DUE PROCESS DISESTABLISHMENT: WHY *LAWRENCE V. TEXAS* IS A FIRST AMENDMENT CASE

CHARLES B. STRAUT*

Much work has gone into making sense of Justice Kennedy's famously unconventional use of the rational basis test in Lawrence v. Texas*. But why did invalidating state sodomy bans require any doctrinal innovation? Shouldn't* Lawrence *have been an easy case under already-existing law? After all, legislation must serve a secular purpose to meet the Establishment Clause test laid out in* Lemon v. Kurtzman*, and the bans had no rationale but a pan-Abrahamic homosexuality taboo. So hadn't the bans been unconstitutional since* Lemon*—that is, some thirty years before* Lawrence*?*

Until Lawrence*, there was an anomaly at the heart of the* Lemon *test: Courts took morality enforcement for granted as a secular purpose, irrespective of whether that morality had any nonreligious rationale. This prevented the* Lemon *test from reaching one of the areas that needed it most: so-called "morals legislation." Hence* Lawrence *is in effect an Establishment Clause case despite purporting to sound in due process. For the rule of decision it applied in invalidating the bans for lack of a secular purpose is none other than the familiar first prong of the* Lemon *test: Legislation must do more than codify creed.*

In reaffirming that religious belief never suffices as a basis for legislation, Lawrence *gave* Lemon *the breadth it always should have had. When it applied the secular purpose requirement to morals legislation,* Lawrence *vindicated the cultural choice implicit in the First Amendment's nonestablishment rule—our precommitment to a legal system grounded in reasons that are open to all Americans.*

INTRODUCTION 1795
I. WHAT REASONS MUST THE STATE GIVE? 1798
A. *The Rational Basis Default* 1798
B. *The* Lemon *Test* 1801
C. Lemon*'s Limits* 1804
II. WHAT *LAWRENCE* HELD—AND WHY IT MATTERS 1808
A. Lawrence *Applied* Lemon 1808
B. Lawrence *Vindicated Nonestablishment's Public Reason Principle* 1810

 J.D., 2016, New York University School of Law; A.B., 2010, Princeton University. I am grateful to Professor Oscar Chase and the Colloquium on Culture and Law for giving this project a home. Thanks also go to Professors Stephen Holmes, Joseph Landau, and Adam Samaha, as well as Alistair Blacklock, Jessica Mattuozi, Zachary Shemtob, and Maureen Straut. I owe a debt to the *Law Review* staff involved with this Note: Lauren Brachman, Jacob Hutt, Steven Hylas, Carmi Schickler, Caleb Seeley, Pooja Shethji, and Jessica Wilkins—and above all my Note Editor, Rich Diggs, who kept the faith.

III. TWO POTENTIAL OBJECTIONS 1814
A. *Dignity in Disestablishment* 1814
B. *A Place at the Table* 1818
CONCLUSION 1820

INTRODUCTION

> *The greatest oddity . . . may be the fact that the United States nonetheless ended up with something very similar to the establishment of religion in the public life of the nation. The effect often proved little more than an agreement about morals: The endlessly proliferating American churches, Tocqueville concluded, "all differ in respect to the worship which is due to the Creator; but they all agree in respect to the duties which are due from man to man." The agreement was sometimes merely an establishment of manners: "The clergy of all the different sects . . . hold the same language," he added. "[T]heir opinions are in agreement with the laws, and the human mind flows onwards, so to speak, in one undivided current."*
>
> *Joseph Bottum*[1]

The Establishment Clause[2] illustrates the ambiguous causal relationship between law and culture. On the one hand, the Clause is a judicially enforceable legal rule forbidding the establishment of a national religion—two centuries after the founding, it continues to foster a culture of nonestablishment, mediating a distinctively American dichotomy between intense private religiosity and state agnosticism.[3] On the other hand, of course, the very fact of its selection as a

---

[1] Joseph Bottum, *The Death of Protestant America: A Political Theory of the Protestant Mainline*, FIRST THINGS (Aug. 2008) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275–76 (Francis Bowen ed., Henry Reeve trans., Barnes & Noble Books 2003) (1835) (alterations added)), http://www.firstthings.com/article/2008/08/001-the-death-of-protestant-america-a-political-theory-of-the-protestant-mainline.

[2] U.S. CONST. amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion . . . ."). A national religion was implicitly foreclosed even before the First Amendment came into force—after all, it is logically incompatible with the original Constitution's rule that "no religious [t]est shall ever be required as a [q]ualification to any [o]ffice or public [t]rust under the United States." *Id.* art. VI, cl. 3.

[3] It is a dynamic balance, to be sure. Notwithstanding the Establishment Clause, many Americans take it for granted that their country is, as Justice Brewer put it, a "Christian nation." Holy Trinity Church v. United States, 143 U.S. 457, 471 (1892). Constitutional amendments to that effect have been proposed over the years, and the proposition polled at 19% in 2015. Stoyan Zaimov, *Is America a Christian Nation? New Poll Suggests Few Americans View the US as a Christian Country*, CHRISTIAN POST (July 31, 2015), http://www.christianpost.com/news/is-america-a-christian-nation-new-poll-suggests-few-americans-view-the-us-as-a-christian-country-142124/#TxmailLOArqVaBvZ.99.

rule demonstrates that it reflects a preexisting consensus.[4] Indeed, by placing ex ante limits on the range of permissible outputs of the legislative process—on the set of propositions capable of attaining the status of law—the Establishment Clause is at once an operative legal rule but also a cultural choice, a precommitment to a legal system grounded in reasons that are open to all Americans.

This Note addresses a longstanding Establishment Clause problem that arises from the permeable relationship between law and culture: the problem of de facto religious establishment.[5] By proscribing a national religion, the Establishment Clause guarantees that American "law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[6] The Framers expected nonestablishment to preserve liberty[7]—under nonestablishment, no one sect would be able to predominate as an electoral majority, gain control of the instrumentalities of the state, and use them to impose its beliefs on nonadherents.[8] But what happens when the doctrines of sects whose adherents comprise an electoral majority happen to overlap on an issue that government must address with legislation? If those adherents' policy preference is governed by their sects' doctrinal stances, de facto establishment results. The statute the legislature

---

[4] As Jefferson wrote to the Danbury Baptists: "[T]hat act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion' . . . build[s] a wall of separation between Church and State." Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281–82 (Albert E. Bergh ed., 1907); *see also* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 428 (2002) ("The relationship between church and state has been one of the crucial questions in Western constitutional thinking since the Middle Ages. By affirmatively adopting nonestablishment, the Framers took a step unprecedented in that history.").

