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# THE POLITICS OF CRITICIZING JUDGES

*Anthony Champagne*\*

## I. INTRODUCTION

In a national broadcast, a leading political figure said, the Supreme Court “improperly set itself up as a third house of the Congress—a super-legislature . . . .”<sup>1</sup> The politician added that the Court “read[s] into the Constitution words and implications which are not there, and which were never intended to be there.”<sup>2</sup> Another major politician used a national forum to attack Supreme Court decisions, claiming the rulings were evidence not of judicial independence, but rather of “judicial supremacy, [and] judicial autocracy.”<sup>3</sup> Both politicians were hostile towards decisions of the Supreme Court and its power to interpret the meaning of the Constitution. The first criticism was by President Franklin D. Roosevelt in March 1937,<sup>4</sup> while the second was by former House Majority Leader Tom DeLay in August 2005.<sup>5</sup>

Criticism of the Court and of judges is not a new development. Indeed, critiques such as those uttered by Roosevelt and DeLay appear even in the earliest era of American history. Thomas Jefferson, for example, condemned Chief Justice John Marshall for his “twistifications of the law,”<sup>6</sup> for “traveling out of his case to prescribe what the law would be in a moot case not before the

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1. ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 23 (1971) (quoting Turner Catledge, *Time is Held Vital*, N.Y. TIMES, Mar. 10, 1937, at A1).

2. *Id.*

3. David D. Kirkpatrick, *Conservative Gathering is Mostly Quiet on Nominee*, N.Y. TIMES, Aug. 15, 2005, at A15.

4. SCIGLIANO, *supra* note 1, at 23.

5. Kirkpatrick, *supra* note 3.

6. SCIGLIANO, *supra* note 1, at 24–25.

Court,”<sup>7</sup> and for being a “crafty chief judge.”<sup>8</sup>

Yet the current criticism of the Supreme Court, and of the judiciary in general, is shrill, angry, and appears to reflect powerful political forces. For example, then House Majority Leader Tom DeLay threatened to withhold funds from the courts.<sup>9</sup> Two influential evangelists have not only been working to get conservative judges on the bench, but also have been trying to find ways to remove some sitting judges.<sup>10</sup> Evangelist Pat Robertson has spoken about liberal judges “destroying a fabric that holds our nation together”<sup>11</sup> and of posing a threat “probably more serious than a few bearded terrorists who fly into buildings.”<sup>12</sup> Tony Perkins, president of the Family Research Council has stated, “[t]here’s more than one way to skin a cat, and there’s more than one way to take a black robe off the bench.”<sup>13</sup> Michael Schwartz, chief of staff to Oklahoma Senator Tom Coburn, has been quoted as saying, “I’m a radical! I’m a real extremist. I don’t want to impeach judges. I want to impale them!”<sup>14</sup> Gary Cass, the director of the Center for Reclaiming America, has publicly supported the Constitution Restoration Act, which would authorize Congress to impeach judges who, among other things, refuse to acknowledge “God as the sovereign source of law, liberty, or government”<sup>15</sup> or who rely on international law in their rulings.<sup>16</sup>

The attacks on the judiciary are largely led by religious conservatives who see themselves as engaged in a battle with secularists over the remaking of the federal judiciary. Jay Sekulow

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7. *Id.*

8. *Id.*

9. Peter Wallsten, *Evangelical Leaders Target Courts*, DALLAS MORNING NEWS, Apr. 23, 2005, at 11A (“We set up the courts. We can unset the courts. We have the power of the purse.”).

10. *Id.* (describing the efforts of Tony Perkins, President, Family Research Council, and James Dobson, Founder, Focus on the Family).

11. *Poor Judgment: Judges Should Not Try to Stifle Criticism*, THE MONITOR, May 31, 2005, available at <http://www.themonitor.com/SiteProcessor.cfm?Template=/GlobalTemplates/Details.cfm&StoryID=7487&Section=Opinion>.

12. *Id.*

13. Wallsten, *supra* note 9.

14. Max Blumenthal, *In Contempt of Courts*, NATION, Apr. 11, 2005, <http://www.thenation.com/doc/20050425/blumenthal>.

15. *Id.*

16. *Id.*

of the American Center for Law and Justice has identified the struggle as a battle against “[t]hose who are opposed to our values, our beliefs, our faiths, our practices . . . .”<sup>17</sup> Sekulow views the federal judiciary as the last hope of secularists to exert their influence; and he views his job, and the jobs of other religious conservatives, as preventing the secularists from succeeding.<sup>18</sup>

Religion is an important part of American life.<sup>19</sup> The U.S. population as a whole is very religious, and the trend since the late 1980s has been toward stronger religious beliefs.<sup>20</sup> Eighty-one percent of Americans say that prayer is important in their daily lives; 81% percent believe in a Judgment Day; and 87% say they have never doubted the existence of God.<sup>21</sup> Although not everyone shares the same moral values, adherence to religious beliefs in America is so high that neither political parties nor politicians can ignore or minimize the importance of religious values in politics.<sup>22</sup>

Opposition to judges and judicial decisions by religious conservatives has been building for years, dating back to the activism of the Supreme Court in the Earl Warren era.<sup>23</sup> Religious conservatives objected to numerous Supreme Court decisions during that period, including bans on prayer and Bible reading in public schools, teaching the theory of evolution, and abortion.<sup>24</sup> These decisions helped politicize religious fundamentalists,<sup>25</sup> who felt

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17. Jeanne Cummings, *In Judge Battle, Mr. Sekulow Plays a Delicate Role*, WALL ST. J., May 17, 2005, at A1.

