

Law's Promise, Law's Expression

**VISIONS
OF POWER
IN THE
POLITICS
OF RACE,
GENDER,
AND
RELIGION**

Kenneth L. Karst

"This book is required reading for all those interested in the cultural revolution of the 1960s and 1970s and the counter-revolution that informs so much of our national politics today."

—Thomas Edsall

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Race, Gender, and Religion

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Law's Promise, Law's Expression

To Glinda/Peter Pan/Cinderella
and
all the members of her supporting cast

Preface

The power of law was a notable preoccupation of the “social issues agenda” of Presidents Ronald Reagan and George Bush. Given the agenda’s apparent effectiveness in presidential campaigns through 1988, there was little surprise in 1992 when some politicians turned the volume even louder: “We are America. These other people are not America.”¹ That strategy proved counterproductive, but even now parts of the social issues agenda retain power. From its earliest uses, antedating President Reagan’s election by some two decades, the agenda has promoted a politics centered on the status of social groups. The target audiences have been voters who have felt left out, even threatened, by various social changes following the upheavals of the 1960s and 1970s: the secularization of the state and the successes of the civil rights movement, the women’s movement, and the gay rights movement. In seeking to weld these voters into a nationwide constituency, the promoters of the social issues agenda have promised to use the power of government, and particularly the power of law, to restore major parts of an earlier day’s social order.

A considerable literature explores the clash of cultures and the role of the social issues in national politics.² Here I offer an extended essay on these themes, placing law in the foreground of discussion. Most of the social issues agenda has been an agenda for law reform—or, in some instances, for a more vigorous enforcement of existing law. For the agenda’s intended audiences, much of the promise of law lies in its perceived potential for governing the expression of public values—not just the power of law to regulate expression, but the expressive power of law itself.

In this book I do not offer an explanation of the rise of the political right, or a model of American politics in the 1980s; my aim is interpretive, not scientific. Nor do I offer a generalized theory about American

political culture. My focus is narrower: on the social issues agenda as a set of promises to deploy law in the service of cultural counterrevolution. The promises were addressed to social groups that were seen—accurately—to include many potential swing voters. It is these groups that I shall call the constituency for cultural counterrevolution.

The heart of the book considers the social issues agenda for law, particularly constitutional law, in the fields of race, gender, and religion. Our main focus in these chapters (3 through 6) will be the interaction of law with that political agenda. One persistent theme is an ideology of masculinity. Not all of the social issues agenda evokes the anxieties of manhood; schoolhouse religion, for example, is an exception. Still, those anxieties are a principal target of the agenda, not only as it touches issues of gender (the status of women, or the status of gay men and lesbians) but also as it touches issues of race. Bracketing the four central chapters are two of introduction and one of conclusion. We begin by looking at the role of law in the genesis of the social issues agenda and at some of the techniques for using the symbols of law and government to mobilize a national political constituency around the social issues. The final chapter centers on the responses of the courts to the social issues agenda's legislative products.

The most important developments in our constitutional law in the last generation, including those dealing with issues of race and gender, have accompanied larger transformations in American society and in the politics generated by those transformations. Admitting all that, it remains true that changes in our constitutional law—and specifically the Supreme Court's decisions in such celebrated cases as *Brown v. Board of Education* and *Roe v. Wade*—have had their own acculturating effects. This book highlights the important role our courts can play in making and preserving a national community in a society of many cultures.

The main doctrinal foundation for analysis of constitutional issues throughout the book is the principle of equal citizenship. That principle presumptively insists that every individual is entitled to be treated by the organized society as a respected and responsible participant. Stated negatively, the principle presumptively forbids the organized society to stigmatize an individual as a member of an inferior or dependent caste, or as a nonparticipant. I traced the origins of the equal citizenship principle, and its partial vindication in modern constitutional law, in my book *Belonging to America: Equal Citizenship and the Constitution* (1989). I shall not repeat that analysis here, but will take the principle as a

doctrinal starting point. In chapter 7 I argue that judicial review of governmental action in the social-issues contexts of race, gender, sexuality, and religion should focus not so much on “procedural” questions (such as the representative or deliberative qualities of the legislative process) as on substantive concerns—specifically, concerns for the full inclusion of all Americans as equal citizens.