[5] Mark DeWolfe Howe coined the term "de facto establishment" in his classic book on church-and-state issues. *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 11 (1967).

[6] United States v. Ballard, 322 U.S. 78, 86 (1944) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871)). In *Ballard*, the Court vacated the mail fraud convictions of the "I Am" religion's founders, because the trial judge improperly treated the veracity of defendants' religious beliefs as a jury question. *Id.* Under nonestablishment, state institutions are not organs of any religious denomination—hence American courts cannot adjudicate questions of religious truth or enforce religious law. *See id.* ("Heresy trials are foreign to our Constitution.").

[7] *See* THE FEDERALIST NO. 51, at 236 (James Madison) (Jacob E. Cooke ed., 1961) ("In a free government, the security . . . for religious rights . . . consists in the . . . multiplicity of sects.").

[8] *See* Feldman, *supra* note 4, at 350 ("[B]y the late eighteenth century, American rationalists and evangelicals alike argued, in terms identifiably derived from John Locke, that the purpose of nonestablishment was to protect the liberty of conscience of religious dissenters from the coercive power of government.").

passes does not designate any one sect as the nation's religion, preempting an Establishment Clause challenge. Yet it puts into effect a policy choice whose only justification is theological—the state has now given force of law to religious belief.[9]

The experience of the dissenting minority living under this sort of cross-sect policy consensus differs in constitutional dimension from that of an ordinary loser in the democratic process. For the new statute is justified by religious belief alone, rather than by reasons that one can understand and appraise without first making a faith commitment. Hence the minority is not merely outvoted on the question of which policy option to select, but excluded from the very logic of the law to which it is subject.[10] Civil and even criminal penalties now attach to nonadherence to a religious tenet—perversely, the very scenario nonestablishment was designed to avoid.[11]

This is a significant problem in the United States—quite counterintuitively, given that it is a highly religiously diverse country that made a foundational commitment to nonestablishment. Since the founding, however, a majority of the population has belonged to Abrahamic religions. To the extent that these religions share creedal content, the substance of American law is at risk of turning on pan-Abrahamic theological consensus—even if no one religion is ever established de jure.

This Note proceeds in three Parts. Part I describes the Supreme Court's attempt to solve the de facto establishment problem by creating the *Lemon* test,[12] an Establishment Clause test that allows the judiciary to depart from the toothless "rational basis" standard of review it normally applies to legislation. *Lemon* demands statutes serve a secular purpose—however, as this Part notes, courts long took morality enforcement for granted as a secular purpose, irrespective of

---

[9] In case a simple example is useful: Imagine a country has a nonestablishment rule, but its population is 45% Religion A, 45% Religion B, and 10% atheist. Suppose Religions A and B are bitter rivals, but both of their holy texts deem it sinful to cover one's hands. If the religious 90% of the country vote their creed when a bare-hands mandate is proposed, surely neither religion has been "established." But the nonreligious 10% are now subject to a law whose justification is solely theological.

[10] It is true that the atheists in the example *supra* note 9 can surely "understand" as an empirical matter that the "reason" for the shellfish ban is their fellow citizens' adherence to religions A and B. But they cannot understand the normative reason *why* the ban should be imposed without acceding to one of those creeds. It is not in the nature of an article of faith to find its justification in rationales external to the religion itself. The distinction between a reason and a belief is explored in more depth *infra* Section II.B.

[11] *See* Feldman, *supra* note 4, at 350 (identifying coercion avoidance as a primary Establishment Clause goal).

[12] So-named for *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See* discussion *infra* Section I.B.

whether that morality had any nonreligious rationale. This prevented the *Lemon* test from reaching one of the areas that needed it most: so-called "morals legislation." Part II articulates the Note's thesis: It argues that the Supreme Court finally applied the *Lemon* test to morals legislation when it invalidated state sodomy bans for lack of a secular purpose in *Lawrence v. Texas*,[13] vindicating nonestablishment's public reason principle. Part III addresses two potential objections: first, that *Lawrence* is best understood as a step in the Supreme Court's gradual, sub silentio creation of suspect-class status for LGBT people under the Equal Protection Clause; and second, that secular purpose review under *Lawrence* inappropriately trenches on religiously devout Americans' ability to participate in the political process.

I
WHAT REASONS MUST THE STATE GIVE?

A. The Rational Basis Default

Once the Supreme Court finally wrestled *Lochner*[14]-era substantive due process to the ground in the late 1930s,[15] "rational basis" judicial review emerged as a robust presumption of constitutionality for legislative choice. No longer under the shadow of a fundamental right to contract, a modern regulatory state could flourish in the United States. Going forward, courts would require only that laws be "merely rational."[16]

Rational basis is such a deferential standard that it does not describe a standard of review so much as an outcome: To decide that rational basis review governs the case is also to decide the case itself (in favor of the government, upholding the challenged statute's constitutionality). Therefore, establishing rational basis as the default setting for the judicial review of legislation codifies a presumption of

---

[13] 539 U.S. 558, 578–79 (2003) ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

[14] Lochner v. New York, 198 U.S. 45, 63–64 (1905) (striking down a labor regulation as violative of the freedom to contract protected by the Due Process Clause).

[15] *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (reversing Adkins v. Children's Hosp., 261 U.S. 525 (1923), and affirming the constitutionality of Washington State's minimum wage law). In *Parrish*, Justice Roberts broke with his earlier antiregulatory rulings to supply a fifth vote to uphold the law—the famous "switch in time that saved nine," staving off President Roosevelt's threat to obtain judicial acquiescence in his legislative agenda by expanding the Court's size to fifteen justices. *See generally* MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 (2002) (delving into this history).

[16] *Cf.* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1049 (1979) (noting that the rational basis test's "rationality requirement has been advanced as the most minimal of constitutional limitations on legislative action").

democratic legitimacy: The people are entitled to make their "naked"—i.e., candid and perhaps imperfectly or arbitrarily reasoned—preferences[17] the law. Recognizing their countermajoritarian status as unelected actors,[18] federal judges decline to second-guess the democratic process: Litigants cannot displace legislative choice by claiming that a different policy goal (or a different means of attaining it) would be more efficient or logical.