18. *See generally id.* (describing efforts of Sekulow to mobilize Christian activists to influence appointment of conservative judicial nominees).

19. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *THE 2004 POLITICAL LANDSCAPE: EVENLY DIVIDED AND INCREASINGLY POLARIZED* 65 (2004), available at <http://people-press.org/reports/pdf/196.pdf>.

20. *Id.*

21. *Id.*

22. *See* PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *PUBLIC DIVIDED ON ORIGINS OF LIFE: RELIGION A STRENGTH AND WEAKNESS FOR BOTH PARTIES* 1, 4–6 (2005), available at <http://people-press.org/reports/pdf/254.pdf> (discussing public disenchantment with the attitudes towards religion of both major parties and the fact that many Americans are concerned with a Conservative Values agenda).

23. MATTHEW C. MOEN, *THE CHRISTIAN RIGHT AND CONGRESS* 11–12 (1989).

24. *Id.* at 12.

25. *See id.* at 12–14.

provoked by such events as the *Roe v. Wade*<sup>26</sup> decision, a gay rights ballot proposition, the IRS challenge to tax exemption for certain private schools, and the proposed Equal Rights Amendment.<sup>27</sup>

In 1976, Jimmy Carter demonstrated the value of mobilizing Christian Evangelicals whose votes were essential to his success in the presidential election.<sup>28</sup> More recently, religious conservatives objected to court decisions involving “under God” in the Pledge of Allegiance, gay marriage, Ten Commandments displays in court houses, and “partial-birth” abortion.<sup>29</sup> As battles over judicial nominations have grown more contentious between the two major political parties, religious conservatives have supported President George Bush’s nominations more fervently and have opposed the current state of the American judiciary with equal vigor.<sup>30</sup> When courts refused to intervene in the Terry Schiavo case, the religious conservatives’ fight to control the courts moved into high gear.<sup>31</sup> As Family Research Council President Tony Perkins noted, “[e]very issue we care deeply about has the fingerprints of judges on it.”<sup>32</sup>

The religious conservative agenda is clear: criticize court decisions or remake the judiciary so as to be able to overturn those decisions completely.<sup>33</sup> In contrast, there are many who support current legal doctrines regarding prayer, abortion, the right to die,

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26. 410 U.S. 113 (1973).

27. ROBERT ZWIER, *BORN-AGAIN POLITICS: THE NEW CHRISTIAN RIGHT IN AMERICA* 23–27 (1982).

28. *Id.* at 29–30 (discussing how Carter’s candidacy legitimized political involvement for born-again Christians).

29. Debra Rosenberg, *The War On Judges*, NEWSWEEK, Apr. 25, 2005, at 23, 24.

30. See Wayne Slater, *Christian Conservatives Put Clout Behind Anti-filibuster Movement*, DALLAS MORNING NEWS, May 16, 2005, at 1A.

31. Rosenberg, *supra* note 29, at 23.

32. *Id.* at 24; see also Robert H. Bork, *Here Come the Judges*, NAT’L REV., Aug. 14, 2000, at 37, 37–38 (discussing why social conservatives have become so critical of the judiciary: judges “have assumed the power to decide the most serious cultural and social issues facing America[;]” in addition, “[t]he attempt to rein in a runaway liberal Court is a necessary defense of the institutional structure of American democracy”).

33. See Howard Fineman, *Ready to Blow*, NEWSWEEK, May 23, 2005, at 28, 30 (“Social conservatives and right-to-lifers want a federal judiciary that strongly opposes abortion, gay marriage and manipulation of the human gene pool . . .”).

gay rights, and other issues.<sup>34</sup> The remainder of this paper will demonstrate that this battle over the courts is more than just a battle between cultural perspectives of competing interest groups—religious conservatives versus those who support a more secularist view of the law. This paper will show these competing cultural perspectives are also reflected in vastly opposing views among members of the Democratic and Republican Parties.