I am grateful for the invitations that allowed me to present some of these ideas in lectures at the law schools of the University of Illinois, the University of California, Davis, and UCLA. Longer versions of these lectures have appeared as articles, parts of which are scattered throughout this book.³ For their careful readings of a draft and for their perceptive comments, I am indebted to Alex Aleinikoff, Akhil Amar, Alison Grey Anderson, Julian Eule, Catherine Hancock, Joel Handler, Lynne Henderson, Leonard Levy, Greg Tanaka, and Jon Varat. John Covell of Yale University Press has encouraged this project from the beginning and provided crucial help in making it a reality. Harry Haskell, my amiable and skillful editor at the Press, made our collaboration a pleasure. For research assistance, I thank the UCLA Law Library’s incomparable research librarians and Genie Gifford, Lorien Kranen, Judith London, and Charlotte Robinson Maya. My thanks also to Dean Susan Westerberg Prager and the UCLA School of Law for the sabbatical leave that allowed me to complete much of the manuscript. I had the great good fortune to spend that semester in residence at the Department of Political Science of the University of Hawaii at Hilo; I am grateful to Prof. A. Didrick Castberg and his colleagues for making my stay so rewarding, both professionally and personally. The book’s dedication also expresses thanks, and more than thanks.

When I began this project in the late 1980s, I was prepared to take the long view. High on the list of political priorities of the Justice Department and the White House staff had been the appointment of federal judges, including Justices, who were thought to be “safe” on the social issues. It strained even my considerable capacity for optimism⁴ to expect the federal judiciary in its late-1980s incarnation to give the Constitution’s guarantee of equal citizenship a generous reception. Yet even then this book did not seem an exercise in fantasy. I could remember my own law school days, when the Vinson Court was in flower. In 1951 few observers would have predicted the result in *Brown*, and even fewer would have anticipated that the Court would recognize a constitutional right to control such intimate decisions as contraception or abortion.

Looking at demographic trends in American society, and looking at trends in the political uses of issues such as abortion, it seemed plain even in the late 1980s that America's historic cultural dynamism had not abated. True, the 1992 presidential election seemed to be influenced only marginally by the social issues, and more centrally by the anemia of the national economy. Yet, as I suggest in chapter 7, even before the election the nation seemed to be turning some corners, not only in the politics of the social issues but in our constitutional jurisprudence.

As long as America is culturally divided, American politics will continue to reflect those divisions. So the story of "social issues" will never end. Even as I am "closing the book" in the summer of 1993, two clusters of gay rights issues are stirring the waters of politics: the treatment of gay and lesbian members of the armed services, and proposed ballot initiatives to disable various state and local governments from prohibiting discrimination on the basis of sexual orientation. Both of these subjects have already reached the courts. As this book goes to press, however, neither set of issues has been definitively resolved—nor is it certain that either will be resolved in court. Any resolution, legislative or judicial, lasting or temporary, will gratify some Americans and leave others discontented. For people on all sides of these and other social issues, I offer this remark attributed to Orson Welles: "If you want a happy ending, that depends, of course, on where you stop your story."

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1

Imposing Order: Law and the Origins of the Social Issues Agenda

Imagine James Madison's reaction if someone had predicted in 1789 that one day presidential candidates would make special efforts to communicate their views on the enforcement of state and local criminal law, the power of a state to forbid a woman to have an abortion, and the lawfulness of officially sponsored prayer in local public schools. In raising these issues in the 1988 and 1992 campaigns, President Bush renewed his support for the "social issues agenda" of President Reagan's administration.¹ That agenda looked toward a return to an earlier era's dominant attitudes about the place of religion in public life and about "family values," a cluster of traditional beliefs concerning marriage and family, the roles of men and women, and sexuality. Two complementary themes, dating from President Nixon's "Southern strategy" two decades earlier, rounded out the social issues agenda: distance from the civil rights movement and toughness toward crime. From the beginning the agenda's most publicized aims have included nullifying some Supreme Court decisions of the 1960s and 1970s, and by the 1990s the agenda remained largely addressed to the state of American law. But the political appeal of these policies lies deeper than any specific concerns about the state of the law concerning official religion, family values, race, or crime. The subtext of the social issues agenda was—and is—cultural counterrevolution.

The agenda was designed to create a political constituency out of identifiable groups of voters, and all the social issues are strongly associated with the status of social groups. That association may be positive or negative. In the language of political managers, a "target group" is the intended audience for a message, but the metaphor of targeting reminds us that the messages of status politics also serve purposes that are more sinister. Because they touch the emotions, the social issues lend themselves to the sort of imagery, especially the vivid imagery of

television, that gladdens the heart of a political media consultant. To its intended audience, the imagery typically has pictured the candidate as one of Us, and—more to the point—has depicted enemies who threaten the group, and suggested that the candidate will use the powers of law to save Us from Them.

