ARTICLES

Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective

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Imagine James Madison's reaction if someone had predicted in 1789 that one day a candidate for President would make a special effort to communicate his 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 propriety of officially sponsored prayer in local public schools. In raising these issues in the 1988 campaign, President Bush was pledging support for the "social issues agenda" of President Reagan's administration. Throughout the 1980s that agenda looked toward a return to an earlier era's dom-

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When I began teaching constitutional law, one of the young stars in the field was Ed Barrett. In those days I was brave enough to teach about state taxation of interstate commerce; my colleagues in the field will understand when I say that Ed's work allowed me to teach those cases with a lot less embarrassment than I might have suffered without his guidance. Over the years I have also profited from Ed's thinking about constitutional equality. Although I cannot claim to have persuaded him of my own views on that subject, I am deeply honored to be allowed to present some of those views here, and to add my salute to Ed Barrett in the forum that bears his name.

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inant 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 rounded out the social issues agenda: coolness toward the civil rights movement, and toughness toward crime. The agenda's subtext was — and is — cultural counterrevolution.

Religion, sex, and politics: In the days of my youth, these were the subjects you were not supposed to discuss at a dinner party. Today, religion and sex and the other social issues[1] are present in American politics in the way that automobiles are present in Los Angeles: they are all around us; they bring tears to our eyes; and we don't know what to do about them. The social issues were invented as means of appealing to identifiable groups of voters. A candidate who chooses to make one of these subjects into an issue perceives that the subject is strongly associated with the status of a social group. 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 can also serve purposes that are more sinister. For better or worse, the social issues seem sure to retain their political importance in the foreseeable future.

As the themes of religion and sex and gender have become more prominent as the stuff of political controversy, the issues they raise have also gravitated to the federal government. National politics now must respond to groups organized around these issues, from the National Right to Life Committee to the Gay Men's Health Crisis. In this Article I begin by setting out the uses of these issues in today's symbolic politics, and then turn to their role in the nationalization of what Madison called "the violence of faction."[2] Finally, after showing how contests over gov-

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[1] The term "social issues" has political content of its own. The designers of the conservative social issues agenda had principally in mind the issue clusters suggested in the text: (i) religion, (ii) "family values," (iii) coolness toward the civil rights movement, and (iv) toughness toward crime. I agree with a colleague who commented that issues concerning poverty, for example, have at least as much claim to be called "social issues" as any of these. I use the term here as it is widely used among operatives ranging across the whole political spectrum — and I omit quotation marks only because they would be distracting.

[2] *See infra* text accompanying note 129.

ernmental decisions at the confluence of religion, sex, and politics typically amount to a zero-sum game of status dominance, I argue that these conditions justify an approach to judicial review that emphasizes the principle of equal citizenship.

I. The Symbolic Politics of Cultural Counterrevolution

A. Religion and Family Values: The Constituency

The themes of religion and family values, along with the race and crime themes of the 1980s social issues agenda, were attuned to a profound disquiet produced by the rapid cultural changes of the 1960s and 1970s. During those two decades the messages of the civil rights movement and the women's movement had moved to the forefront of the nation's consciousness. At the same time, and closely related to the expressive aspects of those two egalitarian movements, the permissive messages of sexual freedom had found a wider acceptance, accompanied by a marked increase in the public expression of sexuality.[3] During the same period a tide of secularism had eroded much of the religious element that had previously pervaded official governmental expression.[4]

The members of some social groups — notably minorities identified by race, ethnicity, religion, or sexual orientation — heard these messages as the voices of liberation. Some other listeners, however, were less receptive, for the messages implied not just a preference for "modern" views of society's needs[5] but a cultural revolution that promised to revise the nation's public values — and, in some cases, to change the ordering of group status relationships.[6] The "color line," fundamental to many Americans'

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[3] *See generally* Clecak, *The Movement of the 1960s and Its Cultural and Political Legacy*, in The Development of An American Culture 261 (2d ed. 1983).

[4] For thoughtful critical commentary on the latter development, see R. Neuhaus, The Naked Public Square (1984).

[5] On Americans who reject "the supposed moral superiority of the modern," see Novak, *Pluralism in Humanistic Perspective*, in Concepts of Ethnicity 27, 33 (1980). On Christian fundamentalists' rejection of the new breed of modernizing social expert, see R. Moore, Religious Outsiders and the Making of Americans 159 (1986).

[6] A lively scholarly debate pursues the question whether the activity of the new Christian right should be seen as "status politics" in the functionalist sense of a politics organized around issues of economic class. Plainly the new Christian right is not limited to persons whose positions on the economic scale are threatened; many active rank-and-file members of the various new Christian right groups are solidly planted in the middle class. For a good account of the debate, see S. Bruce, The Rise and Fall

conception of social status, had been eradicated in some social arenas and blurred in nearly all the others. The gender line, fundamental to a conception of family and society that many Americans believed to be ordained by God,[7] had become blurred in two ways: women by the millions had entered territories previously reserved for men, and the gay rights movement had achieved successes that were unimaginable a generation earlier. The older propriety had kept sex invisible; now, in public, it had become a constant presence. Once, religion's place in the nation's public life had been accurately portrayed by the title of Justice David Brewer's 1904 lecture series, "The United States a Christian Nation."[8] Now the Supreme Court had accepted the argument of religious minorities that officially sponsored prayer and Bible reading in the public schools were unconstitutional.[9] Faced with simultaneous challenges to one traditional value after another, many Americans felt threatened.

The moral concerns expressed by religious conservatives are also widely shared among other Americans, and the political constituency that responds to the themes of religion and family values is not sharply confined by the boundaries of religion or

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OF THE NEW CHRISTIAN RIGHT 1-24 (1988). As the text makes clear, this Article uses the term "status politics" to embrace a wider range of political phenomena, including what some writers have called the politics of "lifestyle concern" or "cultural defense." *See id.* at 15-20.

[7] In Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986) (mem.), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 106 (1988), conservative Protestant parents sought an exemption for their children from mandatory reading assignments in the public schools. One first-grade reading textbook showed boys cooking and girls reading. One of the plaintiff parents, writing to a newspaper, said that this sort of text "preached" secular humanism by suggesting to children "that there are no God-given roles for the different sexes." Letter of plaintiff Robert Mozert to the Kingsport, Tennessee, Times News, October 18, 1983, *quoted in* Stossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 340 n.44 (1986).

[8] Brewer's lectures on this topic are published in D. BREWER, THE UNITED STATES A CHRISTIAN NATION (1905). Paul Weyrich, one of the founding strategists of the New Right, has said, "We're radicals working to overturn the present structure of the country — we're talking about Christianizing America," *quoted in* A.J. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 331 (1984).

[9] Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

geography or social class.[10] A long-standing intellectual tradition emphasizes the importance of "a public language of moral purpose,"[11] and thinkers in this tradition continue to argue the need of a strong role for religion in public life.[12] Undoubtedly, however, the largest numbers of political supporters for the conservative social issues agenda are to be found among evangelical or fundamentalist Protestants and actively practicing Catholics; among people of middle age or older; among people with limited formal education; among people with lower income in both white collar and blue collar occupations; and in the South.[13] For some of these people, notably working-class white men, the egalitarian changes wrought by the civil rights movement and women's movement have seemed to threaten economic interests. But the political constituency of the 1980s social issues agenda also included large numbers of Americans, including middle-class Christian conservatives, whose jobs were secure and whose

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[10] These concerns are largely responsible for the willingness of old religious antagonists to join in political coalitions. The sight of conservative Protestants joining with Catholics, or of either of these groups joining with Mormons, is new in the American scene. *See* A.J. REICHLEY, *supra* note 8, at 327-31.

[11] R. NEUHAUS, *supra* note 4, at 197.

[12] *Id. passim*; D. BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 146-71 (1976) (religion as undergirding culture); P. BERGER, THE SACRED CANOPY (1967) (religion as a system of meaning that integrates society); R. NISBET, THE QUEST FOR COMMUNITY 248-84 (1978) (religion as part of pluralism needed to save democracy).

[13] *See, e.g.*, S. BRUCE, *supra* note 6, at 25-49; Yinger & Cutler, *The Moral Majority Viewed Sociologically*, in NEW CHRISTIAN POLITICS 69, 81-85 (1984). In a thoughtful comment on elite biases in our law, Robert Rodes has suggested that the relative invulnerability of the elite is responsible in part for such legal developments as the denial of government subsidies for religious schools, the tolerance of sexually explicit mass literature, and the freedom of sexual choice — with the latter category including abortion rights. Rodes, *Greatness Thrust Upon Them: Class Biases in American Law*, 28 AM. J. JURIS. 1, 6-8 (1983); *see also* J. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 33-46 (1979) (on involvement of upper middle class white men in early leadership of the abortion rights movement). For similar (and similarly thoughtful) arguments addressed to recently recognized constitutional rights of privacy, see Carl Schneider's article, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS., Winter 1988, 79, 108-110; Guido Calabresi's chapter on abortion in his book, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM ch. 5 (1985); and Peter Skerry's article, *The Class Conflict Over Abortion*, 52 PUB. INTEREST 69 (1978).

incomes were rising. What these people shared with their working-class political allies was another kind of apprehension, centered on a status that was not economic but cultural. The nation's identity — who "we" were as a nation — seemed to be moving under their feet, and the tremors called into question not just the authority of traditional cultural values but the individual identities bound up with those values. Whatever else the social issues agenda may be, it is also cultural counterrevolution, fueled by status anxiety.

If religion, sex, and politics are interwoven in modern America, no one should be very surprised. All of us — from the fundamentalist who finds truth in a literal reading of the Bible to the atheist who professes a non-religion — inhabit a social system infused with the long-standing Christian tradition that has placed sexual desire at the core of original sin, regarded sex as a wildness that can be tamed only by severe external discipline, and viewed women as that wildness incarnate.[14] To complicate matters, the American version of this tapestry is stained by our tragic history of race relations.

The European view of black people, from the beginning, has been strongly influenced by a mythology about Africans' sexuality.[15] The supposed sexual rivalry of white and black men has

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[14] This tradition was not the earliest doctrine of the Christian Church. Rather, the tradition crystallized in the writings of St. Augustine of Hippo (354-430), who argued forcefully that sexual desire was not only the proof of humankind's original sin, but the penalty for that sin, sexually transmitted to every succeeding generation. For Augustine, the forbidden fruit symbolized personal control over the will. In the sin of reaching for that fruit, he argued, humanity lost the capacity for self-government. The necessary result was that government by other humans — masters over slaves, husbands over wives, tyrants over their subjects — must be endured if we are to defend against the wild forces unleashed by sin in our nature. It seems no accident that these doctrines of total obedience to authority served the purposes of the Roman emperors who had made Christianity their established church. *See* E. PAGELS, ADAM, EVE, AND THE SERPENT, chs. 5, 6 (1988). For an exhaustive history of misogyny disseminated over two millennia by many authoritative sources of Christian doctrine, see K. ARMSTRONG, THE GOSPEL ACCORDING TO WOMAN: CHRISTIANITY'S CREATION OF THE SEX WAR IN THE WEST (1987). Reverend Ellen Barrett sketches the role of the early and medieval Church in the establishment of legal prohibitions against homosexual conduct in her article, *Legal Homophobia and the Christian Church*, 30 HASTINGS L.J. 1019 (1979).

[15] *See* W. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 40-43, 150-54, 436-37 (1968); Walters, *Control, Sexual*

provided material not just for novelists but for social historians. This mythology is not merely of literary or historical interest; an earlier generation's myth of the "black beast rapist"[16] has come back to haunt our television screens in this generation's versions of status politics. Blacks — especially young black men — have long appeared in white nightmares as symbols of wildness, needing nothing quite so much as discipline and control.[17] In the conservative social issues agenda, the themes of race and crime touch the same parts of the psyche — at least the psyches of a multitude of white males — as do the themes of religion and sex.

Today's cultural counterrevolutionaries, as a group, tend to support a much more visible role for religion in governmental affairs, and especially in the public schools. They also tend to believe in a clearly drawn gender line, with men's and women's roles defined in traditional ways.[18] Indeed, some organizations of the new Christian right have been created explicitly for the purpose of countering what their organizers extravagantly call "radical" feminism.[19] Not incidentally, the same citizens tend to support legal controls to preserve orthodox sexual morality, notably including the ideal of female chastity; and they voice strong disapproval of claims of personal freedom in matters concerning sexuality and its public expression.[20]

Attitudes, Self-Mastery, and Civilization: Abolitionists and the Erotic South, in OUR SELVES, OUR PAST: PSYCHOLOGICAL APPROACHES TO AMERICAN HISTORY 165 (R. Brugger ed. 1981).

16 J. WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 115, 115-19, 127-76 (1984).

17 For a capsule statement of various social science theories about the causes of racism, and a report of a study supporting one of the theories — "that the black male may be sexually threatening to white males and that this threat may be involved in the potential for the violent expression of racism" — see Schulman, *Race, Sex, and Violence: A Laboratory Test of the Sexual Threat of the Black Male Hypothesis*, 79 AM. J. SOC. 1260, 1260 (1974).

18 One survey in the mid-1980s reported that 79% of Southern Baptist ministers opposed adoption of the proposed Equal Rights Amendment. Reichley, *Religion and the Future of American Politics*, 101 POL. SCI. Q. 23, 27 (1986).

19 Concerned Women for America is one such group. *See* A. HERTZKE, REPRESENTING GOD IN WASHINGTON 34-35 (1988). On "supermasculinity" as a common tenet among fundamentalists, see Chandler, *The Wicked Shall Not Bear Rule: The Fundamentalist Heritage of the New Christian Right*, in NEW CHRISTIAN POLITICS, *supra* note 13, at 41, 46 ("Christ was not a lamb, but a ram!").

20 These views are not confined to the new Christian right. Robert

When politicians speak of family values, then, two of the main subtexts are maintenance of the gender line and control over sexuality, especially the sexuality of women. Traditional views about gender roles and about sex translate readily into attitudes concerning a wide range of political issues. The head of the National Christian Action Coalition listed these evils to illustrate the nation's drift into moral bankruptcy: "planned parenthood, the pill, no-fault divorce, open marriages, gay rights, palimony, test-tube babies, women's liberation, children's liberation, unisex, day-care centers, child advocates, and abortion on demand. A man is no longer responsible for his family; a woman need not honor and obey her husband. God has been kicked out, and humanism enthroned."[21] This catalogue was not just a lament; it was a political shopping list.

Religious conservatives are, as a group, the most likely to express a generalized concern about the evils of a secularized society. Fundamentalists, in particular, tend to see the world as a struggle between good and evil.[22] Thus they are particularly distressed by the moral relativist's unwillingness to accept the authority of the Truth in scripture.[23] They see disintegration —

Rodes, a powerful thinker in the Catholic "liberation theology" movement, sees the new sexual freedom as a corruption of the idea of liberation. Rodes, *Sex, Law, and Liberation*, 58 THOUGHT 43 (March 1988). In the text above I am discussing political constituencies, and the new Christian right is such a constituency.