Hence "rational" basis is something of a misnomer. Notwithstanding the rise in influence of the "deliberative democracy" paradigm since the 1980s,[19] popular fiat is not only not disfavored by our constitutional law—it occupies a place of privilege. Indeed, a fundamental feature of modern American judicial review is a refusal to insist on comprehensive rationality in statutes. Rational basis review contemplates multiple "rational" responses to any situation—the courts have no warrant to ensure that legislation coheres as an optimized whole, constituting *the* rational response. It is not unconstitutional for legislation to constitute suboptimal policy either substantively (in the choice of which problems to solve) or procedurally (in the choice of how to solve them). The people are entitled to wield the instrumentalities of the state to take their best shot at the issues they deem worthy of attention.

The rational basis default therefore obviates state reason-giving in litigation. Under rational basis, "[w]here . . . there are plausible reasons for Congress's action, [judicial] inquiry is at an end . . . because [the Supreme] Court has never insisted that a legislative body articulate its reasons for enacting a statute."[20] So long as "any state of facts reasonably may be conceived [by the judge] to justify" the statute, it stands.[21] Courts defer to what the legislators "might have

---

[17] *Cf.* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (examining constitutional prohibitions on naked preferences).

[18] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our [democratic] system.").

[19] While John Rawls emphasized the role of principled reason-giving in the democratic process in his landmark book *A Theory of Justice*, Joseph M. Bessette coined the term in 1980. *See* JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999); Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980). For further exploration of the concept, see, for example, Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY 17 (Adam Hamlin & Philip Pettit eds., 1989).

[20] U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (upholding the basis upon which the 1974 Railroad Retirement Act distinguished between classes of annuitants).

[21] McGowan v. Maryland, 366 U.S. 420, 426 (1961) (rejecting a due process challenge to Maryland's Sunday-closing law). *McGowan*'s Establishment Clause analysis is discussed *infra* in notes 32–43 and accompanying text.

concluded"[22] and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[23]

In response, one of the major projects of post-New Deal constitutional law has been to distinguish the "ordinary" political loser from the citizen who suffers a constitutional injury when her interests are outvoted in the legislative process—to map the set of circumstances in which to depart from the rational basis default and force the state into a "contest of reasons."[24] Over the decades, courts have come to do so when statutes discriminate on the basis of a "suspect" classification[25] or infringe a "fundamental" right[26]—there, the burden shifts to the state. This allows judicial review to serve as a justification-forcing mechanism that ensures legislative choice is grounded in a sufficiently persuasive rationale. Absent such an exception, however, the people are allowed to simply want what they want. For example, in one of the cases that helped launch the tiers-of-scrutiny project,[27] Congress could ban "filled milk" just because an electoral majority deemed it proper[28]—regardless of whether such a ban was driven by a public-

[22] Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955) (upholding Oklahoma's ban on optician practice without an optometry or ophthalmology license).

[23] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (upholding the basis upon which the Cable Communications Policy Act distinguished between two types of cable system facilities).

[24] Jack Knight & James Johnson, *What Sort of Political Equality Does Deliberative Democracy Require?*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 279, 288 (James Bohman & William Rehg eds., 1997).

[25] The court has established two: race, *see* Korematsu v. United States, 323 U.S. 214, 216 (1944) (upholding Japanese internment during World War II), and, for the purposes of state law, alienage, *see* Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (invalidating an Arizona welfare statute that discriminated between citizens and legal aliens). It has also established two "quasi-suspect" classes: gender, *see* Craig v. Boren, 429 U.S. 190, 197 (1976) (invalidating an Oklahoma law that established sex-differentiated minimum ages for buying beer), and illegitimacy, *see* Trimble v. Gordon, 430 U.S. 762, 767 (1977) (invalidating an Illinois law which allowed children born in wedlock—but not children born to unmarried parents—to inherit by intestate succession from both their mothers and their fathers).

[26] The Court has defined this term to include, among others, the right to use contraception within marriage, *see* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down Connecticut's ban on the use of contraception by married couples), and the right to marry, *see* Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating state miscegenation bans). Of course, the Court's resuscitation of substantive due process in *Griswold* raises the question of how to keep *Lochner* in its grave—how to justify strict scrutiny for legislative incursions on personal rights, but not economic rights like the freedom of contract. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 238, 300–01 (2009) (discussing this problem).

[27] United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

[28] *Id.* at 154 (upholding a ban on skimmed milk mixed with non-milk fat or oil). In *Carolene Products*, Justice Stone applied rational basis, but dropped what is likely the most

regarding motive, represented optimal policy, or conflicted with goals advanced by other laws.

B. The Lemon *Test*

The rational basis default regime forecloses relitigation of the legislative process in the courts: So long as a statute conceivably serves some articulable policy end, it stands—even if it is "uncommonly silly."[29] However, rational basis raises the specter of de facto establishment by deferring to statutes that implicitly codify theology. After all, if a law deals with neither a suspect class nor a fundamental right, it is insulated from judicial review. But if that law has no rationale besides policing a religious rule, deference under rational basis will indeed allow "dogma"[30] to become law—and allow the state to find itself recruited into the business of punishing "heresy."[31] To solve this problem, during the same mid-20th century period in which the Supreme Court mapped out suspect class and fundamental rights exceptions to the rational basis default, it also developed an Establishment Clause test to guarantee a secular minimum to the content of legislation—and thereby protect against de facto, not just de jure, religious establishment.

The project began in *McGowan v. Maryland*.[32] There, defendants had been fined for violating Maryland's Sunday-closing laws when they made sales at a discount department store.[33] They asserted a due process defense, which was quickly dispatched by the rational basis

famous footnote in American law, *id.* at 153 n.4, suggesting majoritarian preferences regarding "discrete and insular minorities" should not receive rational basis deference, as they may reflect breakdowns in the legislative process due to "prejudice." *Id.*; *see also* Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093 (1982) (a 1937 Term Stone clerk's reflection on the footnote's seminal impact).