## II. THE INVOLVEMENT OF THE PARTIES

Professor Mark Silverstein notes that the New Deal focus on bread-and-butter economic issues that built support for the Democratic Party among working-class Americans came to an end in 1972 with the McGovern presidential campaign.<sup>35</sup> Suburban professionals replaced urban blue collar workers as the primary base of the Democratic Party.<sup>36</sup> New Dealers were replaced by New Progressives, who were interested in such diverse issues as civil rights, women's rights, consumer rights, and the environment.<sup>37</sup> Despite the fact that Republicans increasingly dominated the political branches of government, the New Progressives proved remarkably successful in achieving their objectives through the courts.<sup>38</sup>

Ronald Reagan's 1980 presidential campaign attracted two groups of core constituents: Republicans who favored Reagan's tax and economic policies and social conservatives swayed by Reagan's conservative social policies.<sup>39</sup> Social conservatism quickly became the primary focus of the Reagan Administration, and federal courts proved a superb scapegoat. For example, although Reagan wanted to return prayer to the classroom, federal court decisions prohibited him from doing so.<sup>40</sup> Thus, the first agenda item was to remake federal

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34. See MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 117 (1994).

35. *Id.* at 86–87.

36. *Id.*

37. See *id.* at 93; see also John C. Green et al., *The Christian Right's Long Political March*, in *THE CHRISTIAN RIGHT IN AMERICAN POLITICS: MARCHING TO THE MILLENNIUM* 14 (2003) (“Among the strongest opponents of the Christian Right are proponents of liberal social policy: feminists, advocates of gay rights, environmentalists, civil libertarians, and critics of organized religion.”).

38. See SILVERSTEIN, *supra* note 34, at 95.

39. *Id.* at 113–16.

40. *Id.* at 116–18.

courts through the appointment of socially conservative judges, including the highly visible Robert Bork.<sup>41</sup> Twenty years later, the social conservatives in the Republican Party still desired to remake the federal judiciary in order to accomplish their objectives as they continued to lose to the New Progressives on key issues.<sup>42</sup>

According to one study, white evangelicals made up 9% of the electorate by 1988, and 81% of that group voted Republican.<sup>43</sup> White evangelicals were becoming as important to the base of the Republican Party as African-Americans were to the Democrats.<sup>44</sup> Indeed, there is some parallel in their voting power within the two parties—African-Americans comprised 10% of the registered voters and 65% voted Democratic.<sup>45</sup> Something was clearly happening to the two political parties. They were separating on social issues such as abortion, school prayer, gay rights, and so on.<sup>46</sup> Social issues were becoming focal points for partisan battles as the two parties drifted further apart.<sup>47</sup> Given the importance of court decisions over these social issues, debates surrounding the current and future composition of the judicial branch inevitably became politicized.

### III. PARTY DIVISIONS ON SOCIAL ISSUES

Researchers John Green, Mark Rozell, and Clyde Wilcox have

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41. *See id.* at 117, 120–22.

42. *See* Wallsten, *supra* note 9.

43. SILVERSTEIN, *supra* note 34, at 115 n.28.

44. Press Release, Annenberg Pub. Policy Ctr., Blacks, Hispanics Resist Republican Appeals but Conservative White Christians are Stronger Supporters than in 2000, National Annenberg Election Survey Data Show 1 (July 25, 2004), [http://www.annenbergpublicpolicycenter.org/naes/2004\\_03\\_religion-release\\_07-26\\_pr.pdf](http://www.annenbergpublicpolicycenter.org/naes/2004_03_religion-release_07-26_pr.pdf).

45. *Id.* at 4.

46. *See* Fineman, *supra* note 33, at 30.

47. *See* LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS* 32–35 (2000) (Strong partisans make up about one-third of the electorate. Strong Republicans have much more favorable feelings toward “conservatives” and strong Democrats have more favorable feelings toward “liberals.” The greater ideological divide between the parties means that there exists less room for moderation and compromise.); *see also* Anthony Champagne, *Political Parties and Judicial Elections*, 34 *LOY. L.A. L. REV.* 1411, 1424–1425 (2001) (“The greater ideological divide among the parties suggests that campaigns between the competing parties, including judicial campaigns, will be more bitter and hard fought.”).

observed that, “[s]ecularists have become a potent constituency in the Democratic Party, reflecting the rise of Christian conservatives in the GOP.”<sup>48</sup> Several polls that find considerable divergence in views on social issues between Democrats and Republicans confirm this statement.<sup>49</sup> Long-term data from the National Election Studies, for example, shows an increased widening of opinion between Democrats and Republicans over the question of whether, by law, a woman should always be able to obtain an abortion as a matter of personal choice.<sup>50</sup> To a large degree, this question will be decided by the courts rather than by the political process. The fact that the two parties are so divided on a matter that is inherently a judicial issue exposes the judiciary to criticism no matter how it rules on the abortion question.

