of votes to have a significant chance of winning a presidential nomination, any of these Justices probably would have received reasonably serious consideration by the news media and at least some political operatives and potential donors if they had sent out feelers from the bench or had resigned from the Court to actively campaign. Similarly, their appointment to the bench would have transformed any vice presidential ambitions from the realm of fantasy to at least the level of improbability. The danger that Supreme Court Justices will seek the presidency is therefore not entirely eliminated by the appointment of Justices who have not served in elective office.

Another danger of appointing a politician may arise from their connections to the nominating president. All four of Truman’s nominees were personal friends, and three had been his colleagues in the U.S. Senate. At least three of these Justices receive low rankings from Court historians. Although some presidential friends have turned out to be distinguished Justices, a President’s appointment of close political ally can encourage the erosion of separation of powers insofar as some presidents have remained in close contact with “their” Justices. The most egregious example was Abe Fortas, who offered political advice to Lyndon Johnson on a virtually daily basis and even is reported to have helped him write speeches and select Vietnam bombing targets. Since Johnson, no political buddy of a president has served on the Court. Harriet Miers’s close association with George W. Bush as White House counsel helped sink her

nomination in 2006.

If a prominent political figure were appointed to the Court, there also is a danger that the Justice would fail to make the adjustment from the robust world of politics to the more hermetic life of the Court. Such a justice might fail to recognize that public respect for the Court and the integrity of its rulings are jeopardized when a Justice makes extra-judicial comments about non-judicial issues. Although Justices can facilitate public understanding of the law through public comments on judicial issues, a Justice who is too accustomed to the limelight of the media might be tempted to comment indiscreetly about the inner workings of the Court or the Court’s opinions, which usually should speak for themselves. Too many American institutions, public and private, have been trivialized by our culture of celebrity. The Court has largely avoided this virus, and the next Justice would do well to emulate Souter, who shunned unnecessary publicity and faithfully and quietly performed his duties without fanfare or hoopla. This is not too much to ask of a professional politician, but it may be too much to expect.

Of course, the Court might benefit from the appointment of a prominent politician who had extensive experience as in the executive or legislative branches of state or federal government. Executive experience might be especially useful for a chief justice. Warren’s long tenure as governor of California, for example, is credited with helping him achieve a consensus in Brown v. Board of Education and helping to maintain harmony on the Court during his years as chief justice. Similarly, Taft’s experience as president enabled him to persuade Congress to enact the Judiciary Act of 1923, which gave the Court much greater discretion over its docket. 269 There is, however, no clear correlation between experience as an elected official and distinction as a Supreme Court justice. Several of the Court’s most distinguished members, including Chief Justice Warren, Marshall, Chase, and Taft, had substantial experience in elective office. On the other hand, many other notable justices, including Holmes, Brandeis, and Cardozo, never were elected to public office.

As various commentators have pointed out during recent years, a president who wanted to diversify the career backgrounds of the Justice could start by appointing a Justice who had trial court experience. This would be particularly useful in the many cases involving criminal procedure that come before the Court. O’Connor’s experience as a state trial judge clearly made her a more effective Justice. Hugo Black was derided at the time of his nomination in 1937 because his only judicial experience was as a judge of Birmingham’s lowly night police court, but Black’s tenure on this grassroots court is credited with helping to forge his sensitivity toward the needs of poor persons and African-Americans. During the past century, only a handful of Justices -- Clarke, William J. Brennan, Sanford, Vinson, and Whittaker – have served as federal

269 It is ironic that the only Justice who also served as a President –William Howard Taft – desired a Supreme Court position much more than he ever wanted the presidency. Taft who was president from 1909 to 1913 before serving as Chief Justice from 1921 to 1930, had turned down two offers of an associate justiceship in 1902 because he wanted to complete his work as governor of the Philippines and in 1906 because his wife Helen strongly wanted him to remain available for the presidency. A LPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 22-23, 27, 30 (1964)
trial judges. Sonia Sotomayor’s experience as a federal trial judge before she became a Court of Appeals judge presumably was one of the reasons why Obama appointed her to the Supreme Court in 2009.

The danger of political ambition among Supreme Court Justices also provides a sound reason for rejecting proposals for constitutional amendments to limit the tenure of Justices. Except for mandatory retirement at an age when most men or women would be too old for consideration for the presidency or vice presidency, any limitation of tenure might encourage politically ambitious Justices to trim their judicial opinions in order to promote their political prospects after the expiration of their judicial terms. Limitation of tenure would seem even more likely to encourage public speculation that at least some Justices were rigging their opinions, if not their votes, to court political popularity. Since public faith in judicial independence is nearly as important as judicial independence itself, public suspicion that Justices were allowing political ambition to influence their votes in anticipation of the day when their terms would expire would have a highly corrosive effect on the integrity of the judiciary even if the Justices were in fact beyond reproach in their refusal to allow political ambition to influence their opinions.