[29] *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting). The dairy industry seems to have a knack for object lessons in the theory of judicial review of legislation—in a poignant echo of *Carolene Products*'s filled-milk ban, West Virginia legislators recently repealed a ban on raw milk, toasted their achievement with the newly-legal libation, and were promptly filmed getting sick in their offices. *See* Heather Dockray, *Celebratory Raw Milk Toast Blamed for Sickening West Virginia Lawmakers*, MASHABLE (Mar. 9, 2016), http://mashable.com/2016/03/09/raw-milk-sick-lawmakers/#wX5Ix0k5ruqs. Under the rational basis default, of course, the repeal is insulated from judicial review. "Rational" does not mean wise; the Constitution will not save us from ill-advised laws. Sometimes "the law is a ass—a idiot." CHARLES DICKENS, OLIVER TWIST 299 (Broadview Press Ltd. 2005) (1846).

[30] United States v. Ballard, 322 U.S. 78, 86 (1944) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.") (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871)). For more on *Ballard*, see *supra* note 6.

[31] *Id.*

[32] 366 U.S. 420 (1961).

[33] *Id.* at 422, 424.

default.[34] But they also raised an Establishment Clause defense.[35] In considering their appeal, the Supreme Court emphasized that the Establishment Clause "afford[s] protection against religious establishment far more extensive than merely to forbid a national or state church."[36] Examining the history of Sunday-closing laws, the *McGowan* Court conceded that the Maryland law's English predecessor "was in aid of the established church."[37] However, while there was "no dispute that the original laws which dealt with Sunday labor were motivated by religious forces," the dispositive question was "whether present Sunday legislation . . . still retains its religious character."[38] The Court held that:

> The present purpose and effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.[39]

The defendants lost their appeal; Maryland's Sunday-closing law stood.[40] However, it was a productive loss. It planted an important seed, for the *McGowan* Court conceded one of the defendants' most important premises by assuming that all laws must have "secular goals"—not just the articulable, plausible purpose rational basis review requires.[41]

To be sure, *McGowan* stands for the proposition that mere overlap of legal rules with religious tenets is permissible. For the Establishment Clause

---

[34] *Id.* at 426; *see also supra* note 21 and accompanying text (rejecting the due process defense).

[35] They could avail themselves of this defense to a state-law conviction because the Establishment Clause had been incorporated against the states in 1947. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (upholding New Jersey's practice of reimbursing parochial school students' transportation costs). The Clause's incorporation has remained firmly settled law, despite influential critiques—including the view that nonestablishment at the federal level was only intended to leave space for the states to establish their own religions. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456 (1990) (articulating this argument).

[36] *McGowan*, 366 U.S. at 442.

[37] *Id.* at 433.

[38] *Id.* at 431.

[39] *Id.* at 445.

[40] *Id.* at 452–53.

[41] *Id.* at 453.

> does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. . . . Thus . . . murder is illegal. And the fact that this agrees with the dictates of the Judeo-Christian religions . . . does not invalidate the regulation.[42]

Overlapping laws must serve at least one secular goal, however; in *McGowan*, the uniform day of rest rationale saved Maryland's Sunday-closing law.[43]

Two years after *McGowan*, in *Abington School District v. Schempp*,[44] Justice Clark described *McGowan*'s "secular goals" requirement as the "secular legislative purpose" the Court would henceforth require of legislation.[45] This soon gained fame as the first prong—the "purpose prong"—announced in *Lemon v. Kurtzman*,[46] where the Court forged a comprehensive Establishment Clause test by restating "the cumulative criteria [it had] developed . . . over many years."[47] Under the "*Lemon* test," every statute first "must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[48]

Over the half century since, litigants have turned to *Lemon* when seeking to invalidate legislation for lack of a secular purpose. The Supreme Court has used it six times: to strike down laws 1) banning the teaching of evolution;[49] 2) mandating classroom display of the Ten Commandments;[50] 3) mandating a period of silence during the school day "for meditation or voluntary prayer";[51] 4) requiring that science

---

[42] *Id.* at 442.

[43] *Id.* at 420.

[44] 374 U.S. 203 (1963) (striking down school-sponsored Bible reading in public schools).

[45] *Id.* at 222.

[46] 403 U.S. 602 (1971).

[47] *Id.* at 612–13.

[48] *Id.* (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)) (citing Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 243 (1968)).

[49] *See* Epperson v. Arkansas, 393 U.S. 97, 107–09 (1968) (invalidating an Arkansas statute preventing teachers from discussing the theory of evolution in their classrooms). Though it preceded *Lemon*, *Epperson* is considered a "*Lemon* case" because it invalidated Arkansas's statute on the grounds that it lacked a secular purpose. *See id.* at 107 (noting that the record contained "no suggestion . . . that Arkansas'[s] law [could] be justified by considerations of state policy other than the religious views of some of its citizens").

[50] *See* Stone v. Graham, 449 U.S. 39, 41–43 (1980) (per curiam) (invalidating a Kentucky statute requiring public schools to post the Ten Commandments on the walls of every classroom).

[51] Wallace v. Jaffree, 472 U.S. 38, 40, 61 (1985) (invalidating an Alabama meditation or voluntary prayer statute for endorsing religion in public schools without any clear secular purpose).

teachers give evolution and "creation science" equal time;[52] 5) permitting prayer before public school athletic events;[53] and 6) mandating display of the Ten Commandments in courthouses.[54] Hence while *Lemon* poses a question that plaintiffs can ask of all legislation—does this statute serve a secular purpose?—the *Lemon* case law's predominant focus on the role of religion in the public schools shows that the test's application has been relatively narrow. Furthermore, under *McGowan*'s harmless overlap rule, almost any secular purpose will satisfy the Court, even if pretextual—which squares with the rational basis regime's policy of accepting ex post hypothetical justification.[55]

C. Lemon*'s Limits*

Lemon's requirement that all laws "have a secular legislative purpose"[56] was limited in application by the fact that courts took morality enforcement for granted as a secular purpose, irrespective of whether that morality had any nonreligious rationale. Hence the *Lemon* test never reached one of the areas that needed it most: so-called "morals legislation."[57]

The term "morals legislation" refers to bans on behavior whose only rationale is the postulated immorality of the proscribed act. In Justice Scalia's famous formulation: "Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral. In American society, such prohibitions have included, for example, sadomasochism, cock-

---

[52] Edwards v. Aguillard, 482 U.S. 578, 581, 596–97 (1987) (invalidating a Louisiana statute forbidding public schools from teaching evolution without also teaching creation science for having no secular purpose while promoting particular religious beliefs).