The political conflict that has emerged between Democrats and Republicans goes well beyond abortion. It also involves other topics that are primarily judicial in nature. Gay rights, for example, is an issue where the judiciary has played a major role.<sup>51</sup> Recent poll data also shows a gulf between the opinions of Democrats and Republicans in this area.<sup>52</sup> On the broader question of traditional moral values, a concept that appears to encompass issues of abortion, gay rights, women’s rights, and other matters involving moral tensions that are often dealt with by the judiciary, more Republicans believe moral values are the most important issue in choosing a President.<sup>53</sup> Republicans also appear less willing to alter their values

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48. Green et al., *supra* note 37, at 14.

49. *See infra* pp. 851-852, tbls.1-2.

50. *See* AM. NAT’L ELECTION STUDIES, THE NES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR (2004), [http://www.umich.edu/~nes/neguide/2ndtable/t4c\\_2b\\_4.htm](http://www.umich.edu/~nes/neguide/2ndtable/t4c_2b_4.htm); *see infra* p. 854, fig.1.

51. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 558 (2003) (holding that the Due Process Clause protects the rights of consenting adults, including members of the same sex, to engage in intimate sexual behavior); *Romer v. Evans*, 517 U.S. 620, 620 (1996) (holding that an amendment to the Colorado Constitution that specifically denied homosexuals legal protection from discrimination violated the Equal Protection Clause because the classification was unrelated to a legitimate state interest).

52. *See infra* p. 851, tbl.1 (showing significant political divergence in “support for Gay Marriage” and “No Legal Recognition for Gays”); p. 855, fig.2. *But see infra* p. 851, tbl.1 (showing only a 2% difference in Republican and Democrat “Support for Gay Civil Unions”).

53. *See infra* p. 852, tbl.2 (showing that 80% of the polled Republicans believe moral values are the most important issue in deciding their presidential



in the face of changing conditions.<sup>54</sup>

Additional polling data indicates similar differences between Republicans and Democrats on other issues that are primarily judicial in nature.<sup>55</sup> Democrats are 8% more likely to have supported the removal of the Schiavo feeding tube than Republicans.<sup>56</sup> While Democrats and Republicans have similar levels of support for gay civil unions, Democrats are far more supportive of gay marriage.<sup>57</sup> In contrast, Republicans are more likely to oppose any legal recognition of gay relationships.<sup>58</sup> Forty-seven percent of Republicans believe President Bush should nominate justices who would overturn *Roe v. Wade*,<sup>59</sup> but only 26% of Democrats share this belief.<sup>60</sup> A relatively new social issue involves whether pharmacists should be permitted to refuse to sell prescribed birth control pills.<sup>61</sup> Only 12% of Democrats support pharmacists being allowed to refuse, but over twice that many Republicans believe pharmacists should be allowed to do so.<sup>62</sup> Approximately one third of Republicans support physician-assisted suicide, as compared to more than half of Democrats.<sup>63</sup> Republicans are more supportive of school prayer by a margin of 10% over Democrats, and there is an 8% difference in Republican support of a ban on “partial birth” abortions versus Democratic support of such a ban.<sup>64</sup> There is a substantial difference between Republicans and Democrats over whether the “morning-after” pill should be allowed without a prescription, and 88% of Republicans support laws requiring parental consent prior to abortions.<sup>65</sup> A huge gulf—a difference of thirty-two percentage points—exists between Republican and Democratic support of the death penalty for convicted murderers, and there is a twenty

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vote compared with only 18% of Democrats).

54. See *infra* p. 857, fig.4.

55. See *infra* p. 851, tbl.1 (showing differences in opinions of Republicans and Democrats on a variety of social issues).

56. See *infra* p. 851, tbl.1.

57. See *infra* p. 851, tbl.1.

58. See *infra* p. 851, tbl.1.

59. 410 U.S. 959 (1973).

60. See *infra* p. 851, tbl.1.

61. See Cummings, *supra* note 17.

62. See *infra* p. 851, tbl.1.

63. See *infra* p. 851, tbl.1.

64. See *infra* p. 851, tbl.1.

65. See *infra* p. 851, tbl.1.

percentage point difference between Republicans and Democrats over the death penalty for juveniles convicted of murder.<sup>66</sup> Finally, 44% of Republicans believe that not destroying embryos is the most important issue regarding stem cell research, compared to only 24% of Democrats.<sup>67</sup>

This data suggests that both the social issues the courts have adjudicated, and those they are likely to encounter in the near future, have brought the judiciary into the factional political arena. Consequently, the composition of the judiciary and the decisions it makes becomes political.