THE PROMISE OF ORDER AND THE POWER OF EXPRESSION

All four themes of the social issues agenda have been attuned to a profound disquiet felt by a number of Americans in the face of cultural changes that took on high visibility during the two decades that preceded President Reagan's election in 1980. To mobilize these citizens the agenda has offered a politics of nostalgia, a promise to impose Order on a society that the members of particular constituencies believe to be riven by Disorder.²

The Order to be imposed is not the absence of conflict; it is the old social Order, the traditional rank-ordering of groups in society. This sort of Order is imposed, in two senses. Most obviously, people in positions of power maintain their version of Order by imposing it, through law and by other means, on those who occupy positions of lesser status. More generally, as I emphasize by capitalizing the word, the status Order exists as a construct that human minds impose on the raw stuff of society.

In this latter sense, of course, even our understanding of the natural order is something we impose on our experience of an environment that would otherwise seem chaotic.³ Failure in this effort leads to—indeed, is—madness. In infancy we learn how the symbols that order our experience are connected to our ability to maintain our places in the world. When the one-year-old points at a round object and says, “ball”—a label adults have imposed on her understanding of what she sees—she is, in turn, asserting a kind of control over the object. She is learning that expression is power.

In imposing Order on society, too, expression is power. Expression draws the boundaries that divide us into groups, with momentous effects on our individual identities. If you doubt the power of expression, ask yourself what meanings come to mind when someone you don't know is identified as black, or gay, or a woman—and then ask yourself where those meanings came from. The answer is easy: Any

social group's status finds its definition in expression, both private and public. In defining meanings in our public life, no form of expression is more powerful than the law.

Cultural counterrevolution, then, is primarily a contest for influence among social groups over dominance of expression in public, a contest over the meanings attributed to behavior.⁴ When a political candidate promises to use the power of government to restore Order in the area of "family values," he is not just advocating particular changes in the law, or endorsing the traditional morals of the white middle class. He is also consciously taking a position in a series of group status conflicts. The Order he promises exists mainly in the minds of his audience; it is the renewed predominance of a series of traditional images: of marriage and family, of the roles of men and women, and of sexual morality.

Let us begin with a snapshot dated 1952. In the background stands a little house, one of a row of little houses in a suburb. In the foreground is the white family that lives in the house: the father, who earns the family's living; the mother, who tends the house and the children; and the two children who will soon go to school. Add the dog and the car, and imagine the redwood picnic table and the barbecue in the backyard, and you have the picture. If you are over the age of thirty and white, and your parents were of the middle class, you have your own picture of the house's interior; the chances are good that you used to live there.

Nevertheless, this picture in the "family values" album obscures much of the reality of American life, even in 1952. First, many millions of Americans are missing: rural white families; nonwhite families, both rural and urban; gay and lesbian couples; two-wage-earner families; single mothers; the poor. It is an understatement to say that the politics of nostalgia in recent years has not been designed to appeal to people of these descriptions. In the Order promised by the social issues agenda, outsiders have been expected to adjust their lives to approximate the image in the snapshot. Some outsiders simply lack the wherewithal to make any such adjustment. Others, who might be able to adjust, choose not to do so; instead, they claim the right of inclusion as equal citizens even as they retain their identities.

Our 1952 snapshot may be misleading even as to the people in the picture. Was there sex outside marriage, for example? Consider the couple in the snapshot. They had been high school sweethearts, but during the war, before they were married, he was overseas and she was in college. Were they celibate during that long separation? How would

we ever know? Sex, either inside or outside marriage, was largely invisible.⁵ We do know that if the young woman became pregnant, and the option of abortion was unavailable, her parents would help her to hide her pregnancy. She would go away, on what was explained as a “visit,” to have the baby and place the child with an adoption agency. Her husband-to-be, of course, was expected by his service mates to demonstrate his manhood in a variety of ways, some of which were nothing to write home about. In public, however, America’s traditional images of “family values” had little visible competition.

The generation that came to adulthood during the Great Depression had emerged from World War II in search of security. With the aid of the GI Bill, many of them had bought houses like the one in our snapshot, and many had gone to college. Among the people missing from the snapshot, however, fewer could take advantage of those benefits. The war had looked as though it might work a major transformation of American society. Women, both married and single, had been working in factories. New job opportunities had produced a second great migration of black people from the rural South to the cities of the North and West. White generals, under pressure from Washington, had finally pronounced black soldiers to be fit for combat duty. Gay and lesbian Americans by the hundreds of thousands had discovered each other in the services and in the cities where service personnel gathered. At war’s end, however, women were told that their duty was to leave the factories and make room for men; black Americans—veterans or not—learned, the hard way, about the durability of racial discrimination; and lesbians and gay men mostly stayed in the closet. The legal underpinnings of the old status Order remained largely unchanged, and on the surface of American society the war’s transformative power seemed to have dissipated.