[53] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316–17 (2000) (invalidating a Texas public school district's policy of permitting student-led, student-initiated prayer before football games).

[54] *See* McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 881 (2005) (upholding a preliminary injunction preventing counties from displaying the Ten Commandments in courthouses).

[55] *See supra* notes 17–23 and accompanying text (discussing the privileged position of popular opinion in constitutional law and judges' hesitancy to second-guess democratic outcomes, leading to the deferential default of rational basis review).

[56] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[57] The Supreme Court coined the term in Ginsberg v. New York, 390 U.S. 629 (1968), when it upheld New York's ban on "girlie magazines," *id.* at 675 (Fortas, J., concurring), to minors. "While many of the constitutional arguments against morals legislation apply equally to legislation protecting the morals of children," the Court wrote, "one can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit." *Id.* at 639 n.7 (quoting Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 413 n.68 (1963)).

fighting, bestiality, suicide, drug use, prostitution, and sodomy."[58] As a matter of tradition, then, the *Lemon* test's deference to morality enforcement was to be expected; after all, "much legal enforcement of morality is uncontroversial and rarely discussed."[59] Indeed, when the Court decided *Lemon* in 1971, morality enforcement already had a long pedigree as a valid—indeed axiomatic—rationale for state action.[60]

On the other hand, however, such deference creates an anomalous circularity that thwarts *Lemon*'s secular purpose inquiry in cases where morality enforcement serves no purpose besides enforcing a religious rule. As Joseph Bottum observes in the epigraph,[61] the presence of a wide range of Abrahamic denominations in the United States means that a pan-Abrahamic theological tenet can easily become codified into law without designating itself as belonging to any one sect, because such codification will be the product of the various sects' overlapping consensus on how to respond to what is ostensibly a mere "policy" question. Therefore morals legislation can be facially non-religious, but nonetheless produce de facto establishment on topics where multiple sects' doctrines happen to coincide.[62]

Yet *Lemon*'s anomaly was the law, impeding Establishment Clause challenges to morals legislation.[63] The Supreme Court's deci-

---

[58] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575 (1991) (Scalia, J., concurring) (second emphasis omitted) (upholding Indiana's ban on nude dancing in bars).

[59] Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 710 (1995).

[60] *See, e.g.*, Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877) ("Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to . . . the preservation of good order and the public morals."); *see also* Lochner v. New York, 198 U.S. 45, 53 (1905) (noting that the police power bears upon "safety, health, morals, and general welfare of the public").

[61] *Supra* p. 1795; *see* Bottum, *supra* note 1.

[62] Indeed, the late 20th century Christian right worked to exploit this. As Paul Weyrich put it: "The new political philosophy must be defined by us in moral terms, packaged in non-religious language, and propagated throughout the country by our new coalition." RANDALL BALMER, REDEEMER: THE LIFE OF JIMMY CARTER 101 (2014) (quoting Paul M. Weyrich, The Moral Majority (undated) (unpublished paper) (on file with the American Heritage Center, University of Wyoming)). When produced by this sort of self-conscious and intentional "stealth tactics," de facto establishment might better be termed crypto-establishment. Robert Sullivan, *An Army of the Faithful*, N.Y. TIMES MAG. (Apr. 25, 1993), http://www.nytimes.com/1993/04/25/magazine/an-army-of-the-faithful.html (describing the Christian Coalition movement).

[63] Many recognized the *Lemon* anomaly, but accepted it as an obstacle foreclosing Establishment Clause challenges to de facto establishment. *See, e.g.*, Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 303 (1984) ("Unfortunately, neither of two constitutional doctrines typically employed by critics of morality legislation—the right to privacy and traditional establishment clause analysis—can adequately combat all of the

sion in *Bowers v. Hardwick*[64] illustrates this state of affairs. In *Bowers*, Michael Hardwick challenged Georgia's sodomy ban—a classic piece of "morals legislation."[65] Though he framed his case as a due process challenge, the Court's ruling doubled as a referendum on religious belief's sufficiency as a basis for law.

Writing for the majority, Justice White rejected the proposition that the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was "an inadequate rationale to support the law."[66] Clearly, he continued, "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . the courts will be very busy indeed."[67]

In a brief concurrence, Chief Justice Burger took a more historical view. He noted that "[h]omosexual sodomy was a capital crime under Roman law,"[68] citing the Codex Theodosianus and Code of Justinian—which were in force during the era when Christianity was the Roman Empire's official state religion. He also observed that "the first English statute criminalizing sodomy was passed" "[d]uring the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts"[69]—that is, when England broke with Roman Catholicism and formally established the Church of England. That ban "became the received law of Georgia"[70] when the state adopted English common law in passing its reception statute upon American independence, giving Georgia's criminalization of sodomy a provenance in de jure religious establishment. In sum, the Chief Justice concluded, the sodomy ban's "firm[ ] root[s] in Judeo-Christian moral and ethical standards" sufficed to place it within Georgia's legislative authority.[71]

In dissent, Justice Blackmun agreed that "[t]he theological nature of the origin of Anglo-American antisodomy statutes is patent."[72] Though he did not explicitly invoke the *Lemon* test, he cited

constitutional problems posed by the use of the police power to promote public morality.").

64 478 U.S. 186 (1986).

65 *See supra* note 58 and accompanying text (identifying sodomy bans as a prototypical piece of morals legislation).

66 *Bowers*, 478 U.S. at 196.

67 *Id.*

68 *Id.* at 196 (Burger, C.J., concurring).

69 *Id.* at 197.

70 *Id.*

71 *Id.* at 196.

72 *Id.* at 211 n.6 (Blackmun, J., dissenting).

McGowan[73] and *Stone*[74] (as discussed *supra*, the Supreme Court's first use of the secular purpose requirement it created in *Lemon*[75])—and his dissent amounted to a plea that the Court not exempt morals legislation from the secular purpose test.[76] He argued that even if Hardwick had committed an "abominable crime not fit to be named among Christians," this did not suffice as a basis for Georgia to subject him to criminal punishment.[77] For "[t]he assertion that 'traditional Judeo-Christian values proscribe' the conduct involved . . . cannot provide an adequate justification" for the ban.[78] "That certain . . . religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry," for "[t]he legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine."[79] Therefore,

> far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the sodomy ban] represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.[80]

As a matter of precedent, the *Bowers* majority was right about morality. Public morality—the sheer fact of the electorate's like or dislike, even if grounded in religious belief—is the kind of naked popular preference that normally suffices as a basis for legislative choice.[81] Justice Blackmun's *Bowers* dissent was not the law; de facto establishment through morals legislation remained shielded from *Lemon*. That is what makes Justice Kennedy's reasoning in *Lawrence v. Texas* so important.