21 The list appeared in the Coalition's "Family Issues Voting Index," a report card on legislators circulated by Rev. Robert Billings during the 1980 election campaign. It is quoted in E. JORSTAD, THE POLITICS OF MORALISM: THE NEW CHRISTIAN RIGHT IN AMERICAN LIFE 83 (1981).

On the ways in which abortion activists on both sides relate their positions to their own life histories, see F. GINSBURG: CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY (1989); K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984). *See generally* R. PETCHESKY, ABORTION AND WOMAN'S CHOICE (2d ed. 1990).

22 A.J. REICHLEY, *supra* note 8, at 191-92.

23 In an undated leaflet entitled "Is Humanism Molesting Your Child?," a Texas group called Pro-Family Forum characterizes "secular humanism" as a similarly comprehensive belief system that:

> Denies the deity of God, the inspiration of the Bible and the divinity of Jesus Christ.
>
> Denies the existence of the soul, life after death, salvation and heaven, damnation and hell.
>
> Denies the Biblical account of Creation.
>
> Believes that there are no absolutes, no right, no wrong —that

of moral standards, of families,[24] of communities — as the bitter fruits of a society grown too tolerant,[25] a society obsessed with freedom, with hedonism, with self-indulgence.[26] They need to

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moral values are self-determined and situational. Do your own thing, "as long as it does not harm anyone else."

Believes in the removal of distinctive roles of male and female.

Believes in sexual freedom between consenting individuals, regardless of age, including premarital sex, homosexuality, lesbianism and incest.

Believes in the right to abortion, euthanasia (mercy killing), and suicide.

Believes in equal distribution of America's wealth to reduce poverty and bring about equality.

Believes in control of the environment, control of energy and its limitation.

Believes in removal of American patriotism and the free enterprise system, disarmament, and the creation of a one-world socialistic government.

Quoted in S. BRUCE, *supra* note 6, at 77.

Secular Humanism is an all-purpose term of art among some fundamentalist Christian writers. Its main utility seems to be that it serves to identify an Enemy. There is a small group called the American Humanist Association, and there are documents called "humanist manifestos," but Secular Humanism, in the perception of these writers, is much broader than these. It is seen to be a nontheistic religion that embraces an apparently limitless collection of philosophies and religious views, including the views of leaders of some "mainline" Protestant churches. For an example in the legal literature, see Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH L. REV. 1 (1978). For the view of one of the founders of the Moral Majority, see LaHaye, *The Religion of Secular Humanism*, in PUBLIC SCHOOLS AND THE FIRST AMENDMENT 1 (1983). The latter article includes a schematic diagram setting out Rev. LaHaye's mental picture of the five "premises" of Secular Humanism (atheism, evolution, amorality, selfishness, and a socialist world view). In one version the diagram is surrounded by a long list of Secular Humanism's supporters, including the broadcasting networks, newspaper owners, the NAACP, the National Organization of Women, gay activists, the American Bar Association, and the National Council of Churches. For the longer version of these views, and more diagrams, see T. LAHAYE, THE BATTLE FOR THE MIND (1980).

[24] *See generally* B. BERGER & P. BERGER, THE WAR OVER THE FAMILY (1983).

[25] On the role of moral absolutes and intolerance of deviation in the rapid growth of conservative religions in America, and the corresponding role of leniency in the decline of "mainline" religions, see D. KELLEY, WHY CONSERVATIVE CHURCHES ARE GROWING 78-87, 99-102, and *passim* (1986).

[26] A. HERTZKE, *supra* note 19, at 32-36. One common response among activist "pro-life" women is that "pro-choice" women are selfish, placing

know — and many of them do know, on the basis of biblical literalism — what is right and what is wrong, and they see that knowledge as the proper guide not only for individual salvation[27] but also for the exercise of government's coercive power.

Americans who translate their strongly held religious beliefs into programs for political action are following an old tradition. Historically, too, such programs have not only served their advertised purposes but also maintained the existing order of cultural dominance, as in the case of the Temperance movement,[28] or subverted that order, as in the case of the Abolition movement.[29] As these examples suggest, the status of cultural groups is not a new phenomenon in American politics. The same examples remind us that status politics is a game any number can play. This Article's focus is the politics of the cultural counterrevolution, as expressed in the conservative social issues agenda. But politicians ranging over the whole spectrum — those associated with groups claiming the status of equal citizenship, as well as those associated with the groups that seek to exclude them from that

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their own lives above the lives that are aborted. *See, e.g.*, F. GINSBURG, *supra* note 21, at 172-95.

27 On the Christian revival as a quest for personal fulfillment, parallel to the quest of the cultural revolutionaries of the 1960s and 1970s, see P. CLECAK, AMERICA'S QUEST FOR THE IDEAL SELF 125-44 (1983).

28 The classic work on the Temperance movement as a deployment of symbolic politics, seeking not just alcohol control but the maintenance of status dominance, is J. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (2d ed. 1986). Gusfield's critics say that he outlines one result of the Temperance movement — maintaining the status dominance of Anglo-Protestants — and then imputes such an intention to the movement's actors, unjustifiedly making status maintenance into a cause of the movement. *See, e.g.*, S. BRUCE, *supra* note 6, at 2-3. My response is a demurrer. Gusfield's study is valuable for showing how the symbolism of Temperance had status consequences, irrespective of the causes of the movement. For Gusfield's acknowledgement of some excesses in his original work, see his epilogue to the second edition, *supra*, at 189-210. Part of the problem may have resulted from his use of the word "status," which social scientists often use in referring to someone's position on the socioeconomic scale. "Status" is a perfectly good word to refer to the dominance or subordination of a group's cultural values, and I so use the word here.

29 On Abolitionism's American origins among Christian reformers and radicals, see G. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914, at 27-32 (1987). On the role of Quakers in the early Abolition movement, see W. JORDAN, *supra* note 15, at 193-98, 256-57, 271-76, 356-65.

status — have always used the images and symbols of status politics.

B. The Social Issues and the Symbols of Government

One definition of culture is the assignment of meaning to behavior.[30] We articulate the meanings that define and redefine our culture not only through speaking and writing but also through our day-to-day public conduct.[31] Every social situation provides the makings of diverse explanations and diverse meanings. A political issue comes into being — a situation becomes a "problem," in the political sense — when different groups define events and behavior differently, giving them rival meanings.[32] Today's cultural counterrevolution is primarily an effort to reclaim control of the expressive apparatus, including behavior, that defines meanings in our public life.[33] Christian fundamentalists are anything but a splinter group; some estimates place their number as high as forty percent of the nation's population.[34] Yet

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30 *See generally* J. HALL, THE SILENT LANGUAGE (1973).

31 C. GEERTZ, THE INTERPRETATION OF CULTURES 17 (1973); *see also id.* at 10 (culture is an "acted document").

32 M. EDELMAN, CONSTRUCTING THE POLITICAL SPECTACLE 12-25 (1988).

33 "Every term and every entity in the environment is a signifier, and signifiers evoke a range of meanings that continue to widen endlessly. It is evident that the dominant [political] meanings rationalize existing social inequalities, but always in ways that subvert those values and premises as well." *Id.* at 119. In the clash of cultures discussed in the text, the contending parties seek to influence the public in its selection of meanings to be assigned to various forms of behavior.

34 This is the percentage of households estimated to listen each week to one or more broadcasts by television evangelists. S. BRUCE, *supra* note 6, at 47. "Since 1965, membership in liberal [Protestant] denominations has *declined* at an average five-year rate of 4.6 percent. By contrast, Evangelical denominations have *increased* their membership at an average five-year rate of 8 percent." J. HUNTER, EVANGELICALISM: THE COMING GENERATION 6 (1987) ("Evangelical," in this sentence, includes fundamentalist denominations).

"No matter how one defines Fundamentalism, one risks joining together in Christian fellowship a lot of people who would prefer to remain apart." R. MOORE, *supra* note 5, at 151. For example, a number of Christian fundamentalists cling to their churches' earlier pietistic traditions, believing that the church and its members should tend to their own salvation and stay out of the political realm. "Fundamentalists," or even "conservative Christians," should not be equated with the new Christian right. *See, e.g.*, R. NEUHAUS, *supra* note 4, at 40.

Some writers lump Christian fundamentalists together with evangelical

they see themselves as a minority that a secularized polity has belittled — or, worse, ignored. The reason is that they are largely left out of the "mainstream" expressive apparatus that plays so important a part in defining the meanings of America: the schools, the press, the broadcast media, the universities.[35] Not only are these institutions centers of communications; they are also centers for the allocation of prestige. One major focus of the politics of cultural status is expression itself.

Candidates for office turn to the social issues not only to reach particular constituencies, but also because other kinds of public problems are more complex — not just harder to explain, but harder to understand and resolve. Should we reconsider the deregulation of the airlines? Limit foreign acquisition of American land? Commence a new war on poverty? Questions like these mostly lead not to quick answers but to hosts of other questions. They are not "hot button" issues, for they lack drama. In part, an electoral strategy emphasizing the social issues commends itself because the medium dictates the message. You can't transmit any position on the problem of poverty in a thirty-second television announcement, but you can send a powerful message about crime — and its political correlative, race — by

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Christians, but the two groups have differed in both theological and political orientation. Although in recent decades evangelicals have tended to agree with fundamentalists about "family values" and about the place of religion in public life, they have also been more likely than fundamentalists to join peace movements and liberal causes concerning economic policy. For concise summaries, see A. HERTZKE, *supra* note 19, at 32-36, 40-42. Evangelicals as a group may be turning to more egalitarian visions of relations between women and men. *See* J. HUNTER, *supra*, at 114; J. STACEY, BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE TWENTIETH CENTURY AMERICA ch. 6 (1990).

[35] A. HERTZKE, *supra* note 19, at 155-56. On the Christian revival as a form of dissent embracing "personal attempts to neutralize and disparage the social and cultural handicaps imposed by the structure of advantage," see P. CLECAK, *supra* note 27, at 141.

For thoughtful statements of concern about the exclusion of traditional religion from secular public education, see Dent, *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863 (1988); Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127 (1985).

One response in the past two decades, very much in the spirit of the first amendment, has been for fundamentalists to establish an expressive apparatus of their own, including universities, Christian schools, and national television broadcasting by evangelists.

showing a picture of Willie Horton. In the age of television, status politics is not just emotion-laden; it is also cost-efficient.

The habits of political image-making take on a life of their own. In the era of the "permanent campaign," what begins as a style of campaigning for office becomes a style of governing.[36] Posturing about family values, after all, is easier than asking constituents to make the sacrifices necessary to overcome the trade imbalance or the budget deficit.[37] Some elected officials promote the cultural counterrevolution's values not by getting laws enacted but by using their offices as platforms for expressing those values. Their supporters are not naive; they know, in the context of cultural redefinition, that lip service really serves.

More generally, capturing the government apparatus is valued because government is an all-pervading medium of public communication. Public schools and museums are only the most visible avenues for government communication; every day, innumerable public agencies at all levels are engaging in instruction and advocacy. Government also uses the power of the purse to subsidize some messages and withhold support from others.[38] The point of conducting official prayers in public school classrooms would not be to provide children with a chance to pray. As Justice Stevens noted,[39] any child inclined to pray has plenty of opportunity to do so during the school day. Rather, the point is the state's official stamp of approval — of one Christian sect, of Christianity in general, of monotheism, or of prayer or religion in general.

The enactment of a regulatory law may serve important expressive purposes for its proponents even if the law goes unenforced. Especially in the area of human interaction where religion and sex come together, the whole system of legal regulation stands as a code of official pronouncements about right and wrong. The law,

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[36] *See* S. BLUMENTHAL, THE PERMANENT CAMPAIGN: INSIDE THE WORLD OF ELITE POLITICAL OPERATIVES 4 (1980).

[37] On "position taking" as a critical element in the electoral strategies of members of Congress, see D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION PASSION (1974). Perhaps it was not entirely accidental that the 1980s were not just the decade of the social issues but also a decade of debt.

[38] *See generally* M. YUDOF, WHEN GOVERNMENTS SPEAK: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA (1983); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

[39] Wallace v. Jaffree, 472 U.S. 38, 57-59 & n.45 (1985) (opinion of the Court, holding unconstitutional a law authorizing a moment of silence "for meditation or voluntary prayer" as part of the school day).

especially the criminal law, speaks to everyone, shaping the moral order and defining the community itself.[40] Legislation regulating sexual morality, in other words, specifies not only what conduct is permissible but also who belongs. In the cultural counterrevolution, one of the main purposes of capturing government is to define "deviance" in ways that produce stigma, excluding people from respectable membership in the community: for example, the young unmarried woman who is pregnant, and thus visibly sexually active; or lesbians and gay men who openly avow their sexual orientation. This exclusionary function of law is understood not only by those who are stigmatized but also by those who are using the law to draw the community's boundaries.

Similarly, a regulatory law need not be enforced to produce a status gain for its proponents. The Prohibition amendment did not prevent people from getting their hands on liquor, but it did stand as a symbol of cultural status, a formal affirmation by the government that the values of Anglo-Protestants outranked those of the Irish and German Catholics who had more recently come to our shores.[41]

If government in modern America often appears to be a "theatre state,"[42] the reason is that myth and ritual and symbol are crucially important instruments in the definition and redefinition of a culture.[43] The media consultants who design political ads for television understand the importance of imagery in capturing the viewers' attention and obtaining the emotional response that will

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[40] *See generally* E. DURKHEIM, DIVISION OF LABOR IN SOCIETY, bk. 2, ch. 2 (1933). For modern defenses of the use of law to advance Christian (or Judeo-Christian) morality, see G. BUCHANAN, MORALITY, SEX, AND THE CONSTITUTION (1985); Rodes, *supra* note 20; Schneider, *supra* note 13. Buchanan limits his argument to the question of gay "marriage." Schneider does not seek to decide particular cases, but argues that the state's most persuasive justification for regulating sexual morals lies in its purpose to socialize the citizenry to prevent more serious forms of antisocial behavior and to inhibit the growth of an offensive social environment. Buchanan opposes criminalizing sodomy; Schneider doubts the justifiability of such a law; Rodes would criminalize sodomy but not have the police enforce these laws.

[41] J. GUSFIELD, *supra* note 28, *passim*.

[42] *See generally* C. GEERTZ, NEGARA: THE THEATRE STATE IN NINETEENTH CENTURY BALI (1980).

[43] *See, e.g.*, E. CASSIRER, THE MYTH OF THE STATE (1946); *see also* Ingber, *The Interface of Myth and Practice in Law*, 34 VAND. L. REV. 309 (1981); Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CALIF. L. REV. 699 (1978).

imprint a message on their minds. But words, too, have their mythical, "magical"[44] uses, not just the word-imagery of metaphor but the narratives that create word-pictures. The symbolic messages of status politics are readily conveyed by the oldest medium of all, the political speech, for they are easily reduced to caricatures that will fit into the listeners' accumulated store of myths and devils. Here is an excerpt from a speech by Senator Jesse Helms during his 1990 re-election campaign in North Carolina:

> Think about it. Homosexuals and lesbians, disgusting people marching in our streets demanding all sorts of things, including the right to marry each other. How do you like them apples? Isn't our obligation, yours and mine, to get up and do some demanding on our own? What about the rights of human beings, born and unborn? What about the rights of women who want to stay in the home doing the most important job there is — raising our children?[45]

These words carry an emotional punch for at least two reasons. In four rapid-fire references the Senator evokes the fear that the traditional gender line is being eroded. At the same time he reinforces the listeners' sense of identity, inviting them to contrast themselves with an abstract and threatening image of Otherness. The lines are clearly drawn, with a faceless group as the enemy: It is "our" obligation to stand up to "disgusting people." Good and Evil; Us and Them; as the Senator says, think about it.