Under the surface, though, important social changes were building. The Supreme Court’s 1954 decision in *Brown v. Board of Education*⁶ both symbolized and accelerated the changes.⁷ During the next decade, as black Americans pressed their claims to equal citizenship, others joined their cause, including many young white college students from the North and West who went south to help mobilize black voters. When these students returned home, they formed the nuclei for a “new politics” that burst into high visibility in the mid-1960s. By the end of the decade, with the civil rights experience as the most prominent model, the modern women’s movement and the gay liberation movement had begun.

The wider social convulsion that came to be called “the movement” of the 1960s was not a political party, not even a coherent ideology, but an aggregate of diverse critical beliefs and heterodox behavior centered in the youth culture of America’s postwar generation. Above all, the movement was a variegated collection of insurgent messages. Some of the messages were pure protest: opposition to the Vietnam War and the military draft. Other messages combined protest and affirmation: racial justice, equality for women, sexual freedom. Still other messages were harder to classify, but unmistakably rejected the dominant world view among the white Americans who had found their security in corporate suburbia. In part, the movement was a mutiny against reigning moral and legal codes that the challengers saw as hypocritical and repressive. Even in its overtly political manifestations, the movement “took root primarily at the level of sensibility in a largely personal revolt against postwar American society and culture.”⁸

The active participants in this upheaval, from the “heads and seekers”⁹ to the practitioners of the new politics, looked forward to an emancipation of their own identities and to a more inclusive, more cohesive community. They saw these individual and social goals as intertwined: “The personal is political.” Some young people sought to return to Nature, expressing their search for a new authenticity in long hair, overalls, or the blues. Others, hoping to escape the shackles of linear Reason, sought a new and higher consciousness in chemicals, Eastern mysticism, or acid rock. Observing the scene, Daniel Bell perceived a shift “from the Protestant ethic to the psychedelic bazaar.”¹⁰ Nearly all the flower children were searching for a spiritual communion they had missed in their parents’ world. For some, even the claim to sexual freedom was not merely self-indulgence, but part of an alternative morality associated with the quest for authenticity and awareness. In the eyes of sympathizers and skeptics alike, the movement’s varied messages seemed an eruption of Nature from below the crust of Reason.

The members of some social groups—notably the vanguard of the women’s movement and members of minorities identified by race, ethnicity, religion, or sexual orientation—heard these messages as the voice of liberation. For some other listeners, however, the same messages tapped into deep-seated anxieties. In the dominant cultural view, women and black people had long been associated with Nature, as opposed to Culture; with wildness, as opposed to civilization. Uncivilized Nature must be controlled, not only in the unreasoning Other, but in oneself.¹¹ The idea of sexual liberation, of course, could be seen to

threaten self-control at the very center of the self. The suburbs looked at the flower children with the special loathing engendered by desire.

A culture is a community of meaning and morality, the matrix of the sense of self. Many citizens, viewing the challenge to dominant cultural patterns as “an attack on reason itself,”¹² feared the imminent degeneration of the only communities and the only identities they had. The insurgent messages implied not just a preference for modern over traditional views of society, but a cultural challenge that promised to revise the nation’s public morality—and, not incidentally, to change the status ordering of groups in America.¹³ If the existing Order should collapse, what rough beast might rise from the rubble?¹⁴

When the Vietnam War ended, the political and cultural tides turned, and by the mid-1970s the main interest of the movement was historical. Yet, a notable egalitarian reordering of American society was well under way. Given the historic role of law in maintaining the subordination of groups, the reshaping of that law had been a necessary and prominent part of the transition. The “color line,” long fundamental to most Americans’ conception of social status, had been eradicated in some arenas of public life and blurred in most of the others. The gender line, fundamental to a conception of family and society that many believed to be ordained by God, had become blurred in two ways. First, with the aid of new laws and court decisions, women by the millions were entering territories previously reserved to men. Second—and not unrelated to the success of the women’s movement—sexual freedom had broadened considerably. The gay rights movement had acquired a visibility that would have been unimaginable a generation earlier. The older moral propriety had kept sex out of sight; now, in public, it was a constant presence. Once, religion’s place in the nation’s public life had been accurately portrayed by Justice David Brewer’s 1904 lecture series “The United States a Christian Nation.” Now the Supreme Court had accepted the argument of religious outsiders that officially sponsored prayer and Bible reading in the public schools were unconstitutional.

In political and legal terms, these changes augured the inclusion of a number of new groups of Americans as full participants. In cultural terms, the changes marked a new tolerance, a widening of the range of acceptable beliefs and behavior. In all, it was a cultural revolution, and the revolutionaries had seized the transmitters.

Cultural difference alone does not make a clash of cultures. Much that was represented by the 1960s movement recalled earlier critical vocabu-