Some critics of Justices who aspire to the presidency have proposed constitutional amendments to restrict the ability of Justices to seek the presidency. Chief Justice Waite favored such an amendment. In the wake of the recent presidential bids of Field and Miller, The Washington Post in 1884 called for an amendment making any Supreme Court Justice forever ineligible for any elective office. Hughes remarked privately late in his life that he wished that a constitutional amendment had prevented him from resigning from the Court to accept the Republican presidential nomination in 1916.

In 1954, both houses of Congress considered a proposed amendment that would have barred Justices from the presidency within five years of leaving the Court. Senator John Marshall Butler of Maryland, who sponsored the Senate resolution, explained that the legislation “not only would remove possible political temptation from the Justices, but would also remove any suspicion that the judicial deliberation of the Justices was colored by political aspirations.”

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270 TRIMBLE, supra at 144, quoting letter from Waite to H.L. Bond, Nov. 7, 1875.

271 DubecK, supra at 598, quoting Let Us Amend the Constitution (editorial), WASH. POST, Feb. 17, 1884, at 4.


273 Id., at 6. Butler believed that the measure was necessary “in order to protect the Justices from any suspicion that they, consciously or unconsciously, might be seeking public favor.” Id. Butler declared that “once a man has become of the judiciary, he should devote his entire thought toward serving our Government without the slightest intimation that he might some day divest himself of his judicial robes to assume a different role in his country’s Government.” Id.
Similarly, a prominent New York attorney because “[o]ver the years many presidential bees have been lodged in Supreme Court bonnets. Future bees are most apt to light in the bonnets of those jurists least dedicated to their judicial duties and most open to suspicion of political aspirations.”

Likewise, the president of the American Law Institute, Harrison Tweed, expressed approval of the amendment because it would “protect the high repute of the Court” by helping to keep “politics out of the Court.”

Restraints on political availability also might discourage some highly qualified persons from accepting a nomination to the Court. Chase and Warren, for example, might not have been willing to have become chief justice if their appointment had necessarily terminated their presidential opportunities. This is why at least one member of the House of Representatives opposed the proposed amendment to bar former Justices from seeking the presidency within five years after leaving the Court.

Such an amendment also seems unfair to the Justices because it deprives them of a right that other Americans enjoy. An amendment also could have the unintended consequence of actually diminishing public confidence in judicial independence because it would suggest that Justices were politically ambitious. Even though former Justice Roberts favored an amendment to prohibit Justices from seeking the presidency within five years of leaving the Court, he acknowledged that some opposition to the proposed amendment arose from the belief that it placed Justices “in a different class than any other official and that it shows kind of a distrust.”

Moreover, such a provision could deprive the nation of much needed leadership in a time of crisis, when a particular Supreme Court Justice might be uniquely able to provide the type of experience or talent that the nation desperately needed. Or a Justice might be so respected that only he or she could provide sorely needed party unity or national unity. As we have seen, the perception in 1916 that Hughes was the only person who could unite the Republican Party went

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274 Id., at 36 (testimony of Edwin A. Falk, chair of the Special Committee on Federal Courts of the Association of the Bar of the City of New York).

275 House Hearings, supra at 44 (statement of Harrison Tweed on S.J. Res. 44).

276 Id. [House Hearings], at 12 (testimony of Rep. George Anthony Dondero of Michigan). Although Dondero expressed his opinion that Chase “would have rejected the appointment offered to him...because Chase had presidential ambitions, and particularly in 1864,” Chase’s presidential ambitions in 1864 could not have influenced his decision to accept the chief justiceship since Lincoln did not nominate Chase until December 6, one month after the election. Chase’s future presidential ambitions, however, might well have caused him to reject the nomination. Whether this would have been good for the Court and country must remain a subject of speculation.

277 Id. [House Hearings], at 21. Roberts made clear, however, that he did not necessarily share this reservation.
far toward ameliorating criticism of his resignation from the Court to accept his party’s presidential nomination.

IV. Conclusion

Presidential fever rarely was dormant among Supreme Court Justices before the middle of the twentieth century and at times it was rampant. Although no Justice has sought the presidency during the past half century, the danger of presidential aspirations among Justices never disappears. Such ambition is hazardous to the Court’s integrity because a politically ambitious Judge could alter his votes or opinions to promote his availability for the presidency. Even the mere appearance of such temptation could impair the prestige that the Court must have in order to command public support for its decisions. Although the Court might benefit from the experience of a career politician, presidents should nominate such persons only if they are convinced that the Justice lacked any further political ambition.