The construction of enemies is an old technique,[46] with roots deep in the dirt of political history. The extremist forms of today's status politics feed on the same fear and greed that powered yesterday's less sophisticated politics of anti-Catholicism, anti-Semitism, nativism, and racism. Vague, abstract symbols, either of "our" group or of the Other, can stand for wide ranges of referents, and correspondingly wide ranges of possible political actions — indeed, they can stand for a whole world view and a whole sense of self. One result is that a particular policy proposal may be supported or opposed because it is seen as a symbol of those larger identity-defining values.

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44 E. CASSIRER, *supra* note 43, at 282-83. On "word magic," see also E. CASSIRER, LANGUAGE AND MYTH 44-62 (1946).

45 Gargan, *Will Jesse Rise Again?*, L.A. Times (Magazine), Oct. 28, 1990, at 14, 18.

46 *See* M. EDELMAN, *supra* note 32, at 66-89; R. HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 3-141 (1979).

An example is the proposal, adopted by Congress last year but vetoed by President Bush, to provide federal funding for abortions to indigent women who are the victims of rape or incest.[47] Standing alone, this proposal has appeal for a considerable number of Americans who otherwise describe themselves as "pro-life."[48] Even so, arguments about slippery slopes are as common among politicians as they are among lawyers, and the opponents of this funding proposal successfully linked it to the more general question of the President's identification with the pro-life cause. Status politics has a way of doing just that: influencing people to dig in, to resist compromise, to treat each of the social issues as a zero-sum game: Good or Evil; Us or Them.

The most vivid image in the quoted excerpt from Senator Helms's speech was the picture of homosexuals marching in the streets. What particularly disgusted the Senator, apparently, was not that some Americans might have gay or lesbian identities, but that they should openly declare those identities and still insist on being accepted as equal citizens.[49] The contest between the Senator and the gay rights marchers is, more than anything else, a struggle for the power that inheres in expression.

That struggle can take the form of efforts to limit or silence someone else's expression. In the debates over legislation restricting pornography and racist speech, all sides invoke the rhetoric of "silencing."[50] Another method of controlling expres-

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47 Molotsky, *As Expected Bush Vetoes Bill That Would Pay for Some Abortions,* N.Y. Times, Oct. 22, 1989, § 1, at 32, col. 3.

48 Laurence Tribe cites a 1989 nationwide poll in which 81% of the respondents said they would favor abortion in a case of rape or incest. L. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 231-32 (1990). This figure necessarily includes many who would call themselves "pro-life." As Tribe and others have pointed out, one reason why these people have a different view in a case of rape or incest may be that in such a case they do not see the woman's pregnancy as her "fault." Such a position suggests a punitive view concerning sex outside marriage — a view that provides emotional fuel for some adherents of the antiabortion movement. *See generally* R. PETCHESKY, *supra* note 21, at 221-33.

49 This, surely, was the real "crime" that led to Michael Hardwick's initial arrest — for carrying an open container of beer on the street — and ultimately led to the Supreme Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986). The story is recounted in K. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 201-10 (1989).

50 These laws undoubtedly are aimed at silencing hate speech. Their proponents, however, see the hate speech itself as silencing. *See, e.g.*, C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 188-89,

sion, however, is to regulate behavior that has little to do with actual "speech." A major part of the abortion controversy is a contest over public symbols about sexuality; in this sense, a young unmarried woman's access to the abortion clinic — or the denial of access — has expressive importance beyond the interest of women in reproductive autonomy or the interest of Operation Rescue demonstrators in saving fetal life.[51]

Undoubtedly, changes in material circumstances are a vital factor in any group's escape from subordinate status. The modern women's movement accelerated dramatically when "the pill" created the material possibility for women to take control over their sexuality and maternity, thus giving them a greater measure of equality — and respect — both in their intimate relations with men and in the public world of work.[52] Immigrant groups in America, from the Irish to the Japanese, have found respect as equal citizens when their members moved in overwhelming numbers into the middle class.[53] Here, however, I am concerned with the expressive uses of law and government in promoting or denying equal citizenship. Consider the issue of same-sex marriage — or, more precisely, a status that would allow gay or lesbian couples to create formal unions analogous to marriage, with similar contractual and property consequences. Some material concerns would be implicated by the establishment of such a status: health insurance for an employee's partner, for example. Yet even without such a status the gay couple can make a contract, or hold property in joint tenancy. If such a law should be passed, a citizen (for example, Senator Helms) who finds a marriage-like status for gay couples "disgusting" need not enter one. What matters most, on both sides of the issue, is the state's official expression, recognizing the couple as a couple.[54] If the managers

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193-95 (1987) (pornography); Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452-57 (racist speech); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2335-41 (1989) (same).

51 Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 106-08. On the expressive aspects of the Jim Crow laws and the social practices they reinforced, *see id.* at 109-16; Lawrence, *supra* note 50, at 438-44.

52 *See* R. PETCHESKY, *supra* note 21, at 118, 168-73.

53 *See* Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 325-36 (1986).

54 G. BUCHANAN, *supra* note 40, ch. 5.

of electoral campaigns see the social issues largely as political theater, the reason is that the clash of cultures is a clash of symbols.

II. Religion, Family Values, and the Nationalization of "Factions"

Among this country's community-defining symbols, none is more visible or more influential than the law,[55] and especially the law of the Constitution.[56] Some of the most important cultural redefinitions of the 1960s and 1970s were accelerated by decisions of the Supreme Court. Here are some of the most prominent subjects of the conservative social issues agenda; imagine how America might look if the Supreme Court had not entered these arenas: racial discrimination; sex discrimination; marriage and divorce; contraception and abortion; illegitimacy; prayer in the public schools; financial aid to religious schools. Subjects like these arouse our emotions because they are cultural totems, symbolizing aspects of our self-identification.

The social issues agenda addresses politics at all levels of American government. What is striking — what would perhaps surprise James Madison most of all — is the way in which political issues focused on sex and gender, formerly the province of local communities, have become national. The change has two dimensions. First, these issues are present in every region of the country. Second, the same issues regularly present themselves to the Congress, to the Executive branch, and to the federal courts. The first development is part of a more general nationalizing of American culture; increasingly, locally dominant cultures have had to confront national cultural norms. The second development is part of the centralization of governmental power; increasingly, national political norms have been imposed on those who dominate local politics. Together, these two trends have produced what we now recognize as a fact of American life: intensified cultural conflict, pursued in a national political arena and creating national constituencies.

Although there is something new in seeing these morality plays performed on a national political stage, the center of gravity of

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55 " 'Law' is primarily a great reservoir of emotionally important social symbols." T. Arnold, The Symbols of Government 34 (1962).

56 *See* R. Gabriel, The Course of American Democratic Thought *passim* (1940); Lerner, *Constitution and Court as Symbols*, 46 Yale L.J. 1290 (1937).

American politics had moved to Washington well before today's social issues arrived.[57] In the nation's early days, a considerable proportion of political power was decentralized — as John Jay indicated in 1795 when he resigned as Chief Justice of the United States to become Governor of New York. With the centralization of government[58] came the centralization of political power. By the middle of the 20th century most of the major political issues had become, irreversibly, issues for the national government. In 1953 Earl Warren resigned as Governor of California to become Chief Justice of the United States.

What we now call the social issues had remained muted during the Great Depression and World War II.[59] Under Warren's leadership the Supreme Court led the way in transforming these issues into national issues, starting with *Brown v. Board of Education*.[60] From mid-century to about 1975 the Court gave constitutional recognition to many of the claims of equality and freedom that had found new voice during the postwar years. The cultural counterrevolution got its start in the politics of resistance to the decisions of the Warren and Burger Courts on school segregation, criminal justice, school prayers, and abortion.

A. The Social Issues, the Congress, and the President

Each time the Supreme Court strikes down a state law on constitutional grounds[61] it substitutes a uniform national principle of

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57 On the role of the Constitution in the process that transferred power from local political parties to national parties, see Tushnet, *The Constitution and the Nationalization of American Politics*, in A WORKABLE GOVERNMENT? THE CONSTITUTION AFTER 200 YEARS 144 (B. Marshall ed. 1987).

58 The following are some of the main factors in that centralizing process: the rise of national political parties, see Tushnet, *supra* note 57; the early steps of an infant national economy, with an occasional helping hand from the Supreme Court, see K. KARST, *supra* note 49, at 177-79; the challenge to slavery, culminating in the Civil War and Reconstruction; *see id.* at ch. 4; the growth of a nationwide system of transportation and communication; the Supreme Court's defense of economic liberties in the name of the fourteenth amendment; the adoption of the federal income tax; World War I; the full maturity of a national economy, made painfully apparent by a Great Depression that was nationwide; the New Deal, and its constitutional ratification by the Supreme Court; World War II; the Cold War.

59 The cultural clash over Temperance lasted until 1933, when the eighteenth amendment establishing Prohibition was repealed.

60 347 U.S. 483 (1954).

61 Or, for that matter, on federal statutory grounds.

law for a diversity of state rules.[62] Any item on the social issues agenda that responds to the Court's decisions is necessarily a national issue, to be pressed not only in the courts but in the executive and legislative branches of the federal government. Of course, the President is "the focus of public hopes and expectations"[63] about the social issues as well as other issues. More specifically, presidential candidates who prominently feature the symbols of religion and sex and gender are widely understood to be promising to appoint new Supreme Court Justices who will turn the tides of constitutional doctrine. Furthermore, in the federal legislative process both the President and members of Congress are regularly called upon to stand up and be counted on the social issues. In the era of symbolic politics, standing up and being counted have their own political importance, whether or not the vote will have any direct effect on anyone's behavior.

The abortion issue, for example, repeatedly gives the President and Congress occasion to take a stand. The attempt to overturn the Supreme Court's 1973 decision in *Roe v. Wade*[64] by constitutional amendment was doomed from the beginning; yet President Reagan and some members of Congress correctly saw the various amendment proposals as a series of opportunities to associate themselves with the "pro-life" movement. Similarly, Senator Helms's "human life" bill,[65] declaring that human life begins at conception — assuming it had been adopted and then interpreted to have some effect beyond expressing Congress's opinion — would almost certainly have been unconstitutional; yet it provided media exposure for the issue and for the bill's sponsor.

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62 The role of the Supreme Court as a nationalizing agent is particularly evident in the context of constitutional limits on local control of the public schools. The Court faces these questions virtually every Term. The Court is less willing than it was two decades ago to impose national constitutional norms. The change is evident in contexts as varied as the freedom of speech and the press, *compare* Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969) *with* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988), public aid to religious schools, *compare* Lemon v. Kurtzman, 403 U.S. 602 (1971) *with* Mueller v. Allen, 463 U.S. 388 (1983), and constitutional limitations on school discipline, *compare* Goss v. Lopez, 419 U.S. 565 (1975) *with* New Jersey v. T.L.O., 469 U.S. 325 (1985).

63 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

64 410 U.S. 113 (1973).

65 One version of this bill was introduced as S. 158, 91st Cong., 1st Sess. (1981).

The posturing of politicians is by no means the whole story. There are material consequences of some of the action Congress takes in the field of abortion, and even graver consequences of what Congress chooses not to do. Particularly important are its decisions on federal funding, not just for abortion procedures for poor women,[66] but for family planning counseling, overseas aid to health and population control programs, and domestic medical research. In any of these congressional contests the "pro-life" forces have a major advantage in the inertial drag of the legislative process.[67]

Federal funding usually is accompanied by conditions. Here a President can do some legislating of his own. Toward the end of President Reagan's second term, the Secretary of Health and Human Services issued a new regulation forbidding federally subsidized family planning clinics and health professionals to counsel patients about the option of abortion.[68] Congress had not changed the law; the Secretary had simply reinterpreted his authority under existing law.[69] In such a case the burden of overcoming legislative inertia is shifted to those who would overturn the President's "legislative" decision. It is generally easier to block legislation than to pass it.

That rule of thumb has taken on new force in today's world of congressional politics. As particularistic interest groups of all kinds have rapidly increased in number and effectiveness, they have been joined by religious groups. Between 1950 and 1985 the number of major religious lobbies in Washington grew from sixteen to at least eighty, and the list is growing.[70] The lobbyists are in the national capital not merely because they seek to influence Congress and the executive departments, but also because

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66 *See infra* text accompanying note 140.

67 Consider, too, the relation between the ways in which the President and members of Congress perceive the status of gay men and the levels of funding for AIDS research and care for persons with AIDS.

68 53 Fed. Reg. 2944-46 (1988) (codified at 42 C.F.R. § 59.8) (1990)).

69 The regulations reinterpret Title X of the Public Health Service Act of 1970. At this writing these regulations are under challenge in the Supreme Court, on both statutory and constitutional grounds. Rust v. Sullivan, 889 F.2d 401 (2d Cir. 1989), *cert. granted*, 110 S. Ct. 2559 (1990).

70 A. HERTZKE, *supra* note 19, at 5. The latter figure represents all religious lobbies, including groups supporting liberal causes such as civil rights legislation, environmental protection, and the funding of day care for the children of working parents. On the social issues, these groups do not serve as a counterweight to the lobbies of the Christian right.

Washington gives them a platform from which to project their messages to a constituency that stretches across the nation.[71]

At the same time the political parties, even the national parties, have declined in popular appeal[72] and in political muscle. Election finance is mainly in the hands of the candidates, not the parties, and political action committees (PACs) have come to play an increasing role in congressional campaign fund-raising.[73] In the Congress, where power used to be centralized in the hands of a small group of senior members, power has been dispersed. This dispersal, combined with the multiplicity and influence of interest groups, allows for many more access points to political power —

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71 National interest groups also routinely provide funds, and even mobilize local constituencies, to defeat local candidates. Thus "the political safeguards of federalism" are turned upside down, creating what the Framers of the Constitution surely would see as a topsy-turvy political world. *Cf.* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). Justice Powell had political developments like this in mind when he wrote his vigorous dissent in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 564-67 (1985).

72 By 1976, the number of Americans who called themselves Republicans had declined from more than 30% to under 20%, and those who said they were Democrats had declined from a majority to about 40%. S. BLUMENTHAL, *supra* note 36, at 39. In 1988 some 36% of American adults identified themselves as "strong" or "weak" Democrats, and 28% as "strong" or "weak" Republicans. These figures exclude 12% self-styled "independent Democrats" and 13% "independent Republicans"; presumably their attachments are weaker than "weak." STATISTICAL ABSTRACT OF THE UNITED STATES 264 (1990). In a Times-Mirror Co. poll just after the end of the Gulf War, 36% of the respondents identified themselves as Republicans and 29% as Democrats. *GOP Preferred by 36% to 29%, New Poll Finds*, L.A. Times, Mar. 22, 1991, at A1, col. 3.