#### IV. SOCIAL VALUES IN ELECTION POLITICS

Existing data also indicates a significant correlation between views on social issues and voting patterns in national elections.<sup>68</sup> It is notable that Protestants, especially white Protestants and Evangelical or “Born Again” Christians, overwhelmingly supported George W. Bush over John Kerry in the 2004 elections.<sup>69</sup> These voters backed Bush with 78% support, and comprised 23% of the electorate in 2004<sup>70</sup> compared to only 9% of the electorate in 1988.<sup>71</sup> Kerry, a Catholic himself, was unable to carry the Catholic vote.<sup>72</sup>

Seventy-three percent of voters who believed abortion should be legal in all cases supported John Kerry, as well as 61% of voters who believed abortion should be legal in most cases.<sup>73</sup> However, 77% of voters who believed abortion should be illegal in all cases, and 73% who believed it should be illegal in most cases, supported George W. Bush.<sup>74</sup> Gay rights is also an issue where there is a deep divide of opinion between the voters in the two parties. Although voters supporting gay civil unions were almost evenly balanced in support for Kerry (47%) versus Bush (52%), voters who supported gay marriage overwhelmingly supported Kerry by a margin of more than

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66. *See infra* p. 851, tbl.1.

67. *See infra* p. 851, tbl.1.

68. *See infra* p. 852, tbl.2.

69. *See infra* p. 852, tbl.2.

70. *See infra* p. 852, tbl.2.

71. SILVERSTEIN, *supra* note 34, at 115 n.28.

72. *See infra* p. 852, tbl.2.

73. *See infra* p. 852, tbl.2.

74. *See infra* p. 852, tbl.2.

fifty percentage points over Bush.<sup>75</sup> In contrast, voters who opposed the legal recognition of gay relationships overwhelmingly supported Bush by a margin of forty-one percentage points over Kerry.<sup>76</sup>

Finally, 80% of political moralists,<sup>77</sup> who comprise 22% of the electorate, overwhelmingly supported Bush.<sup>78</sup> The commitment of this group to moral issues is significant, as demonstrated by their claim that moral values governed their vote over all other political issues, including the economy, job growth, terrorism, the Iraq war, health care, taxes, and education.<sup>79</sup>

## V. CONCLUSION

Attacks on the judiciary are nothing new in the sense that judges have always been subject to criticism in American politics.<sup>80</sup> In another sense, however, a new development is emerging in the current criticisms of the judiciary. During the Roosevelt era, and for many years afterwards, most of the heated battles in American politics were over economic issues and foreign policy questions such as involvement in the Korean and Vietnam Wars.<sup>81</sup> Courts limited their involvement in these debates and, for the most part, deferred to the political branches.<sup>82</sup> However, courts steadily increased their involvement with controversial issues beginning with civil liberties

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75. See *infra* p. 852, tbl.2.

76. See *infra* p. 852, tbl.2.

77. In this Article, this term refers to those voters who believe moral values are the most important factor in choosing a presidential candidate for whom to vote. For a discussion of the various meanings of the term political moralist, see GREEN ET AL., *supra* note 37, at 11.

78. See *infra* See *infra* p. 852, tbl.2.

79. See Beliefnet.com, 2004 Election Exit Poll Results by Religion, [http://beliefnet.com/story/155/story\\_15546\\_1.html](http://beliefnet.com/story/155/story_15546_1.html) (last visited Jan. 16, 2006) (stating that 22% of the electorate listed moral values as the issue that most affected their vote out of the following choices: taxes, education, the war in Iraq, terrorism, economy and jobs, health care, and moral values).

80. SCIGLIANO, *supra* note 1, at 23.

81. See OTIS H. STEPHENS, JR. & JOHN M. SCHEB II, *AMERICAN CONSTITUTIONAL LAW* 42 (3d ed. 2003) ("From 1937 until the mid-1990s, the Court consistently upheld sweeping federal legislation affecting commerce. The Court exercised similar restraint with respect to state laws regulating economic activity."); e.g. *Massachusetts v. Laird*, 400 U.S. 886 (1970) (exemplifying its unwillingness to involve itself in foreign policy issues, the Court denied certiorari because the case raised the political question of the Vietnam War's constitutionality).

82. See STEPHENS, *supra* note 81, at 40.

questions during the Warren Court era and continuing with social issues such as abortion, the free exercise of religion, women's rights, and gay rights.<sup>83</sup> Resolution of these issues was in the judiciary, rather than the political process.<sup>84</sup>

Ultimately, the involvement of the judiciary did have political consequences. Over a period of several decades, social conservatives who viewed many of these court decisions as reflecting immoral or inappropriate values, reacted with a sense of moral urgency.<sup>85</sup> At the same time, people with less traditional or more secular values strongly supported these same decisions.<sup>86</sup> As the previously discussed data demonstrates, these two groups' competing views of judicial decisions materialized in the increasingly divergent views of the Democratic and Republican parties. The gulf between the perspectives of Democrats and Republicans regarding court decisions with significant social ramifications guaranteed that the courts, judges, and their decisions would become part of the national political debate.

It does not appear that the political controversy over the courts will diminish any time soon. The era of "umbrella" political parties where each party had numerous members reflecting a variety of views is gone. Today's parties increasingly reflect sharply divergent views.<sup>87</sup> This development, of course, explains the lack of cooperation and the proliferation of partisanship in Washington. There is no evidence that this pattern will change in the near future. Nor is it likely that the courts can now remove themselves from the political

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83. *See id.* at 42 ("The modern Court has shown heightened concern for civil rights and liberties. This concern was especially pronounced during the Warren era (1953–1969).").