---

[73] McGowan v. Maryland, 366 U.S. 420 (1961); *see supra* notes 32–43 and accompanying text.

[74] Stone v. Graham, 449 U.S. 39 (1980) (per curiam).

[75] *See supra* note 50 and accompanying text.

[76] *Bowers*, 478 U.S. at 211–12 (Blackmun, J., dissenting).

[77] *Id.* at 200 (Blackmun, J., dissenting) (quoting Herring v. State, 119 Ga. 709, 721 (1904)).

[78] *Id.* at 211 (quoting Brief for Petitioner, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667939, at *20).

[79] *Id.*

[80] *Id.* at 211–12.

[81] *See supra* Section I.A.

II
WHAT *LAWRENCE* HELD—AND WHY IT MATTERS

A. Lawrence *Applied* Lemon

Sodomy bans returned to the Supreme Court seventeen years later in *Lawrence v. Texas*.[82] The *Lawrence* Court couched its decision in due process, explicitly overruling its due process holding in *Bowers* and thereby invalidating state sodomy bans nationwide.[83] However, *Lawrence* is hard to understand as a due process case.

Justice Kennedy did not claim sodomy bans infringed a fundamental right; therefore, rational basis governed the case.[84] Hence one would expect the bans to survive a due process challenge. To decide rational basis governs a case is to decide the case in the government's favor; the statute stands if any conceivable justification for the law exists.[85] Here, Texas did not need to resort to hypothetical rationales—it could point to cases like *Bowers*, in which the Supreme Court made clear that morality enforcement has historically been a valid basis for legislative choice. Therefore, as Justice Scalia's dissent pointed out, *Lawrence* was "out of accord with our jurisprudence."[86] For "[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[87] So why did rational basis "bite"[88] in *Lawrence*?

---

[82] 539 U.S. 558 (2003). For an in-depth review of the case's extraordinary fact pattern and procedural history, see DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *Lawrence v. Texas* (2012).

[83] *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

[84] As explained *supra* in Section I.A, rational basis is the default rule in any due process case—to trigger heightened scrutiny, the government must infringe a fundamental right. In *Lawrence*, Justice Kennedy repeatedly referred to the "freedom" or "liberty interest" at stake in the case, each time conspicuously declining to call it a fundamental right. *Lawrence*, 539 U.S. at 562, 567, 574–75, 577–78. This underscores just how anomalous *Lawrence*'s due process holding is. In an opinion Justice Kennedy joined, the Court had only recently reaffirmed the rule that substantive due process "specially protects . . . fundamental rights and liberties," meaning liberty interests that are not "fundamental" receive only rational basis review. Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (upholding Washington State's ban on assisted suicide).

[85] *See* discussion *supra* Section I.A.

[86] *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

[87] *Id.* at 589.

[88] The term "rational basis with bite" has come to describe the rare case in which the government loses a case even after the court has announced it will apply rational basis review. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV.

Lawrence may have employed "an unheard-of form of rational-basis review,"[89] but it employed a very well-known form of Establishment Clause review. For the Court decided *Lawrence* by asking *Lemon*'s secular purpose question. Indeed, the *Lawrence* Court conducted the very kind of secular purpose inquiry Justice Blackmun argued for in his *Bowers* dissent, examining whether the sodomy ban's morality enforcement had any nonreligious rationale.[90]

Justice Kennedy noted that sodomy bans were "firmly rooted in Judeao-Christian moral and ethical standards."[91] However, he continued, the bans' basis in "religious beliefs . . . do[es] not answer the question before us"—the question of "whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."[92] Putting it that way makes all the difference—for his formulation presupposes that religious belief is not a sufficient basis for law. After all, if religious belief sufficed as a basis for law, the sodomy bans' basis in religious belief *would* answer his question—the answer would be: "yes." To rephrase Justice Kennedy's point in the affirmative: The exercise of state power must have a basis in something other than religious belief. Because sodomy bans lacked a nonreligious rationale,[93] they were an illegitimate exercise of state power and could not stand.

L. REV. 1, 18–19 (1972) (discussing judicial opinions that "found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard"). Rational basis "bites" under a variety of circumstances—no one theory can explain all the cases. *See* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2078–99 (2015) (arriving at this conclusion).

89 *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

90 Bowers v. Hardwick, 478 U.S. 186, 211–12 (1986) (Blackmun, J., dissenting); *see also supra* notes 79–80 and accompanying text (outlining the Blackmun dissent).

91 *Lawrence*, 539 U.S. at 571 (citation omitted).

92 *Id.*

93 The three *Lawrence* dissenters did not argue that sodomy bans served a secular purpose—only that morality enforcement per se sufficed as a basis for the bans. *See supra* notes 86–87 and accompanying text. Attempts to adduce a secular purpose for sodomy bans have not succeeded. Some have pointed to the fact that anal intercourse is more conducive to HIV-transmission than vaginal intercourse, but sodomy bans proscribe same-sex sexual intimacy—this putative public health rationale would not explain banning sex between women and non-anal sex between men. The countries that still retain sodomy bans are either former colonies of Abrahamic powers (for instance, India, where a sodomy ban was first introduced by the British as an article of colonial law, *see* Naz Found. v. Gov't of NCT of Delhi, (2009) WP(C) No. 7455/2001 ¶ 4 (Delhi HC) (India)) or majority-Abrahamic themselves (for instance, Iran (99.4% Muslim, *see Iran*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html (last visited Sept. 3, 2016)) or Ethiopia (43.5% Ethiopian Orthodox Christian, 18.5% Protestant, *see Ethiopia*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/et.html (last visited Sept. 3, 2016))).