73 *See generally* F. SORAUF, MONEY IN AMERICAN ELECTIONS (1988). On the decline of parties and their share of campaign funding, *see id.* at 3-4, 25-28, 121-53. On PACs, *see id.* at 72-120; J. BERRY, THE INTEREST GROUP SOCIETY 117-39 (2d ed. 1989). On the increase in lobbies generally, see K. SCHLOZMAN AND J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 74-78 (1986).

One result of the rise in importance of national lobbies and PACs is that, politically speaking, the rich get richer. Representing interests generally means representing the strong; interest groups are far less likely than political parties to represent the poor, the marginalized, the less well educated citizens. Furthermore, even national lobbies that do see themselves as representing people who are otherwise "left out" — for example, poverty action groups, or even some fundamentalist Christian groups — tend to be elitist in both attitude and operation. *See* A. HERTZKE, *supra* note 19, at 7-8.

an "advocacy explosion"[74] that further weakens party discipline. Newer voters have been less inclined than their parents to have strong party loyalties; among voters of all ages, ticket-splitting has grown. The candidate is more important than the party; indeed, in a political world increasingly populated by media specialists, the candidate is more important than the issues. "The issues in a campaign are the candidates, not the things they refer to as the issues. The question [for the consumer/voter] is which candidate will *feel* more like you do in relation to an issue."[75]

Some influential national PACs and interest groups are focused on single social issues, such as abortion or crime. By focusing their resources — particularly their electoral mobilization — on support for incumbents in congressional districts in which the swing of relatively few votes can change electoral outcomes, these nationwide groups can have considerable influence on particular representatives' floor voting on legislation, including appropriations of money, and even more influence on the representatives' behavior in the pre-vote legislative process.[76] In such a district these groups may be able to exercise something approximating a veto power, strongly inhibiting the district's representative from voting for bills that the groups actively oppose.[77]

The President, of course, has something more than influence that effectively amounts to a veto; he has the Veto Power itself. If the President vetoes a bill dealing with one of the social issues, it is hard to produce the two-thirds vote in each house that is necessary for Congress to override the veto and enact the bill into law. It is extremely difficult to enact civil rights legislation, for example, without the support of the President. So, a President who wants to maintain the legislative status quo is in a strong position to succeed. When an executive department issues regulations

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74 J. BERRY, *supra* note 73, at 16-43.

75 Tony Schwartz, a New York political media consultant, *quoted in* S. BLUMENTHAL, *supra* note 36, at 127 (emphasis added).

76 *See* J. BERRY, *supra* note 73, at 133-34. By an overwhelming preponderance, PAC money goes to congressional candidates, and, in elections to the House of Representatives, PACs contribute seven times as much to incumbents as they contribute to challengers. F. SORAUF, *supra* note 73, at 98-100. "Ideological" PACs contribute to challengers at a somewhat higher rate, *id.* at 105, but efforts to unseat incumbents tend not to succeed. *Id.* at 112-13.

77 For analyses of the electoral activities of fundamentalist Christian groups, see NEW CHRISTIAN POLITICS, *supra* note 13, at 169-268; S. BRUCE, *supra* note 6, at 81-90; A. HERTZKE, *supra* note 19, *passim*.

embodying new interpretations of existing laws — as in the family planning counseling regulations of 1988[78] — it creates a new "status quo" that Congress itself may be powerless to change unless it can override a presidential veto.[79]

One of the meanings of group subordination is that the members of a social group have difficulty in securing the changes in legislation they need in order to escape from their subordinate status. Historically a group's escape typically has been accomplished in a process that is locally variable and discontinuous, with intense bursts of status improvement punctuating longer periods of stagnation. One recent example is the legislative success of gay and lesbian Americans in some regions during the past two decades. They have secured the repeal of sodomy laws — a major symbol of stigma — in about half the states, and in a number of local communities they have secured the cooperation of public officials in antidiscrimination efforts ranging from redirection of police behavior to enactment of AIDS discrimination ordinances.

One response to gay-bashing, then, might be to move away from a hostile community to one that is more accepting — as, presumably, black people in Louisiana in the 1890s were free to move North to avoid racial segregation in railroad cars.[80] But the

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78 *See supra* text accompanying note 69.

79 In some cases Congress can influence executive decisions of this kind through its control over appropriations, or through the Senate's power to confirm high-level executive appointments.

80 In a thought-provoking article, Paul Carrington has suggested a system of "local option" in which states would be constitutionally free to regulate sexual morality in accordance with majoritarian preferences. Carrington, *A Senate of Five: An Essay on Sexuality and Law*, 23 GA. L. REV. 859 (1989). Constitutional doctrine can produce this range of choice for local legislative majorities by wholly rejecting, for example, lesbians' and gay men's claim of any right to sexual privacy. The disappointed claimants would remain free to move to San Francisco or New York or Los Angeles. If they wanted to remain at home, however, the logic of law and stigma would put great pressure on them to keep their sexual identities private, abandoning their right to be known as the people they are and still be treated as equal citizens. On equality and the disclosure of gay sexual identity generally, see Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

Professor Schneider, *supra* note 13, at 110, suggests an alternative doctrinal perspective: that a state's interest in socializing its citizens to majoritarian morality should be recognized as legitimate "if social dissensus about family law issues is not inevitable, and if a particular state has

single most important governmental expression stigmatizing gay Americans is one with nationwide symbolic effects that no one can escape by moving. It is the Defense Department's policy purporting to exclude lesbians and gay men from the armed services.[81] Here the political remedy for gay rights advocates would be to get Congress to act affirmatively to overturn administrative regulations. Yet the promotion of gay rights has not been high on the social issues agenda of either President Reagan or President Bush. A veto-proof majority in favor of abolishing the Defense Department's antigay policy is unlikely in the near future. In other words, Congress will not remove this stain on the principle of equal citizenship until the White House takes a different position. That eventuality will not arise soon. Indeed, the whole conservative social issues agenda seems likely to maintain its importance for Republican presidents so long as the South continues to be seen as the key to the "realignment" that the party's candidates have sought for a quarter-century.

B. Religion and Family Values: Presidential Politics and the Role of the South

After President Johnson signed the Civil Rights Act of 1964 into law, he said to an aide, "I think we just delivered the South to the Republican party for a long time to come."[82] As to presidential elections, Johnson's prediction came true as early as 1968. In that year Richard Nixon essentially swept the South[83] on the basis of a "Southern strategy" that foreshadowed two features of the 1980s social issues: distance from the civil rights movement[84] and toughness toward crime. The Nixon campaign emphasized the dual themes of opposition to busing remedies for school desegregation and support for "law and order" — the latter term expressing resistance to the Warren Court's decisions restricting

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something like social consensus as to them." Given the demography of sexual orientation, this doctrinal proposal might invalidate legislation expressing an antigay policy only in New York or California, the places where such a policy is least likely to be enacted into law — and so would provide little or nothing in the way of effective constitutional protection.

81 *See* Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 545-63 (1991).

82 Moyers, *What a Real President Was Like*, Washington Post, Nov. 13, 1988, at C5, col. 4.

83 The only exceptions were four states that went for George Wallace, the candidate of the American Independent Party.

84 *See, e.g.*, A. LAMIS, THE TWO-PARTY SOUTH 28-30 (1984).

law enforcement in the name of the Bill of Rights. The themes of race and crime were linked in 1968 and remain linked today; as a modern political issue, "crime control" evokes — and is intended to evoke — mental pictures of young men with black and brown faces.

Nearly a generation has passed since 1968, and much has changed in the politics of race relations, in the South as elsewhere in the nation. But not everything has changed. The 1990 senatorial campaign in North Carolina featured a television ad showing white hands crumpling a job-rejection letter. The recipient was portrayed as having lost out to a minority applicant because of an affirmative action program. Every white viewer could feel the dramatic force of the ad as a symbol of the status changes that had permitted Harvey Gantt, a black man, to offer a serious challenge to Senator Helms.

The North Carolina incident was seen by some political prophets as a harbinger of the 1992 presidential campaign. A few months earlier, in Louisiana, a former Nazi with a political facelift had made a strong showing in a primary election for the U.S. Senate, and soon thereafter the President had vetoed Congress's bill to enact a Civil Rights Act of 1990. The President claimed that the bill would encourage private employers to adopt racial quotas in hiring.[85] After the November 1990 election, William Bennett, the chair-apparent of the Republican National Committee, made a major speech blasting the idea of race-conscious remedies for past discrimination.[86] The speech seemed to signal that the 1992 campaign would feature an aggressive use of the rhetoric of "quotas." Shortly afterward, however, Bennett withdrew from consideration for the post, and political commentators reported that White House strategists were divided over the ques-

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85 The bill was designed in part to overrule the Supreme Court's decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989). *Wards Cove* dealt a devastating blow to plaintiffs in employment discrimination suits. *See* Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 SUP. CT. REV. 1. The sponsors of the 1990 bill, however, responded to the Bush administration's expressed concerns by including a provision that nothing in the law "shall be construed to require or encourage quotas." In political terms, this sort of statutory language is no match for a video image of white hands crumpling a job-rejection letter.

86 Bennett, who had campaigned actively for Senator Helms' re-election, had been a long-time foe of affirmative action. *See* T. EASTLAND & W. BENNETT, COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO BAKKE AND WEBER (1979).

tion of whether the party should push the race button again in 1992.[87]

Just before President Bush was inaugurated, he spoke to a black audience in these words: "What becomes of Martin Luther King's dreams is up to us. We must not fail him. We must not fail ourselves."[88] Why, then, are some of the President's political advisers recommending a hard line on race? The answer lies in two facts of political life. First, race has been an effective "wedge issue," attracting significant numbers of working-class whites away from their post-New Deal attachments to the Democratic Party.[89] Second, if a Republican candidate for President can sweep the South, the Democratic candidate faces an obstacle that is virtually insurmountable.

The special role of the South in presidential elections is reflected not only in electoral strategies concerning race and crime, but also in a more general strategy to emphasize the whole range of subjects on the social issues agenda. Large numbers of southern whites, for example, are active members of fundamentalist Protestant churches,[90] and most of these are blue-collar or lower white-collar voters.[91] More than any other region of the

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87 *See* Barrett, *Testing the Waters on Race*, TIME, Dec. 24, 1990, at 21; *see also* Eaton, *House Panel Backs New Rights Bill Opposed by Bush; Showdown Seen*, L.A. Times, March 13, 1991, at A4, col. 1.

88 Gerstenzang, *Bush Vows to Pursue King Dream*, L.A. Times, Jan. 17, 1989, at A1, col. 6.

89 *See* E. CARMINES AND J. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (1989); A. LAMIS, *supra* note 84, at 7-30, 210-32.

90 The Moral Majority (now rebaptized the Liberty Federation) is overwhelmingly fundamentalist and Protestant, with strong representation of Baptists, especially in the South. A. HERTZKE, *supra* note 19, at 96. On the role of Protestant churches in mobilizing Southern white voters, see Guth, *The Politics of Preachers: Southern Baptist Ministers and Christian Right Activism*, in NEW CHRISTIAN POLITICS, *supra* note 13, at 235. On Protestant churches' role in voter registration in 1984, see A. J. REICHLEY, *supra* note 8, at 326.

91 For demographic data from national surveys, see Yinger & Cutler, *supra* note 13, at 69, 81-90; *see also* A. HERTZKE, *supra* note 19, at 143, referring to fundamentalist churches as "churches of the dispossessed."

These characterizations are accurate, but it is just as true for the religious right as for the rest of American politics that political activity is correlated positively with economic class. K. SHIENBAUM, BEYOND THE ELECTORAL CONNECTION: A REASSESSMENT OF THE ROLE OF VOTING IN CONTEMPORARY POLITICS 89 (1984). For middle-class activists, the status politics of Christian conservatism cannot be laid to anxiety over a declining position

country, the South is dominated by "culture Protestantism."[92] The products of Southern legislatures reflect religious orthodoxy on questions of "sex, divorce, abortion, equal rights for women, pornography, drugs, alcohol, education, child-rearing, parental authority, dress, and general behavior."[93] So, religion and "family values" are wedge issues, too. Religious fundamentalism has joined race in cracking party loyalties throughout the white South and converting Democrats into Republicans.[94]

A President who is persuaded that he needs to hold the white South to be re-elected might be expected to support the legislative agenda of the cultural counterrevolution. He would be cool to the civil rights movement, and would express that coolness in the language of opposition to "quotas." He would favor officially sponsored prayer in the public schools, and federal funding for religious organizations' counseling of pregnant women, but would oppose federal funding for abortion counseling — and, of course, oppose funding for any sort of abortion procedure, even when the woman has become pregnant through rape or incest. In proposing new social issues legislation, he would win some battles and lose others. In opposing legislation on the other side of the social issues — especially legislation promoting equality for

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on the socioeconomic scale. Rather, it represents anxiety over the underrepresentation of their values in American public life. *See* Harper & Leicht, *Explaining the New Religious Right: Status Politics and Beyond*, in NEW CHRISTIAN POLITICS, *supra* note 13, at 101; A. HERTZKE, *supra* note 19, at 35.

92 *See* Hill, *The South's Culture-Protestantism*, 79 CHRISTIAN CENTURY 1094 (1962).

93 Roland, *The Ever-Vanishing South*, in 2 MYTH AND SOUTHERN HISTORY 155, 162-63 (2d ed. 1989)

94 A. HERTZKE, *supra* note 19, at 33-34. One survey showed that 80% of "white evangelicals" (a term seemingly intended to include fundamentalists as well) voted for President Reagan in 1984. Reichley, *supra* note 18, at 27. Conservative strategists have also used religion and "family values" issues as means for attracting working-class Catholics away from their historic attachments to the Democratic Party. *See, e.g.*, A.J. REICHLEY, *supra* note 8, at 299-302. The Democrats have occasionally added their own self-destructive tendencies to this mix; the symbolic trappings of their 1972 presidential convention, for example, seemed perversely designed to make working-class whites feel they were being drummed out of the party's constituency.

In the years since the Supreme Court decided Webster v. Reproductive Health Services, 492 U.S. 490 (1989), abortion rights apparently have, to some degree, served to split "pro-choice" Republicans away from candidates previously committed to "pro-life" positions. Such a development had been predicted earlier. *See, e.g.*, Reichley, *supra* note 18, at 30.

racial and ethnic minorities, for women, or for gay Americans — he would almost always win.[95]

In this scene we are hip-deep in irony. Even before the Civil War the white South had seen itself as a culture under siege. From the occupation by Union troops to the modern Supreme Court's enforcement of the fourteenth amendment, this defensive attitude and its underlying sense of "frustration, failure, and defeat"[96] were reinforced by application of the nation's power. Culturally speaking, some upper-class white southerners used to think of themselves as peripheral to the centers of the Northeast; if Thomas Wolfe could not go home again, the reason was that his novels had touched an exposed nerve in his old community. In 1942 Gunnar Myrdal wrote that the South was becoming "Americanized."[97] Today the South — especially the white Protestant South — is a major influence on the social issues agenda of the President, and thus on the policies of the national government. As a result, through the community-defining functions of political expression, America is becoming more "Southernized" in the culture of our public life.