84. *See id.* at 40.

85. Henry Plotkin, *Issues in the Campaign, in THE ELECTION OF 1984: REPORTS AND INTERPRETATIONS* 49, 49 (M. Pomper ed., 1985) (noting that social conservatives in the 1984 elections, "saw America becoming a new Sodom and Gomorrah—a land where the pornographers, atheists, and socialists held sway, threatening to destroy all that was virtuous. Therefore, their participation in electoral politics was not that of just another pressure group but was a holy cause.").

86. *Id.* at 50 (noting the importance of social issues in the 1984 elections and that Walter Mondale, the Democratic nominee, stressed a "wall of separation between church and state" and opposition to the "prolife, antihomosexual, proprayer, and similar thrusts by the Reagan campaign").

87. JACOBS & SHAPIRO, *supra* note 47, at 34–35.

thicket. How, for example, could the courts avoid controversy over such questions as abortion? A reaffirmation of *Roe v. Wade*<sup>88</sup> would lead to intense criticism of the Court by Roe's opponents. Yet, to overturn the decision would lead to a similar response from Roe's supporters. What we now have, for good or ill, is a new era for the American judiciary—an era when battles over control of the judiciary and criticism of the bench reflect the underlying division in the country over its social values.

Long ago, Justice Felix Frankfurter warned against the Court entering the "political thicket" when commenting on the issue of reapportionment of legislatures.<sup>89</sup> The battle over the judiciary today with respect to social issues demonstrates that once the courts enter the "political thicket", it is impossible for them to escape. Yet, courts have survived political controversies in the past, even when, like the thicket of reapportionment, they pose longstanding and seemingly unsolvable problems. There is no reason to believe that the thicket of social issues will be any different.

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88. 410 U.S. 959 (1973).

89. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion); see also David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, in *AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR* 201, 216 (Sheldon Goldman & Austin Sarat eds., 2d ed. 1989) (discussing Frankfurter's pessimism about Court involvement in political thickets, and the fact that although support for the judiciary has ebbed and flowed in American history, the Court has proved remarkably resilient as a policymaker).

TABLE 1

REPUBLICAN AND DEMOCRATIC  
DIFFERENCES ON A VARIETY OF SOCIAL ISSUES

<i>ISSUE</i>	<i>REPUBLICANS AGREE</i>	<i>DEMOCRATS AGREE</i>
Support for Removal of Schiavo Feeding Tube <sup>90</sup>	54%	62%
Support for Gay Marriage <sup>91</sup>	8%	29%
Support for Gay Civil Unions <sup>92</sup>	37%	35%
No Legal Recognition for Gays <sup>93</sup>	54%	34%
Bush Should Nominate Justices Who Would Overturn <i>Roe v. Wade</i> <sup>94</sup>	47%	26%
Pharmacists Should Be Able to Refuse to Sell Birth Control Pills <sup>95</sup>	25%	12%
Support Physician Assisted Suicide <sup>96</sup>	32%	54%
Support Prayer in the Public Schools <sup>97</sup>	76%	66%
Ban partial birth abortion <sup>98</sup>	67%	59%
Allow Morning-after Pill without Prescription <sup>99</sup>	38%	58%

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90. David W. Moore, *Public Supports Removal of Feeding Tube for Terri Schiavo*, GALLUP POLL, Mar. 22, 2005, <http://poll.gallup.com/content/default.aspx?ci=15310&pg1>.

91. CBS News/New York Times Poll: Bush Faces Foreign and Domestic Issues (Feb. 24–28, 2005), [http://www.cbsnews.com/htdocs/CBSNews\\_polls/bush\\_0302.pdf](http://www.cbsnews.com/htdocs/CBSNews_polls/bush_0302.pdf).

92. *Id.*

93. *Id.*

94. Press Release, Quinnipiac Univ. Polling Inst., U.S. Voters Favor Death Penalty 2-1, Quinnipiac University National Poll Finds; But Voters Prefer Life Without Parole Over Death (Dec. 15, 2004), <http://www.quinnipiac.edu/x11367.xml?ReleaseID=596>.

95. *Religion at the Drugstore*, CBSNEWS.COM, Nov. 23, 2004, <http://www.cbsnews.com/stories/2004/11/23/opinion/polls/main657413.shtml>.

96. *Poll: Physician-Assisted Suicide*, CBSNEWS.COM, Nov. 24, 2004, <http://cbsnews.com/stories/2004/11/24/opinion/polls/main657617.shtml>.

97. Wendy W. Simmons & Frank Newport, *Issue Referendum Reveals Mix of Liberal and Conservative Views in America Today*, GALLUP POLL, Nov. 1, 2000, <http://poll.gallup.com/content/default.aspx?ci=2374&VERSION=p>.