Hence while *Lawrence* did not mention the Establishment Clause, the rule of decision it applied is *Lemon*'s secular purpose requirement: Legislation must do more than codify creed.[94] Before *Lawrence*, a morals-legislation statute's failure to do more than enforce a religious rule had never been judged a constitutional infirmity. By making clear that morality does not suffice as a basis for law if it represents a solely religious belief, *Lawrence* removed the barrier that had prevented courts from asking *Lemon*'s secular purpose question about morals legislation.[95]

B. Lawrence *Vindicated Nonestablishment's Public Reason Principle*

In *Lawrence*, Justice Kennedy hit bedrock. The acceptance of morality enforcement as a secular purpose had been a longstanding anomaly at the heart of Establishment Clause jurisprudence, unduly limiting the *Lemon* test's reach. It deserved to be eliminated, for courts should ask the secular purpose question about all legislation.

After all, the Establishment Clause must operate both formally and functionally if Americans are to experience nonestablishment as a lived reality. To reflect nonestablishment-in-fact, the laws to which citizens are subject must have some basis in "public reason"[96]—in ratio-

---

[94] Andrew Cohen deserves great credit for recognizing that *Lawrence* "impliedly invoked the Establishment Clause." Andrew D. Cohen, Note, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After* Lawrence, 79 FORDHAM L. REV. 605, 642 (2010). To be clear, however, when the Court "judge[d] the merit of the 'why'" of the sodomy bans and faulted their lack of a nonreligious rationale, it did not just "apply Establishment Clause values"—it applied *Lemon*'s secular purpose test. *Id.* at 608, 642. The secular purpose requirement is not a First Amendment "value"—it is the first prong of the most famous rule in Establishment Clause jurisprudence.

[95] Little likely turns on whether the Supreme Court ever explicitly labels *Lawrence* an Establishment Clause case, rather than a due process case that applies an Establishment Clause rule. If the Court were to do so, however, it would not be the first instance of this sort of doctrinal sleight of hand. Prominent rechristenings include *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (deciding the case under the Fifteenth Amendment, but later recognized as applying the Fourteenth Amendment in Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)), and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (reaching a decision under the Equal Protection Clause, but later recognized as applying the Due Process Clause in Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

[96] Immanuel Kant popularized the distinction between reasoning for "private use" (*Privatgebrauch*) and reasoning that is "publicly available" or "for public use" (*öffentlich*) in 1784. IMMANUEL KANT, *An Answer to the Question: 'What Is Enlightenment?,' in* KANT: POLITICAL WRITINGS 54 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 2d enlarged ed., 14th prtg. 2003). Two centuries later, John Rawls made an enormously influential contribution to contemporary democratic theory by using Kant's concept of "public" or "publicly available" reason to describe the set of normative propositions that citizens of any (or no) religious faith can understand and appraise, despite the irreconcilable differences in their worldviews. *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766–69 (1997) [hereinafter Rawls, *Public Reason*]

nales that are "open to examination by any rational person, regardless of the stand that person takes on questions of ultimate meaning or the definition of a good human life."[97] Less euphemistically, perhaps, a public reason is a proposition "whose normative force . . . does not . . . depend on the existence of God . . . or on theological considerations."[98] By contrast, a proposition whose normative force depends on a theological axiom "does not qualify as a reason [for state action] . . . in a democracy like ours, . . . one in which, for any foreseeable future, the citizens will have significant and irreconcilable differences on matters of conscience, including but not limited to such issues as the existence and nature of God."[99]

Hence while the Establishment Clause is agnostic as to which policy ends (and means) the legislature selects, it constrains the legislature's realm of choice to ends and means grounded in rationales that all Americans can understand and appraise.[100] For legislation that is "only intelligible within a particular sectarian tradition and thus implicitly declare[s] religious truth"[101] violates a deep equality prin-

(making these points). This set then defines the permissible bases for state action in a pluralist democracy. *Id.* For more on his theory of public reason, see John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233 (1989).

97 Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 179 (1998).

98 Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259, 278 (1989).

99 Cicchino, *supra* note 97, at 173; *see also* Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019, 1031, 1033 (1990) [hereinafter Greenawalt, *Religious Convictions*] ("Communicating aspects of [personal religious belief] to people who have never had such experiences may be like trying to tell someone who has never been in love what that feeling is like, really beyond the reach of understanding of the other person. . . . [Hence] there is not much opportunity for genuine dialogue with someone who lacks that faith."); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 842 (1992) ("Religious issues are so intractable because different people have fundamentally different perceptions of reality.").

100 Indeed, "[v]irtually every theory of the philosophy of the Constitution depends on a notion of public deliberation, which in turn depends on the idea of public reason." Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 469 (1996). "[T]he Establishment Clause . . . is the Constitution's textual embodiment of this idea of political liberalism . . . prohibit[ing] the new federal government from developing an allegiance to any of the various religious belief-systems that then existed, or that might come to exist, within American culture." Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 963–64 (1993). Therefore, "[n]either Bible nor Talmud may directly settle, for example, public controversy over whether abortion preserves liberty or ends life." Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198 (1992).

101 Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 94 (2002) [hereinafter Koppelman, *Secular Purpose*].

ciple of American political culture[102] by making "adherence to religion relevant to a person's standing in the political community."[103] Because its logic is only accessible to a subset of citizens, legislation that lacks a basis in public reason "exclude[s] [nonbelievers] from full citizenship."[104]

Sodomy bans illustrated this better than the typical *Lemon* fact patterns described in Section I.B, where no one stood to be criminally sanctioned for breaking the rules of a religion to which he did not belong. In the sodomy context, the First Amendment injury was not merely "expressive"[105]—sodomy bans did not just "cast a pall of orthodoxy."[106] They recruited the state into punishing nonadherence to religious law. Enlisting the state's "coercive powers to enforce religious truth"[107] violates the core precept that "[h]eresy trials are foreign to our Constitution"[108] and is therefore properly banned by the Establishment Clause.[109]

Using *Lawrence*'s extension of *Lemon*, then, judicial review can ensure that all legislative choices are "justified in terms of reasons and arguments that can be shared with reasonable people whose religious and other ultimate commitments differ."[110] Recalling Justice White's

---

[102] *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION, at ix (1989) ("[Equal citizenship] has long served the nation as a unifying ideal and has emerged in our own time as a principle of American constitutional law."); *see also* Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513 (2003) (elaborating on his earlier argument).

[103] Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in the judgment). For more on *Wallace*, see *supra* note 51 and accompanying text.

[104] Koppelman, *Secular Purpose*, *supra* note 101, at 93.

[105] For further exploration of law's symbolic or "expressive" functions, see, for example, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996), and Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 485 (1993) (coining the term "expressive harm" in the right-to-vote context).