C. Mobilizing a National Constituency

The South gets its distinctive importance in presidential politics from a combination of two factors: the concentration of a large number of fundamentalist Protestants, and a tragic regional history that makes the race question a subtext for all politics. But, the political rise of Christian fundamentalism is also a nationwide development, with a national significance that matches the fundamentalists' numbers. Where the "mainline" Protestant denominations[98] tend to lack cohesiveness on issues concerning sexuality and the roles of women, the conservative Protestant sects and the Catholic Church have clearly defined positions. That clarity aids political managers seeking to mobilize scattered voters into political factions. On their television screens and in their mailboxes these voters find regular reminders that they are a national political constituency whose voices are being heard. This new group

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95 But not quite always. *See* the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1681 (1988).

96 C. V. WOODWARD, THE BURDEN OF SOUTHERN HISTORY 19 (1968).

97 G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1011 (1944). The book went to press in 1942.

98 The label survives in an era of declining membership.

consciousness, and the substantive preferences it represents, are part of a "major cultural movement."[99] Presidential candidates and their campaign consultants have found in that movement a new reservoir of support that can be tapped through judicious employment of the rhetoric of the social issues.

In the 1970s evangelists who were broadcasting on national television discovered a way to make their medium interactive, allowing viewers who phoned the studios not just to pledge money but also to pray with the people who took their calls.[100] This innovation was dramatically successful, and today about a hundred million Americans live in households where someone regularly tunes in the evangelists' programs.[101] Although the nationally prominent preachers only rarely use their broadcasts to endorse candidates, their messages are overtly political when they discuss issues such as school prayer or gay rights.[102]

Huge numbers of Americans, no doubt including some readers of this article, have their names on mailing lists of groups whose reason for being is status politics. Direct-mail advertising, carefully targeted to recipients already identified as supporters of particular causes, has grown spectacularly since the 1970s, and has played an especially important role in the nationwide mobilization of the new Christian right.[103] This newer version of cultural politics alters the emphasis of political expression. Typically the recipient of a message about sex education in the schools, or abortion funding, is invited not only to do something (support a cause, vote for a candidate) but also to be someone — to make a

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99 A. HERTZKE, *supra* note 19, at 201.

100 E. JORSTAD, *supra* note 21, at 28, 31-68. On the "electronic church" generally, see A. REICHLEY, *supra* note 8, at 314-19.

101 This figure, which includes children, is taken from the 40% figure in the text *supra* note 34 and applied to a national population of about 250 million. For other estimates of the audiences for various kinds of religious broadcasting, see Gaddy, *Some Potential Causes and Consequences of the Use of Religious Broadcasts*, in NEW CHRISTIAN POLITICS, *supra* note 13, at 117.

102 *Id.* For a suggestion that structural factors will cause the political influence of television evangelists to grow, see Hadden, *Televangelism and the Future of American Politics*, in NEW CHRISTIAN POLITICS, *supra* note 13, at 151, 161-65.

103 On direct-mail techniques by religious groups generally, see A. HERTZKE, *supra* note 19, at 49-55, 146-60; E. JORSTAD, *supra* note 21, at 69-88. On direct-mail mobilization by the new Christian right, with particular attention to PACs, see Latus, *Mobilizing Christians for Political Action: Campaigning with God on Your Side*, in NEW CHRISTIAN POLITICS, *supra* note 13, at 251.

public statement of self-identification with a social group and its professed values. As Richard Viguerie said a decade ago, "[Liberals] think of direct mail as fundraising. They miss the whole boat if they think that. It is a form of advertising. . . . It's a way of mobilizing our people; it's a way of communicating with our people; it identifies our people; and it marshals our people."[104]

As liberal groups such as Common Cause also know, computerized direct-mail techniques do, indeed, permit the rapid mobilization of letter-writing to legislative representatives; on some issues (school prayer, abortion, the Equal Rights Amendment) it is possible to get mailings of this kind into the hands of millions of Americans.[105] The interactive technique works here, too. Even solicitations of money frequently are cast as invitations to "send a message" to Washington (or Sacramento, or Albany, or Montgomery). For the constituents who respond by writing to their representatives, or "voting" in straw polls, or contributing money, expression is not just an instrument for achieving some policy goal; it is also an end in itself. Whether or not their preferred candidates or measures succeed, their participation allows the constituents to believe that their values count for something in the polity's decisional process.[106] For people who feel that their values have been ignored by a secularized society, participation is its own reward.

Increasingly, then, the messages of this new religious populism flow from the constituents to the specialists in constituent mobilization. As a result, each passing year finds the political operatives better able to fashion political appeals tailored to their audiences' established preferences. In the realms of religion, sex, and gender, the appeals make heavy use of emotion-laden symbols. When the intended audience consists of conservative Protestants, the Bible is an especially powerful symbol,[107] but it is by no means the only one; Senator Helms's word-cartoon of the gay-

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104 *Quoted in* S. BLUMENTHAL, *supra* note 36, at 226-27 (emphasis omitted). On the direct-mail techniques of Viguerie and other operatives of the New Right, *see id.* at 217-34.

105 On the New Right's direct mail capacities, see A. HERTZKE, *supra* note 19, at 53.

106 *See id.* at 97.

107 The same political operatives who appeal to their constituents in biblical language generally turn around and make arguments to congressional staffers in the secular language of politics and social utility. *See id.* at 88.

rights marchers is another such symbol,[108] and the checklist of the Family Issues Voting Index includes several other symbols of the 'devil's work.'[109] The basic tactic of direct-mail political advertising — not just by the New Right, but across the whole political spectrum — is an appeal to fear.[110]

Today many a candidate's main goal is to project a personality,[111] and in seeking to do so many turn naturally to the social issues. Sidney Blumenthal's comment about the new media-centered politics is of special pertinence to the politics of religion, sex, and gender:

> The [political] consultant must stimulate the public's wish fulfillment for the candidate through manipulation of symbols and images, enticing voters to believe that the candidate can satisfy their needs. The relationship of dreams to reality is analogous to the relationship between advertising and politics. Ads are condensed images of wish fulfillment. Political commercials are sometimes made to be deliberately irrational in order to reach voters on other than a conscious plane. Image-making, no matter how manipulative, doesn't replace reality; it becomes part of it. Images are not unreal simply because they are manufactured. Comprehending this new image-making is essential to understanding modern politics.[112]

As the media specialists know, nightmares about impending doom are every bit as effective as dreams of wish-fulfillment. Whatever else they may do, today's practitioners of cultural politics traffic in manufactured images of enemies who are scary.

III. The Social Issues and the Courts: From Faction to Exclusion

The same fears that drive the politics of the social issues agenda also tend to polarize both the citizens and the politicians who mobilize them into constituencies. Although political issues concerning religion and sex and gender sometimes do implicate

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108 *See supra* text accompanying note 45.

109 *See supra* text accompanying note 21.

110 This tactic is not a monopoly of the New Right. Prophecies of doom also abound in advertising for liberal causes. On the publicity campaign against Judge Robert Bork's nomination to the Supreme Court — complete with focus-group opinion polls, media consultants, and cartoon-like television spots — see E. Bronner, Battle for Justice: How the Bork Nomination Shook America (1989).

111 S. Blumenthal, *supra* note 36, at 3.

112 *Id.* at 5.

interests in the classical sense — the distribution of money, or of jobs — mostly they are centered on cultural symbols. In this perspective politics aims to capture government's expressive capacity. If law and government give official approval to the values of a cultural group as the "true" American values, the members of that group can feel justified in claiming the status of "true" Americans. The resulting contests over government expression are thus a series of highly polarized zero-sum games, in which every status gain for one side implies a status loss for the other. This political environment is ripe for what James Madison called the tyranny of "faction." Madison believed that the Framers of the proposed Constitution had devised structures for the national government that would inhibit the impulse and opportunity to advance factional interests and would also promote legislative deliberation in the public interest. These hopes were excessively optimistic even in Madison's time, and in the context of today's cultural politics they seem fanciful. Yet some modern commentators see his structural analysis of factional power as a key to understanding and justifying the role of the courts in interpreting the equal protection clause and its analogue in the fifth amendment's due process clause.[113]

Unquestionably the judiciary has a crucial role to play in warding off the harms of group subordination. But in my view, the central responsibility of the courts in protecting against factional oppression focused on the social issues is not so much structural as substantive: not the purification of the legislative process, but the effective inclusion of all our people as Americans. This final discussion sets out the problem of the zero-sum game, considers the Madisonian concerns about factional domination in the light of today's issues concerning religion and sex and gender, and suggests a judicial response to those issues centered on the substantive principle of equal citizenship.

A. Government Expression and the Zero-Sum Game of Status Dominance

The lesbian and gay rights movement provides a near-perfect example of the way in which political issues involving religion, sex, and gender tend to focus on government expression, to implicate the status ordering of cultural groups, and to confront

[113] On the latter guarantee, see Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977).

decision makers with zero-sum choices that often resist compromise. These tendencies are observable across the whole range of lesbian and gay rights issues, from employment to child custody.[114] Here, however, it will suffice to refer to three recent points of contention: laws criminalizing sodomy, the Defense Department's policy that purports to exclude lesbians and gay men from the armed services, and the issue of same-sex "marriage."

These issues take their primary importance from the messages conveyed by government about the status of lesbians and gay men in American society. The sodomy laws are still on the books in about half the states, but they are enforced only rarely. Their main function is symbolic, the representation of the organized community's disapproval of the people who engage in homosexual sex.[115] Even the lowest estimates place the number of gay and lesbian service members in the scores of thousands. The effective prohibition of the exclusion policy is a ban on the open expression of homosexual orientation. The exclusion policy is retained for its expressive content, in an effort to maintain both the gender line and an ideology of masculinity.[116]

Similarly, as we have already seen, government's official expression about the status of homosexual orientation is one of the most critical issues raised by a proposal to offer gay and lesbian couples a formal legal status that parallels the status of marriage.[117] Yet, one of the standard arguments opposing repeal of a sodomy law, or abandonment of the services' exclusion policy, or adoption of a status for gays resembling marriage, is that such a change in the law might be taken as approval of a gay or lesbian identity or of homosexual conduct.[118]

A contest that is a zero-sum game does not necessarily preclude

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114 Rhonda Rivera has exhaustively discussed all these issues in a series of articles: *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979); *Queer Law: Sexual Orientation Law in the Mid-Eighties*, (pts. 1 & 2) 10 U. DAYTON L. REV. 459 (1985), 11 U. DAYTON L. REV. 275 (1986).

115 The majority in Bowers v. Hardwick, 478 U.S. 186 (1986), manifests this function of the sodomy laws with chilling clarity. *See* K. KARST, *supra* note 49, at 201-10.

116 *See* Karst, *supra* note 81, at 545-63.

117 *See supra* text accompanying note 54.

118 *See, e.g.*, G. BUCHANAN, *supra* note 40, at 127-59 (lesbian or gay "marriage"); Wilkinson & White, *Constitutional Protection for Personal Life Styles*, 62 CORNELL. L. REV. 563, 593-96 (1977) (repeal of sodomy laws).

compromise. In a state that maintains a law criminalizing sodomy, it is entirely possible — indeed, it is the norm — for that law not to be enforced. Similarly, one who wanted to "split the difference" on the issue of gay rights might favor repeal of the sodomy laws but resist the proposal of a marriage-like status for gay or lesbian couples.[119] Such efforts at compromise, however, do not resolve the problem of the zero-sum game. The main antagonists in these cultural battles are resistant to halfway solutions, not because they are intransigent but because they are realistic about what is at stake.

The main purpose for keeping the unenforced sodomy laws on the books, or rejecting a status approximating marriage for gay and lesbian couples, is to maintain the community's "moral climate" (with the climate controls in the hands of a majority in the legislature) through formal condemnation of homosexual orientation.[120] These official expressions are effective, as the Jim Crow laws were effective in defining the status of black Americans. The moral climate maintained by these laws brings acid rain into millions of lives, for it invites all manner of private gay-bashing, from insults to employment discrimination to physical attacks. One person's community-defining moral condemnation, then, is another's community-denying stigma. Viewed from either angle, it is hard to see a workable compromise of the zero-sum game of status dominance. Either the sodomy law stays on the books or it is repealed (or invalidated).[121] If the law remains as a symbol of moral condemnation, gay and lesbian citizens are stigmatized; if the law is repealed or held invalid, many citizens will see that act as one more example of a secular society's dismissal of their values.

The issue of school-sponsored prayer in the public schools similarly centers on government expression and its community-defin-

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119 The latter is the position of Professor Buchanan, *supra* note 40, chs. 4, 5. He sees the position as a compromise, calling it a "three-fourths loaf" proposal. *Id.* at 81-82.

120 *See, e.g.*, G. BUCHANAN, *supra* note 40, at 146-56. *Cf.* Schneider, *supra* note 13, at 100 (discussing more generally the state's interest in avoiding a "social environment" that is "offensive").

121 In *Hardwick* Justice Powell, concurring in the majority's refusal to strike down the Georgia sodomy law, stated that the case would be different if the state actually were to imprison someone for violating the law. 478 U.S. at 197. This comment may have been intended to soften the blow to gay rights advocates, but it made clear that the law's only effective function was to stigmatize homosexual conduct.

ing functions. The value of religious ritual as part of a community's moral cement is undeniable; there is deep wisdom in the comment that "ritual is prior to dogma."[122] But the community thus defined excludes the child who does not share the majority's religion. Sacred symbols dramatize negative values as well as positive ones, pointing "not only toward the existence of good but also of evil, and toward the conflict between them."[123] For the child who is a religious outsider, it is little comfort to be told not to take it personally. How would you like to be assigned to the 'wrong' side in a zero-sum game between Good and Evil, Us and Them?

A law restricting access to abortion touches material interests of grave dimension, whether the law be adopted or repealed, upheld or struck down. But such a law also has its expressive, community-defining aspects, and its uses in ordering the status of social groups. Legal controls over women's sexuality and maternity have been crucial features of a social system that has subordinated women.[124] Issues touched by abortion laws are not limited to the status of women in relation to men, although it has been clear from an early time that access to abortion is a feminist issue.[125] There is also the status conflict between women who have placed high value on a life in the public world of work and women who have placed high value on a life centered in the domestic world — a conflict with roots in both religion and socio-

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122 E. CASSIRER, AN ESSAY ON MAN 79 (1944). It is "out of the context of concrete acts of religious observance that religious conviction emerges on the human plane." Geertz, *Religion as a Cultural System*, in ANTHROPOLOGICAL APPROACHES TO THE STUDY OF RELIGION 28 (M. Bannon ed. 1966).

123 C. GEERTZ, *supra* note 31, at 130.

124 See MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, in FEMINIST THEORY: A CRITIQUE OF IDEOLOGY 1, 15-27 (1982) [hereafter FEMINIST THEORY], for an excellent statement of this point. In seeking to understand this process one cannot usefully separate values from interests; the sexualization of male power is central not only in limiting women's power in intimate relations but also in limiting women's opportunities in the public world of office-holding and employment. For a recent comment see Eisenstein, *The Sexual Politics of the New Right: Understanding the "Crisis of Liberalism" for the 1980s*, in FEMINIST THEORY, *supra*, at 77.