98. *Id.*

99. THE PEW RESEARCH CTR. FOR PEOPLE AND THE PRESS & THE PEW FORUM ON RELIGIOUS AND PUBLIC LIFE, ABORTION AND RIGHTS OF TERROR SUSPECTS TOP COURT ISSUES: STRONG SUPPORT FOR STEM CELL RESEARCH

TABLE 1 (CONTINUED)

<i>ISSUE</i>	<i>REPUBLICANS AGREE</i>	<i>DEMOCRATS AGREE</i>
Require Parental Consent before Abortion <sup>100</sup>	88%	63%
Support Death Penalty for Murderers <sup>101</sup>	84%	52%
Support Death penalty for juveniles convicted of murder <sup>102</sup>	46%	26%
Not Destroying Embryos Is Most Important Issue Regarding Stem Cell Research <sup>103</sup>	44%	24%

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18 (2005), <http://pewforum.org/publications/surveys/social-issues-05.pdf>.

100. *Id.*

101. *Id.* at 20.

102. *Id.*

103. *Id.*

TABLE 2

RELIGION AND THE 2004 ELECTION<sup>104</sup>

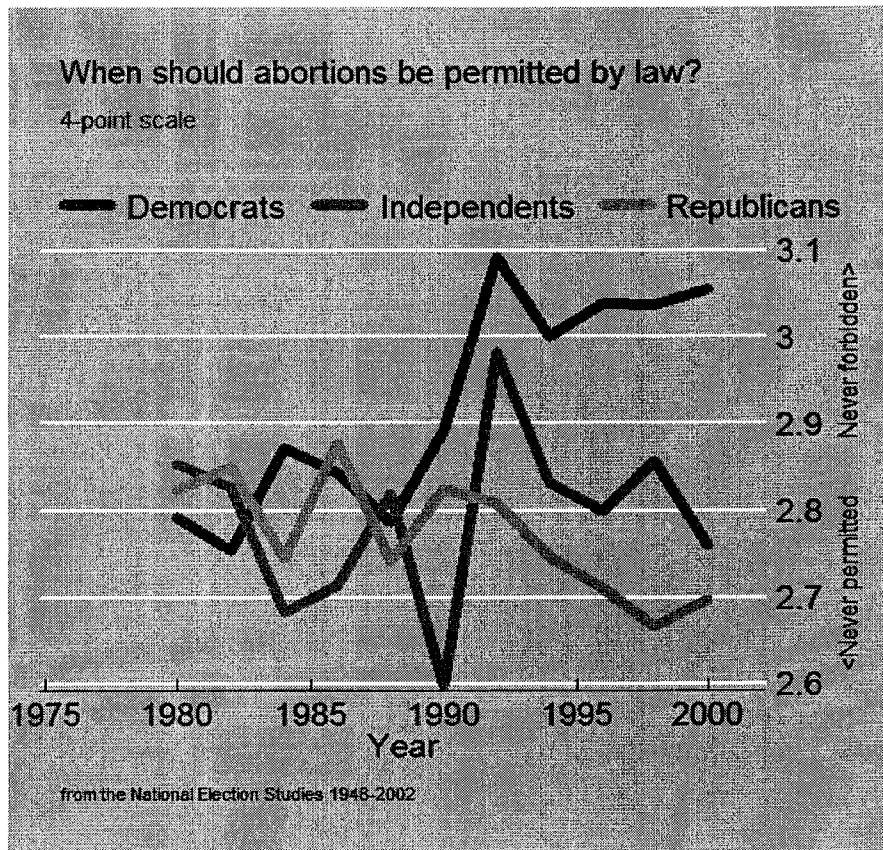
<i>RELIGION</i>	<i>% KERRY</i>	<i>% BUSH</i>
Protestant/Other Christian	40%	59%
% of Electorate 54%		
White Protestants	32%	67%
% of Electorate 41%		
White Evangelical/Born Again	21%	78%
% of Electorate 23%		
Catholic	47%	52%
% of Electorate 27%		
Jewish	74%	25%
% of Electorate 3%		
Other	74%	23%
% of Electorate 7%		
None	67%	31%
% of Electorate		
Voters Believing Abortion Should be Legal In All Cases	73%	25%
% of Electorate 21%		
Voters Believing Abortion Should be Legal In Most Cases	61%	38%
% of Electorate 34%		
Voters Believing Abortion Should be Illegal In All Cases	22%	77%
% of Electorate 16%		
Voters Supporting Gay Marriage	77%	22%
Voters Supporting Civil Unions	47%	52%
Voters Opposing Legal Recognition for Gay Relationships	29%	70%
Voters Believing Moral Values are the Most Important Issue in Deciding Presidential Vote	18%	80%
% of Electorate 22%		

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104. Beliefnet.com, *supra* note 79.