125 *See, e.g.*, G. CALABRESI, *supra* note 13, ch. 5; Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. REV. 375 (1980); Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977).

economic class.[126] The abortion issue heightens consciousness of sex before marriage and of teenage female sexuality, questions on which there are deep cultural and religious disagreements in American society.[127] Symbol and substance are intertwined here; regulations of abortion and the invalidation of those regulations are both seen as official government expression, not just about the morality of abortion but about the roles appropriate for women. On these issues, any views government may express will offend someone's deeply held values.[128]

The social issues agenda for religion, sex, and gender is part of a large-scale zero-sum game centered on the expressive apparatus of government. The agenda is not just a response to the passions of cultural division; it is designed to keep those passions inflamed, to assure that a struggle over factional dominance and subordination will be a central and long-lasting feature of national politics. Here we strike another rich vein of irony. The

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126 *See generally* K. LUKER, *supra* note 21. In Luker's study of women who were politically active in the "pro-life" and "pro-choice" causes, there was a high correlation between women's own life choices (for domesticity, or for careers outside the home) and their beliefs about a woman's right to have the option of abortion. Faye Ginsburg, in her later study of a smaller group of women activists, generally agreed with Luker, but also found women on both sides of the abortion issue who departed from the pattern Luker had identified. (In particular, some younger "pro-life" women were career-oriented.) Furthermore, Ginsburg's analysis highlights an inner tension felt by women on both sides of the abortion issue, "a tension between their participation in domestic and public domains." F. GINSBURG, *supra* note 21, at 147. Ginsburg confirms, however, the vitality in this dispute of a contest over "the moral authority of nurturance attributed to domesticity and its relationship to both female identity and action." *Id.* The abortion issue finds its emotional center in the culturally contested definition of women's social identity.

127 *See supra* text accompanying note 51.

128 Professor Schneider, *supra* note 13, at 111-14, argues that courts and constitutional doctrine have impeded compromise on the social issues, and that the only judicial compromise in sight would be his suggestion for a constitutional "local option" doctrine. In this view states with strong majorities on the social issues would be allowed to regulate sexual morality in ways that would be denied to states that were more divided on those issues. For minorities such as lesbians and gay men this "compromise" would add next to nothing in effective constitutional protection. *See supra* note 80. Not only do efforts at judicial compromise face an uphill struggle, but, as Professor Schneider recognizes, *supra* note 13, at 114-17, *legislative* compromise of the zero-sum game of cultural status is itself extremely unlikely.

authors of the social issues agenda are the same people who regularly exhort us to be true to the vision of the Framers.

B. Madison's Avenues

James Madison's most celebrated contribution to *The Federalist* was his defense of the structure of the proposed national government as a response to the problems of "faction." Madison assumed that in conditions of liberty and democracy citizens would form into factions, groups "united by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[129] As this very definition signaled, he foresaw two dangers when a faction came to command a majority in the legislative branch of government: the tendency to oppress a minority faction, and the tendency to place factional interest above the public good.

Madison argued that the structure of the proposed national government would mitigate these dangers in two ways, one "republican" and one "pluralist." First, the people would rule not by direct democracy, but through elected representatives whose positions would enable them to rise above factional struggles to pursue the public good.[130] Second, although a tendency toward polarization made factional domination a serious problem in state legislatures, in the much larger national Congress the presence of many competing factions would tend to prevent any one of them from enacting oppressive laws. Furthermore, the effects of any abuses of factional power in Congress would be moderated by the "checks and balances" built into the separation of powers and federalism.[131]

In the beginning Madison's hopes for government by relatively

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[129] THE FEDERALIST No. 10 (J. Madison).

[130] Julian Eule has explored Madison's concerns about direct democracy in the context of today's legislation by initiative measure, and argued persuasively for active judicial review of laws adopted by popular vote. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522-30 and *passim* (1990). On direct democracy and the passions of cultural division, *see id.* at 1553-58; Linde, *When Is Initiative Lawmaking Not "Republican Government"?*, 17 HASTINGS CONST. L.Q. 159 (1989).

[131] *See* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-45 (1985) (discussing Madison's analysis). For a slightly different view, see M. MEYERS, THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON xxiv-xxxiii (rev. ed. 1981).

disinterested legislators had some chance for success. By around 1820, however, "gentry rule" had collapsed, and the play of interests came to dominate Congress as well as the state legislatures.[132] Admittedly, legislators over the years have consistently cast their arguments for and against proposed legislation in the language of the public good. Similarly, the courts often behave *as if* legislatures were deliberating — were even constitutionally obligated to deliberate — in the service of something higher and purer than factional advantage.[133] Yet these legislative and judicial expressions of republican piety usually bespeak more ceremony than conviction.

Madison had seen the quarrels of religion at close hand, but could not possibly have foreseen today's interactions of religion, sex, and politics. The issues raised by these interactions are especially hard to fit into any pattern of reasoned congressional deliberation. The problem is not just that the typical member of Congress lives in an environment teeming with lobbyists, PACs, and media consultants. More fundamentally, the member is himself or herself a cultural artifact, the product of socialization that makes acculturated assumptions seem like objective reality.[134] This conditioning is especially effective when the "reality" in question is the social construct of gender that has become lodged in the member's sense of self. In the halls of Congress as elsewhere, the personal is political. Given the centrality of gender identity, a political issue that implicates the social meanings of gender is not just like any other issue with an ideological charge. In this area the same passions that produce factions also confound "republican" detachment. The process by which the member of Congress apprehends and decides an issue concerning sexuality simply cannot be captured in the idea of deliberation about the public good.

Proposals to restrict abortion, for example, tap our deepest feelings about sex and gender. Starting in childhood, nearly all of us are given strong doses of emotion-laden acculturation about

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132 On the end of gentry rule, see R. WIEBE, THE OPENING OF AMERICAN SOCIETY 129-252 (1984).

133 *See id.* at 49-59; Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 177-99 (1977-78).

134 *See* Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987). On the role of sexuality in constructing the "reality" of gender, see MacKinnon, *supra* note 124, at 15-27.

"woman's role" as child-bearer and child-rearer. The assumptions thus ingrained seem sure to affect opinions about abortion in ways that do not even reach conscious awareness.[135] Similarly, males in our society are raised in an ideology of masculinity that thrives on deep-seated anxieties associated with sex and with gender identity. In combination these buried passions may produce attitudes that are hostile or punitive — for example, toward the young woman whose visit to the abortion clinic personifies a challenge to traditional norms of sexual behavior.[136] Attitudes like these, just as common among legislators as in any other group of citizens, are in no sense the product of deliberation. Worst of all, a considerable number of national representatives, far from seeking insulation from their constituents' impulses of passion, intentionally use electronic images of fear to stimulate those impulses and translate them into political division. Among the things James Madison could not foresee in today's politics, none would dismay him more than the role of Madison Avenue.

If Madison's "republican" solution to factional tyranny is frustrated by today's mixture of religion, sex, and politics, his "pluralist" solution is likewise frustrated. No cultural minority can safely rely on the structure of the national government to prevent factional tyranny. Here, I concede, Madison's expectation has been partly fulfilled. Congress in the modern era has defeated a number of proposals for new laws that would further oppress subordinated groups.[137] In some cases — the enactment and extension of major civil rights laws since the 1960s, for example — Congress has moved affirmatively to displace local factional domination with national norms of equal citizenship. However, several features of our political world prevent the full realization of Madison's hopes for the national government as an instrument for dampening the impulse to factional tyranny.

When that impulse is founded on the passions of cultural identity,[138] as it is when the matters at stake concern religion or sex or

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135 *See generally* N. CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE (1976).

136 *See* R. PETCHESKY, *supra* note 21, at 221-33.

137 The notable exceptions have tended to come during times of national hysteria; the internment of Japanese Americans during World War II is the classic case.

138 *See* Linde, *supra* note 130, at 166-69.

both, the issues before Congress have a singular capacity to polarize. Not only does such an issue tend to produce a factional majority; it also tends to present a choice between fundamental cultural values, in which one faction's status gain implies the devaluation of another faction's status. The markedly increased activity of national interest groups — not just the lobbies of the religious right, but groups such as the National Organization of Women or Planned Parenthood — heightens this tendency. To mobilize their constituencies and secure the funding to keep themselves going, these groups must construct enemies.[139] They have a vested interest in portraying each social issue as a zero-sum game of status dominance, and they succeed in doing so.

In relying on structural mechanisms that would make it difficult for Congress to act, Madison revealed the incompleteness of his understanding of the ways in which "the violence of faction" could affect the legislative process. Cultural minorities in particular often need the active intervention of government to break the grasp of "private" (that is, nongovernmental) tyranny.[140] In this circumstance factional control can be reinforced merely by preserving the legislative status quo. Here all those Madisonian mechanisms that promote stagnation and stalemate operate not to prevent factional domination but to maintain it. This pattern is illustrated by the recent difficulties attending the enactment of federal civil rights legislation, and laws providing federal funding for abortions when poor women's pregnancies have resulted from rape or incest.[141]

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[139] As one liberal specialist in direct-mail solicitation put it, "You've got to have a devil. If you don't have a devil, you're in trouble." *Quoted in* J. BERRY, *supra* note 73, at 59.

[140] *See, e.g.*, Karst, *supra* note 85.

[141] Presidential vetoes present "political questions" that are not reviewable in court. The denial of abortion funding to poor women is nonetheless reviewable. Congress provides funds for poor women's medical expenses of childbirth, and the resulting inequality deserves the constitutional redress that the Supreme Court denied in Harris v. McRae, 448 U.S. 297 (1980) and Maher v. Roe, 432 U.S. 464 (1977). Government allocates a large proportion of poor people's resources, and the refusal to fund this medical expense may effectively determine a woman's decision whether to have an abortion. *See* Tushnet, *The Supreme Court on Abortion: A Survey*, in ABORTION, MEDICINE, AND THE LAW 161, 172-73 (3d ed. 1986); *see also* L. TRIBE, CONSTITUTIONAL CHOICES 242-43 (1985).

The vetoed civil rights bill presents a different case. I do not contend that the courts should "enact" such a failed bill by interpreting the Constitution to embrace its provisions. However, the national government's systematic

As the last two examples remind us, Madison could not have foreseen the strong legislative role of the President, both in initiating laws and in vetoing them. The power of the veto is, in effect, a power to legislate when the oppression of a cultural group is embodied in executive regulations. Surely one reason why Congress has not come to grips with the Department of Defense regulations purporting to exclude lesbians and gay men from the armed forces is the high probability of a presidential veto. If there is little hope that Congress will override such a veto, why should a member take the political risk of voting for a doomed bill to end the services' policies of segregation?

The likelihood of a presidential veto of such a bill is directly connected with the role of the South in today's presidential politics. Today the South is strategically placed to project a vision of cultural dominance on national politics — as it was when civil rights bills repeatedly failed during the 1930s and 1940s.[142] In the two decades that followed, of course, the Supreme Court intervened to break the political logjam that was denying the claims of black Americans to full participation in the public life of the community. That experience teaches lessons for today's judges in the field of gay rights, and one of its most important teachings is this: The strongest case for judicial intervention is the one in which a dominant group uses the power of government to deny equal citizenship to the members of another group.

C. Cultural Domination and the Problem of Exclusion: Some Lessons about Judicial Review

Although history has not fulfilled Madison's hopes for eliminating factional domination of national lawmaking, his concerns and his structural analysis continue to influence modern commentary on judicial review. Just two years ago, for example, Justice Scalia quoted Madison to support his conclusion that a city's race-based affirmative action program required more demanding judicial scrutiny than the Court had given a similar program adopted by Congress. Scalia noted that "[t]he struggle for racial justice has historically been a struggle by the national society against oppres-

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refusal to remedy a social group's subordination does, at the very least, add urgency to the group's claim for judicial intervention when government is actively contributing to the subordination.

142 *See* G. MYRDAL, *supra* note 97, at 819-63 (on legislative program and organization of NAACP).

sion in the individual States."[143] There is wisdom in judicial deference when an act of Congress seeks to include groups long underrepresented in aspects of the community's public life as important as employment or government contracting. But the main justification for that deference is not structural but substantive: the responsibility of Congress to enforce the Fourteenth Amendment's guarantee of equal citizenship.[144] In the politics of the social issues, contests for factional dominance are national struggles, and the structure of the national government is an uncertain defense against factional oppression. *Lesson 1* about judicial review is this: When governmental decisions are located at the intersection of religion, sex, and politics, and when those decisions tend to exclude a group from equal citizenship, there is little warrant for judges to be meekly deferential to the Congress and the President.

In a deservedly influential article Cass Sunstein has blended Madison's two objectives — to inhibit oppression of minority factions, and to promote legislative decisions based on deliberation about the public good — into a broader theory of judicial review under the equal protection clause.[145] The theory begins with a restatement of the "rational basis" standard of review in Madisonian terms: Rationality review requires invalidation of a law that results not from public-spirited purposes but from a dominant

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[143] City of Richmond v. J. A. Croson Co., 488 U.S. 469, 522 (1989) (Scalia, J., concurring). Justice O'Connor wrote the principal opinion in the case, and took an even more generous view of Congress's power to enforce the fourteenth amendment. *Id.* at 476-511. Justice Kennedy explicitly dissociated himself from this view. *Id.* at 518-20.

[144] Justice Scalia made this point even before he referred to Madison's views. *Croson*, 488 U.S. at 523 (Scalia, J., concurring).

Given the political reconstitution of the federal judiciary in the 1980s, in the near term Congress seems more likely than the federal courts to promote equality of citizenship. Here I do not address the relative utility of judicial and legislative initiatives, but - assuming the courts will review government decisions at the confluence of religion, sex, and gender - argue that the substantive principle of equal citizenship should guide them in that task.

[145] Sunstein, *supra* note 131, at 48-64, 68-85. The disagreements I express here should not be allowed to obscure my admiration for Professor Sunstein's illumination of the subject of rationality review. In addition to the article discussed here, see Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

faction's "raw power" to promote its own interests.[146] In this view constitutional doctrine insists that legislators deliberate about the public good, not just "respond mechanically to constituent pressures."[147]

Professor Sunstein carries the theory beyond rationality review to the courts' more demanding scrutiny of "discrimination against blacks, women, aliens, and illegitimates," explaining this heightened scrutiny, too, as an inquiry into the quality of legislative deliberation. A faction's "raw power" may be deliberately used to promote factional advantage. But factional power may also prevent or distort public-spirited deliberation in another way. Because power relations among social groups may result in stereotypical views of those who are subordinated, legislative discrimination may be the product of "ideology" — "an unthinking reflection of existing relations of power"[148] — rather than the "reasoned analysis" that reflects disinterested deliberation about the public good.[149] In combination this "reasoned analysis" standard and the less demanding "rational basis" standard add up to an equal protection jurisprudence that is, as Sunstein says, "procedural," one "that inspects legislation to determine whether representatives have attempted to act deliberatively" in the public interest.[150]

If Madison had written in 1868 rather than 1787 he would have lived through the great national contest over slavery that culminated in civil war. It is worth recalling that the equal protection clause emerged from that experience, not from a political

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146 Sunstein, *supra* note 131, at 50-51.

147 *Id.* at 51. Several years before Professor Sunstein's article was published, Edward L. Barrett, Jr. argued powerfully for a much more restricted view of "rational basis" review. Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications*, 68 KY. L.J. 845 (1979-80); *see also* Barrett, *Judicial Supervision of Legislative Classification — A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89, 122-29. As Professor Sunstein concedes, the Supreme Court only rarely departs from the line suggested by Professor Barrett.

148 Sunstein, *supra* note 131, at 57, 56-59.

149 Although Professor Sunstein starts his discussion of "ideology"-based legislative classifications by linking racial discrimination with the other forms, he does not explicitly say that judicial review in race cases is explainable as a search for "reasoned analysis." He quotes that expression from the Supreme Court's opinion in the sex discrimination case of Mississippi University for Women v. Hogan, 458 U.S. 718, 726 (1982).

150 Sunstein, *supra* note 131, at 59.

philosopher's notebook.[151] Keeping in mind Madison's awareness of history and his concern for political reality, it is hard to imagine that he would think the judiciary's central task in applying the equal protection clause would be a search for legislative deliberation. The people who adopted the Fourteenth Amendment had substantive purposes in mind, not the purpose to encourage legislators, lawyers, and judges to cast their arguments in the language of disinterested, public-spirited reason.

The substantive core of the Fourteenth Amendment, and of the equal protection clause in particular, is the principle of equal citizenship. The principle originated in the purpose to recognize that the Americans once held in slavery were free citizens: respected, responsible participants in the community's public life. Their status as citizens had been vindicated not just by legislation but by force of arms. In constitutionalizing that status the framers of the Fourteenth Amendment deliberately chose broad language linking citizenship and equality. In the past quarter-century the Supreme Court has properly translated that language into constitutional protections against other forms of group subordination that stigmatize and exclude. The judiciary's central concern in interpreting the equal protection clause is not procedural but substantive, not deliberation but inclusion.[152]

An equal protection jurisprudence centered on a search for legislative deliberation will be particularly unrewarding when a court considers the validity of legislative decisions in the zone where religion, sex, and politics meet. Suppose, for example, that a state legislature should prohibit local school boards from provid-

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151 *See, e.g.*, H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875 (1982); J. TENBROEK, EQUAL UNDER LAW (1965); W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977). The line reaching from the fourteenth amendment back to Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), is also traced in K. KARST, *supra* note 49, ch. 4.

152 Professor Sunstein is obviously right in saying that government must offer a legitimate purpose for treating anyone unequally, that some kinds of inequalities require more justification than others, and that an ideology of group subordination is not a legitimate justification. These points are common ground for nearly all commentators on the equal protection clause. But where he sees judicial review under the clause as focused on the procedural question "whether representatives have attempted to act deliberatively," Sunstein, *supra* note 131, at 59, I see the heart of the equal protection clause as a cluster of substantive values, and judicial review in these cases as centered on those values.

ing birth control counseling to high school students. Neither the purposes nor the effects of such a law would be gender-neutral, for Margaret Sanger's 1920 comment is still true: "Birth control is woman's problem."[153] Even so, the law can be defended with "public good" reasons based on parental authority. The sponsoring legislators may say (i) that counseling a teenage girl at school may keep her parents from becoming aware that their daughter is sexually active, and thus deny them the chance to counsel her to change her ways; or (ii) that parents will be more effective counselors than a school officer, for they know their daughter's individual needs. Arguments like these may be founded on views about families and sexuality that have little to do with the lives of the young women who would seek counseling. The arguments, however, undoubtedly qualify as "reasoned analysis"; that is, they are consistent with a good-faith effort to promote the public good, as distinguished from a motivation to oppress.

If we ask Professor Sunstein's next question, whether this law is an "unthinking reflection" of power — of men over women, or adults over children, or one cultural faction over another —the judge's inquiry into "reasoned analysis" confronts the problem of the zero-sum game of cultural dominance. Whose cultural values, whose perceptions of the realities of family life, are influenced by ideology, and whose are the product of reason? It is hard enough for a judge to unveil conscious legislative motives that are illicit; a search for the unconscious, ideology-based motivations that lie beneath a legislator's vote is a task no judge should be asked to perform. Each of the contending cultures, after all, sees the other as ideology-laden. As the old saying goes, "I have a social philosophy; you have political opinions; he has an ideology."[154]

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[153] M. SANGER, WOMAN AND THE NEW RACE 100 (1920). There is no good reason why high school boys should not also seek birth control counseling. In the text that follows, references to girls as the counselors' likely clients is based on the assumption that teenage boys, like their male elders, typically do not assume the responsibilities that should accompany sexual activity. That is exactly what Sanger was saying, and in the last seven decades male responsibility in this area has progressed remarkably little.

The text references also assume that parents are generally more fearful about their daughters' sexual activity than they are about their sons' — an assumption closely related to the fears of female sexuality that drive so many public policies in this area.

[154] C. GEERTZ, *supra* note 31, at 194. Professor Sunstein, *supra* note 131, at 77-85, recognizes problems of this type. He does not pretend that his

The problem with a judicial inquiry focused on "reasoned analysis" is not merely theoretical; it has serious practical implications. For reasons long apparent to writers on the role of legislative motivation in equal protection doctrine, a judge who is told to focus on the question of whether a law is "in fact a disguise for, or rooted in, private power"[155] will be disinclined to answer either part of that question in the affirmative if the state offers any plausible justification based on assertions about the public good.[156] Beyond the usual difficulties in assessing legislative motives, it is especially difficult for judges to see a legislative classification's roots in "ideology" when the law discriminates against a group that has, by long-established custom, been low in the pecking order of politics and status. In such a case the existing order of group status may seem part of the natural world, and thus "reason" enough to justify itself. So Justice Bradley

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procedural principle of judicial review presently adds much disinterested deliberation in our legislatures, nor does he argue that the principle will ever impose much of a limit on legislators' real power. He suggests, however, that genuine legislative deliberation might increase if the courts would take more seriously their utterances about rationality review and "reasoned analysis." *See also id.* at 69-73.

155 Sunstein, *supra* note 131, at 58.

156 On the myriad difficulties presented by inquiries into illicit legislative motives, *see, e.g.*, K. Karst, *supra* note 49, at 151-58; Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

PROFESSOR SUNSTEIN, *supra* note 131, at 57-59, recognizes that legislators often engage in deliberation, enact laws, and then offer public-spirited justifications founded on values that are themselves "the product of private power." Legislative classifications should be held invalid, he says, when they are inevitably the product of power even if there has been actual discussion of their costs and benefits. As he remarks, this concession "makes the distinction between 'procedural' review [a search for deliberative reason] and 'substantive' review quite thin." *Id.* at 58 n.121. That assessment is persuasive, and would seem to undermine the thesis that legislative deliberation about the public good is the central requirement of equal protection jurisprudence.

Similarly, Professor Sunstein says that the search for legislative deliberation is irrelevant in cases involving "fundamental rights." *Id.* at 80 n.218. Here, too, distinctions are thin. Consider the case of birth control counseling discussed in the text. Does the challenged law raise an equal protection issue, so that the judge should uphold it if some "reasoned analysis" supports the law? Or is access to birth control counseling a "fundamental right"? Would a wise judge *begin* to think about this case by asking these questions?

assumed in 1872, when he wrote that "the domestic sphere" was divinely ordained as the domain of women.[157] Some "reasoned analysis" can always be found to justify a factional domination that has been around for a long time. By diverting the courts away from the substantive harms of exclusion, this procedural form of judicial review will serve as a formula for upholding discrimination.[158]

As a further example, recall these famous words of the Supreme Court about the need for a public-good justification for a legislative classification: "[E]very exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith and for the promotion of the public good, and not for the annoyance or oppression of a particular class." Having said that, the Court went on to uphold the challenged classification, commenting that the state legislature was "at liberty to act with reference to the established usages, customs, and traditions of the people." The year was 1896, the case was *Plessy v. Ferguson*, and the established custom the Court perceived was a social gulf separating blacks from whites.[159]

Lesson 2: In reviewing laws produced at the confluence of religion, sex, and politics, judges who limit themselves to structural or procedural approaches to judicial review will almost certainly ignore some serious denials of equal citizenship. It is substantive harm that gives any equal protection claim its power: harm to the equal citizenship values of respect, participation, and responsibility. There is no escape from inquiring into the seriousness of that harm, assessing the importance of the government's asserted jus-

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157 Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

158 Professor Schneider says that when a state legislature is considering a law that would "impinge on a fundamental right" such as sexual privacy, it is entitled to make use of "a theory of human nature" when the theory "has been substantially relied on in the past" and "has substantial intellectual antecedents." Schneider, *supra* note 13, at 102. Justice Bradley's theory of women's "nature" surely would qualify. Similarly, the theories that homosexual orientation is sinful, or the manifestation of mental disease, have been widely relied on, with intellectual antecedents galore. This approach, too, is a formula for upholding any discrimination that is long-standing and pervasive.

159 163 U.S. 537, 550 (1896). *Plessy* upheld Louisiana's Jim Crow car law, which required the segregation of black and white passengers into separate cars on railroad trains. The decision was effectively (though not explicitly) overruled in Gayle v. Browder, 352 U.S. 903 (1956), a case involving segregation on municipal buses.

tifications, and weighing those substantive considerations against each other.

When the "family values" issues of sex and gender come to court, the constitutional claims in question may or may not be tagged with equal protection labels. Women's claims to control their own sexuality and maternity, for example, may be cast in the constitutional vocabulary of privacy or autonomy. Yet any sensible view of the subject must recognize the centrality of those forms of control in determining women's status in society and access to the public life of their communities.[160] The fundamentalist who links "planned parenthood, the pill . . . [and] abortion on demand" with "women's liberation"[161] agrees with the feminist who makes the same connections. But the fundamentalist, unlike the feminist, grumbles that secular humanism has taken away the "distinctive roles of male and female"[162] and created a world in which "a woman need not honor and obey her husband."[163] If your culture regards male power as a "family value" ordained by God, you will see nothing amiss in using the power of the state to impose that value on women, even those who disagree. Here the object of the zero-sum game is a dominance that goes beyond cultural status.

The question of abortion lies at the clamorous center of the clash of cultures, and it is not easy to see how our courts can reach any compromise that will not deny one of the central values in contention. The Supreme Court's opinion in *Roe v. Wade*[164] was plainly designed to give something to both sides in the controversy, but any opinion would have been doomed to fail as a compromise. The outcry against the decision would have resulted even if the Court had not dismissed the idea that a fetus could have the constitutional status of a "person."[165] A woman's right to abortion is, inescapably, a right to terminate prenatal life.

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160 For comment on the connections between equal citizenship and women's control over their own sexuality and maternity, and references to other commentary, see K. KARST, *supra* note 49, at 119-24; Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 472-80. On abortion as an issue of women's equality, see the references in *supra* notes 124-25.

161 *See supra* text accompanying note 21.

162 *See supra* note 23.

163 *See supra* text accompanying note 21.

164 410 U.S. 113 (1973).

165 *Cf.* G. CALABRESI, *supra* note 13, ch. 5. Calabresi argues that the uproar might have been diminished if the Court had recognized a constitutional status for fetal life, but nonetheless placed its decision on an

Neither the courts nor the state legislatures can avoid taking sides in an all-or-nothing dispute.

This is not to say that there are no points of potential agreement between people in the "pro-life" and "pro-choice" camps. Nearly everyone would agree that a woman who chooses to have a baby should be protected in her decision against parents or a putative father who might try to coerce her to have an abortion. Other conclusions that would find a similar degree of agreement are harder to identify. No doubt the occasions for contention over abortion would be reduced if women had access to effective family planning services that allowed them to avoid unwanted pregnancies.[166] But a considerable number of Americans, on the basis of religious belief, oppose birth control by means other than abstinence and oppose even more vigorously any public endorsement of contraception. Similarly, many with "pro-choice" views would accept a system of state-financed counseling for women who want help in thinking through the abortion decision, provided (and it is a big proviso) that the counselors were nondirective.[167] Yet many with "pro-life" views would oppose any such counseling, precisely because it is designed to give pregnant women "an opportunity to . . . determine, for themselves, what value should be given to prenatal life,"[168] rather than submit to the teachings that the opponents hear as the Word of God.

My view is that a woman's constitutional right to equal citizenship necessarily includes control over her own sexuality and maternity. Others whom I respect and cherish support the power of government to prohibit abortion in order to protect prenatal life and to promote the humanity of the pregnant woman and the society. I do not intend to argue the abortion question fully here. I do insist, however, that courts cannot responsibly solve the problem of dealing with a compromise-resistant issue by the simple expedient of leaving abortion questions to politics. Virtually everything we know about the intersection of religion, sex, and politics should make us reject this flight from judicial responsibility. The "politics of motherhood"[169] is inextricably intertwined

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equal protection ground. My view is that the uproar resulted not from the opinion in *Roe* but from the result.

166 *See* L. TRIBE, *supra* note 48, at 212-20, 228.

167 This is the proposal of Ruth Colker, in her insightful article, *Abortion & Dialogue*, 63 TUL. L. REV. 1363, 1393-1403 (1989).

168 *Id.* at 1396.

169 *See* K. LUKER, *supra* note 21.

with the question of the roles women should be allowed to play in our society.[170]

One implication of this interconnection is clear: With the abortion issue, as with other issues concerning the status of women, American society has passed a point of no return. The return of severe legal restrictions on abortion would not decrease the number of abortions actually performed nearly so much as many proponents of regulation seem to believe. Much of the importance of government actions relating to abortion, then, lies in their expressive qualities. Those actions are symbolic contributions to the common culture, and particularly to the definition and redefinition of women's roles. Are women to be treated by law and government as equal and responsible participants in public life, or are they to be defined officially as child-bearers and child-rearers first, with nondomestic roles distinctly secondary?[171]

Whatever else one can say about the politics of government regulation of abortion, *Lesson 3* is worth remembering: The principle of equal citizenship is concerned not only with material inequalities but with stigma and stereotype. When a law significantly interferes with women's capacity for full participation in the community's public life, a court should not only weigh those immediate practical consequences against the state's interest in protecting prenatal life, but also consider the law's expressive purposes and effects. It is intolerable for a court to pay strong deference to a legislative determination to use the law's coercion

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[170] It is not impossible to be a feminist and also to favor legal prohibitions on abortion. For illustrations of this combination of views, see F. GINSBURG, *supra* note 21, at 183-86, 193-95; R. PETCHESKY, *supra* note 21, at 260-61. *Cf.* J. STACEY, *supra* note 34, ch.6 (recounting struggles of some California women and some male and female ministers to work out a "postfeminist evangelical gender ideology," *id.* at 261). But the correlation of views on abortion with patterns of religious belief and observance, and of corresponding views about the place of women in society, makes clear that the politics of abortion is in major part a contest between those who would make the gender line into the rigid social boundary it once was, and those who reject any such return to the days when male power was invisible because it pervaded everything. *See, e.g.*, R. PETCHESKY, *supra* note 21, at 241-76; Shupe & Stacey, *Public and Clergy Sentiments toward the Moral Majority: Evidence from the Dallas-Fort Worth Metroplex*, in NEW CHRISTIAN POLITICS, *supra* note 13, at 91; Yinger & Cutler, *supra* note 13, at 69.