FIGURE 1\*



\* The values in Figures 1-4 are the mean values for the question scales for Democrats, Republicans, and Independents. Missing values are excluded. Since not all questions were asked for every time period, there is variation in the time periods reported in the figures.

FIGURE 2

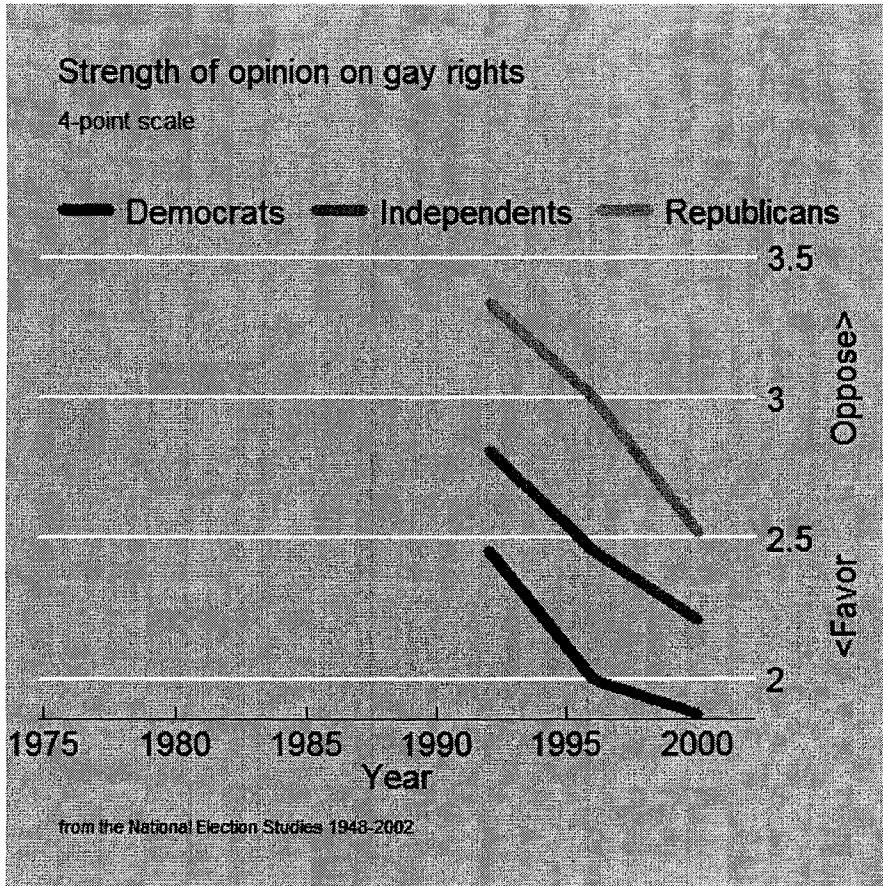


FIGURE 3

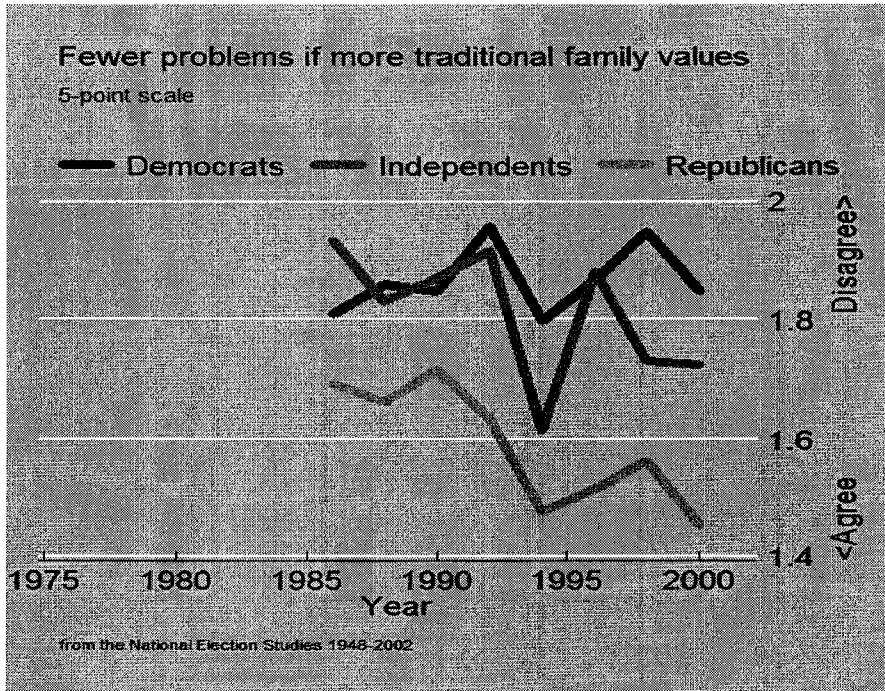


FIGURE 4