[171] Both sides of the politics of abortion are replete with vivid imagery, the construction of enemies, and evocations of fear.

as a means of establishing a social definition of women that is itself incapacitating.

If the problems of abortion regulation seem difficult, the issues of lesbian and gay rights are much easier. The Supreme Court's majority in *Bowers v. Hardwick*[172] first raised a serious equal protection issue (by saying it was not considering whether Georgia's sodomy law, gender-neutral on its face, could be validly applied to a heterosexual couple), and then, by sleight-of-hand, avoided the issue it had raised. If a similar sodomy law should return to the Court, surely its equality dimension will be the central issue. Let me repeat: When the state formally declares that its sodomy law will not be enforced against heterosexual couples,[173] and in practice does not even enforce the law against homosexual couples, the law's only remaining function is expressive: to stigmatize lesbians and gay men for their sexual orientation.[174] That sort of exercise in group subordination is, obviously, a presumptive violation of the principle of equal citizenship. To counter the presumption, the state claims an interest in socializing people to the majority's moral values.[175] Here, too, the zero-sum game of

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[172] 478 U.S. 186 (1986); *see supra* note 115.

[173] In Bowers v. Hardwick counsel for the state conceded at oral argument that the law would not be enforced against heterosexual sodomy. 54 U.S.L.W. 3657 (1986). Presumably that concession was prompted by such precedents as Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972).

[174] Discrimination against lesbians and gay men, both public and private, is often founded on the simple-minded assumption that "a homosexual" is someone who engages in homosexual conduct. The overgeneralization in this assumption should be plain to anyone who can understand the concept of celibacy. But the very terms "lesbian" and "gay man" are overgeneralizations, given the wide-ranging varieties of sexual orientation among humans and the differences in self-identification even among people whose orientations are comparable. Janet Halley's analysis, *supra* note 80, is an unusually helpful guide through this definitional tangle. In any event, the widespread notion that homosexual conduct defines a class of people who are "homosexuals" means that a law criminalizing homosexual sodomy stigmatizes lesbians and gay men generally.

[175] *See, e.g.*, Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 476-78, 560-68 (1983). G. BUCHANAN, *supra* note 40, opposes the criminalizing of sodomy, but makes a case for the majority's power to give formal legal expression to its values in the context of a state's rejection of "same-sex marriage." His discussion makes clear that the relevant majority consists of those who follow the teachings of what he calls "the Judaic-Christian heritage." G. BUCHANAN, *supra* note 40, at 130-36. There are, of

status dominance resists compromise. But the stakes for the two sides are not the same. Both sides seek to affect the state's expressive behavior, but only one side is on the receiving end of the law's stigma and consequential material harms. The unenforced sodomy laws present an unusually pure example of *Lesson 4*: There is no legitimacy in a cultural majority's claim to use the power of government to express its moral values by stigmatizing another group.

The Defense Department's policy that purports to exclude gay and lesbian Americans from the armed services may be the easiest case of all. The arguments presented in support of that policy are circular, designed to preserve the gender line and the ideology of masculinity.[176] At this particular intersection of religion, sex, and politics stands a lesson about judicial review so obvious that it is almost embarrassing to state. *Lesson 5*: It is constitutionally illegitimate for government to rely on a social group's subordinated status as a justification for further governmental action that intensifies the subordination.

There is room for accommodation of some citizens' religion-based views in an expressive apparatus operated by government when the inclusion of those views will not exclude others from equal citizenship. One example is the Equal Access Act, adopted by Congress in 1984.[177] The act requires a federally subsidized public high school that provides students a "limited open forum" to open that forum to student religious groups during noninstructional time. Although some kinds of accommodation of the values of free exercise of religion do tend to have exclusionary effects on religious minorities,[178] the Equal Access Act does not. The fact that religious lobbies played a crucial role in getting the

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course, many Christian churches whose ministers and congregations are mostly lesbians and gay men. Issues concerning the relation of homosexual orientation to theology and church practice are currently under serious discussion in seminaries serving the "mainline" religions, including Catholic seminaries. *See* Wilkes, *The Hands That Would Shape Our Souls*, ATLANTIC MONTHLY, Dec. 1990, at 59, 79-81.

176 Karst, *supra* note 81, at 545-63.

177 20 U.S.C. §§ 4071-74 (1988). The Supreme Court upheld this act in Board of Education v. Mergens, 110 S. Ct. 2356 (1990).

178 *E.g.*, the "released time" program upheld in Zorach v. Clauson, 343 U.S. 306 (1952). This is the paradigm case for the broad view that the establishment clause tolerates a considerable amount of governmental "accommodation" of religion. *See generally* McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

Act passed[179] is, in my view, irrelevant.[180] The constitutional concern in these cases is not to squeeze all religious impulses out of the legislative process, but to prevent the substantive results of that process from denying equal citizenship — in this setting, to prevent the state from branding the members of any group as outsiders.[181]

Another accommodation of the same general type is a law simply authorizing a "moment of silence" in a public schoolroom — assuming, of course, that teachers do not administer the law in ways that promote a majority religion at the psychic expense of children who are marked as religious outsiders. Here, too, the motives of many legislators might be religious, and the effect would be to allow prayer-minded children to pray. But, absent harm to nonadherent children in the form of observances that convey a sense of exclusion, this sort of inclusion of the religious impulse is constitutionally acceptable. In the midst of the clash of cultures, the equal citizenship principle should extend in all directions.[182]

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179 A. HERTZKE, *supra* note 19, at 161-98, ably analyzes the Act's path through the Congress.

180 I agree with Gary Leedes that a legislator's religious views and feelings generally should not be considered constitutionally inappropriate sources for his or her votes on proposed laws. *See* Leedes, *Taking the Bible Seriously*, 1987 AM. B. FOUND. RES. J. 311; *see also* K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 237-39 (1988) (arguing that, in a liberal state, religious convictions can properly influence a legislator's decision, so long as decision can be defended by "publicly accessible reasons").

181 Justice O'Connor's approach to the establishment clause, which downplays the importance of religious purposes behind a law and emphasizes instead a search for its possible exclusionary effects on nonadherents of the majority religion, is an important step toward the principle of equal citizenship. As a number of commentators have remarked, however, that inquiry needs one further refinement. It is not the view of some "objective" observer but the views of the nonadherents that should determine whether those exclusionary effects are caused. *See generally Developments in the Law — Religion and the State*, 100 HARV. L. REV. 1606, 1647-50 (1987).

182 A considerably more controversial proposal for accommodation would provide state funding for education through a voucher system that would extend to parents of children in religious schools as well as parents of children in public schools and secular private schools. The Constitution aside, there are reasons for skepticism about the wisdom of such a program. *See* Levin, *Educational Vouchers and Social Policy*, in CARE AND EDUCATION OF YOUNG CHILDREN IN AMERICA 103 (1980); Levin, *Education as a Public and*

Yet, even a principle of inclusion has its limits. When culture becomes political, as it does at the confluence of religion, sex, and gender, the problem of exclusion is exacerbated by the tendency of so many of the issues to turn into zero-sum games of cultural dominance. No legislative agenda, no constitutional doctrine can at the same time assure women "the freedom of the city"[183] and deny them that freedom in order to keep them in domestic roles under male tutelage. Nor can the claim of gay and lesbian Americans to acceptance as equal citizens be accommodated with a legislative majority's claim of power to use the law to stigmatize them. In each of these cases the contending cultural groups are both appealing to the idea of inclusion, in different ways. Women and gay Americans who seek full inclusion as equal citizens are ranged against those who seek inclusion of their religious views about sexual morality and "woman's place" in government expression and in public policy, including coercive law. To validate one kind of inclusion is to deny the other. Equal citizenship is itself a yes-or-no proposition. For the same reasons that these issues of status are resistant to legislative compromise, our courts will have to choose between equal citizenship and the regulations that deny groups of Americans full participation in our public life.[184]

Private Good, in PUBLIC VALUES, PRIVATE SCHOOLS 215 (N. Devins ed. 1989). Furthermore, despite Mueller v. Allen, 463 U.S. 388 (1983), there are reasons for skepticism about its constitutionality. *See* Sugarman, *New Perspectives on "Aid" to Private School Users*, in NONPUBLIC SCHOOL AID: THE LAW, ECONOMICS, AND POLITICS OF AMERICAN EDUCATION 64 (E. West ed. 1976). For a recent argument in favor of something that looks very much like a voucher plan, agnostic on the inclusion of religious schools, see J. CHUBB & T. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990). The effort to accommodate the constitutional guarantee of religious freedom within the prohibition of the establishment clause has produced an impressive literature. Alan Brownstein, one of the latest in a group of distinguished commentators, apparently would uphold the constitutionality of a voucher system that included parents of children in religious schools. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 153-60 (1990).

[183] M. WALZER, SPHERES OF JUSTICE — A DEFENSE OF PLURALISM AND EQUALITY 240 (1983).

[184] Professor Schneider, *supra* note 13, at 117, writing of the clash of cultures in the area of sexual morality, says that one "advantage of a political, as opposed to a judicial, solution to the conflict over what sort of society we are to be is that it can give people some sense of control over their environments and their lives." The "people" in this statement,

Some commentators urge our judges to respond to this confrontation of values by washing their hands of the whole matter, leaving all such choices to legislative majorities.[185] This proposition is not substantively neutral; it can seem neutral only to one who finds neutrality in the Supreme Court's determination in *Plessy v. Ferguson*[186] to leave Jim Crow to politics. Systems of group subordination have a way of perpetuating themselves, with the legislature a major instrument in the process that converts a dominant faction's power into "apparatus."[187] That is exactly what the principle of equal citizenship forbids. The principle, in other words, is not substantively neutral; its values of respect, responsibility, and participation look toward a society that embraces all Americans as full members. To put the matter negatively: No one is denied membership merely because government refuses to write his or her values into coercive law in ways that stigmatize others, or deny them responsible participation in public life, or both. In short, equal citizenship implies tolerance.[188]

Tolerance is not just an ideal; it also has its practical uses. In *The Federalist* Madison wrote that one of the strengths of the American nation was the presence within our borders of a multiplicity of interests and religious sects.[189] The same idea has

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apparently, are those who can command a legislative majority, writing their views of sexual morality into coercive laws forbidding or severely restricting birth control, abortion, homosexual sex, and the like. It is not easy to understand how these laws will enhance the sense of control for the gay and lesbian Americans and the sexually active women whose environments and lives are the objects of the laws' coercion.

185 *E.g.*, R. BORK, THE TEMPTING OF AMERICA (1990).

186 163 U.S. 537 (1896).

187 Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1293 (1982).

188 Kent Greenawalt has commented that a liberal state requires "not the tolerance of indifference, but the tolerance of a sympathetic mutual understanding of the place that religious premises occupy in the life of serious believers and of the dangers to those of different beliefs if religious convictions and discourse overwhelm the common dialogue of rational secular morality." K. GREENAWALT, *supra* note 180, at 258. I doubt that any dialogue of secular rationality is common to all Americans. Adapting Professor Greenawalt's statement to this Article's purposes, I should end it differently: "if religious convictions and discourse overwhelm the constitutional principle of equal citizenship." On tolerance and constitutional equality generally, see K. KARST, *supra* note 49, at 97, 183-84, 207-08.

189 THE FEDERALIST No. 51 (J. Madison).

appealed to modern sociologists: the fragmentation of a social group — including a nation — may, ironically, serve the group's cohesion by making it possible for antagonists on one issue to be allies on another.[190] An example in our own time that Madison would have understood is the uneasy alliance between some Christian conservatives and some feminists in support of anti-pornography laws.[191] America's cultural diversity has always been a source of conflict. If tolerance for diversity has survived as a basic ideal in the American civic culture,[192] perhaps one reason is that a multiplicity of cultures, in the long run, is a source of stability.

For some Americans, however, tolerance is exactly what is wrong with a society suffering from the disease of "secular humanism." If you believe in moral absolutes, then you are likely to think the civic culture is in urgent need of a correction in the direction of intolerance. Tolerance for the open avowal of gay identity, or for young unmarried women who are sexually active, may seem a blueprint not for a society of free and equal citizens but for social dissolution — indeed, a betrayal of God's plan. When the ideal of tolerance is itself a central object of attack in the conflict of cultures, that ideal cannot be relied upon to make the conflict go away.[193]

Even a constitutional predisposition toward tolerance cannot relieve the officers of government, including judges, from making choices that are essentially moral. Given the competition among views of the relation of marriage to the state, whatever our officials do, "some view concerning sexual relationships gets enforced by the power of law. What is impossible is to take no view at all and call it neutrality."[194] If the principle of equal citi-

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190 *See, e.g.*, L. COSER, THE FUNCTIONS OF SOCIAL CONFLICT 139-49 (1956).

191 *See* West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681; *see also* Karst, *supra* note 51, at 134-47.

192 *See* Karst, *supra* note 53, at 303, 367-68.

193 To put it another way, the "paradox of pluralism" is that it is impossible to accord equal respect and validity for all positions when one of the positions thus respected and validated is an absolutism that brooks no contradiction. *See* Ladd, *Politics and Religion in America: The Enigma of Pluralism*, in NOMOS XXX: RELIGION, MORALITY, AND THE LAW 263, 277-78 (1988).

194 Canavan, *The Pluralist Game*, 44 LAW & CONTEMP. PROBS., Spring 1981, 23, 36 (1981).

zenship is not neutral as constitutional doctrine, neither is it morally neutral; it is an indispensable part of America's "public language of moral purpose."[195]

Madison's assumption that the "passions" of religion would create political factions was founded on experience. Religious conflicts had troubled politics repeatedly throughout the colonial era, and they will continue to do so as long as America's cultural diversity persists. In the last two decades these conflicts have intensified, as politicians have mined the rich lode of the politics of religion and sex and gender. In the near future the process can be counted on to produce more and more heat, more and more laws to serve as counters in the zero-sum game of cultural dominance. Two centuries ago the challenge for Madison and the other founders was to make a nation out of a loose confederation of states. In those early years the courts — especially the Marshall Court — played an indispensable unifying role. Our challenge today is to maintain a nation inclusive enough to embrace all our cultures, and in this endeavor, too, the courts have a special responsibility.[196]

As our judges confront the political products of cultural revolution and counterrevolution, they can nourish the ideal of inclusion by making good on the Constitution's promise of equal citizenship. In rising to this challenge they will carry on the nation-building tradition that began in the founding generation. Any list of great early contributors to that tradition would include James Madison. But the list would also include John Marshall.

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195 R. NEUHAUS, *supra* note 4, at 197.

196 On the role of courts in the nation-maintaining process, see K. KARST, *supra* note 49, ch. 10-12.