[106] Epperson v. Arkansas, 393 U.S. 97, 105 (1968) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (invalidating a state prohibition on teaching evolution). For more on *Epperson*, see *supra* note 49 and accompanying text.

[107] Koppelman, *Secular Purpose*, *supra* note 101, at 112.

[108] United States v. Ballard, 322 U.S. 78, 86 (1944). For more on *Ballard*, see *supra* note 6.

[109] "One need not make up constitutional rights to conclude that the Establishment Clause means, at least, that no citizen can be made a criminal for non-adherence to another's religious precepts." Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159, 182 (2003); *see also* Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 738–39 (1993) (arguing for extension of the public reason requirement to "all coercive uses of state power").

[110] Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468, 475 (1995). Of course, one might say Rawls's public/private distinction is illusory because everyone's politics are fundamentally "private"—when deciding whether you support a campaign finance regulation, for

vision in *Bowers* of the courts becoming "very busy indeed,"[111] Justice Scalia warned that *Lawrence* "effectively decrees the end of all morals legislation"[112] and foretold "a massive disruption of the current social order."[113] Yet its implications are in fact likely modest.

Lawrence was rightly decided, for *Lemon* must reach morals legislation to vindicate nonestablishment's public reason principle. But that does not mean all morals legislation fails *Lawrence* review. For morality—in the sense of the sheer fact of an electoral majority's sense that something is good or bad—retains its rightful place of pride as a valid legislative rationale under the rational basis default. Morals legislation need only be minimally secular;[114] it need not be "rational" in any deep sense. "*Lawrence* may have decreed the end of only a very narrow class of morals legislation"[115] because "[v]ery few laws will fail the secular purpose requirement."[116] Indeed, most entries on Justice Scalia's catalogue of morals legislation in *Barnes*[117] find ready justification in rationales whose merits "believer and nonbeliever alike"[118] can understand and appraise.

For instance, a federal district court recently considered a constitutional challenge to sodomy's neighbor on the *Barnes* catalogue—prostitution.[119] The judge acknowledged that "following the holding in *Lawrence*, moral disapproval is not an adequate or rational basis

instance, can you really say "why" you give more weight to liberty or equality without resorting to a nonfalsifiable belief that one is more important? Individuals do not disagree over politics simply because their material interests conflict, after all—they hold different values and assign different weights to the values they share. "Disagreements exist, and persist, even when reasons are offered that lie in the public domain. People have been exposed to different testimony and arguments, they have had different experiences, and they assess evidence and arguments differently, so reasonable disagreements result." Greenawalt, *Religious Convictions*, *supra* note 99, at 1037. However, "the distinction between a disagreement in the common, public domain and a clash between irreconcilable subjective convictions [is not] too rarefied to be of political significance. Judgment is not the same as faith." Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 235 (1987). Hence, even though there is concededly such a thing as "secular belief," religious belief is what the First Amendment's nonestablishment principle disqualifies as a sufficient basis for legislative choice.

111 *See supra* note 67 and accompanying text.

112 Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

113 *Id.* at 591.

114 Arnold Loewy calls the basis for such legislation "purposive morality, i.e., morality that serves a secular function." Loewy, *supra* note 109, at 161.

115 Manuel Possolo, Note, *Morals Legislation After* Lawrence*: Can States Criminalize the Sale of Sexual Devices?*, 65 STAN. L. REV. 565, 595 (2013) (explaining that most morals legislation will survive *Lawrence* review).

116 Koppelman, *Secular Purpose*, *supra* note 101, at 93.

117 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575 (1991) (Scalia, J., concurring); *see also supra* note 58 and accompanying text.

118 Loewy, *supra* note 109, at 162.

119 *See supra* note 58 and accompanying text.

for criminalizing conduct."[120] Yet it easily identified public reasons justifying a prostitution ban: "for instance, preventing a climate conducive to violence against women and potential human trafficking, preserving the public health, and deterring the commodification of sex."[121] Hence the case could be disposed of with a tidy twelve-page ruling on a motion to dismiss. This hardly seems to portend the society-shaking deluge of litigation Justices White and Scalia feared.

Justice Scalia also warned that the extension of the secular purpose question in *Lawrence* would lead to an oppressive counterestablishment of "law-profession culture."[122] Yet *Lawrence* review need not mandate any particular answer to a given policy debate—whether, for instance, to legalize prostitution—so long as there are arguments grounded in public reason on both sides. The public reason principle vindicated in *Lawrence* merely constrains legislative choice to ends and means that can be justified to all Americans.

III
Two Potential Objections

A. Dignity in Disestablishment

An important caveat is in order. When Justice Kennedy's LGBT-rights jurisprudence is viewed as a whole, the case-specific logics he deployed in *Romer v. Evans*,[123] *Lawrence*, *United States v. Windsor*,[124]

---

[120] Erotic Serv. Provider Legal Educ. & Research Project v. Gascon, No. C 15-01007 JSW, 2016 WL 1258638, at *6 (N.D. Cal. Mar. 31, 2016) (order granting motion to dismiss).

[121] *Id.* at 9.

[122] Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). Indeed, lawsuits have advanced the theory that nonestablishment amounts to an "establishment" of "secular humanism" that itself violates the Establishment Clause. *See, e.g.*, Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987) (rejecting such a claim). Robert Bellah may have inadvertently contributed to this reaction by famously characterizing American civic culture under nonestablishment as a sort of religion. *See* Robert N. Bellah, *Civil Religion in America*, Daedalus, Winter 1967, at 1, 1; *see also* Sanford Levinson, Constitutional Faith (1988) (analyzing the Constitution's role as American civil religion's holy text). Even though these claims have rightly been rejected as a legal matter, they usefully draw attention to the fact that some citizens experience pluralist liberalism's epistemic hegemony under nonestablishment as a kind of religious oppression. The integrity of that experience ought to be acknowledged and respected, if not accommodated. *See, e.g.*, Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 Harv. L. Rev. 581, 588 (1993) (assessing the claims of fundamentalist Christian parents who wanted their children to attend public school while retaining a right to opt out from curricular materials that "indoctrinated students in the liberal traditions of rationalism").

[123] 517 U.S. 620, 632 (1996) (using an "animus" theory to invalidate a Colorado ballot initiative that prevented the state and its municipalities from enacting bans on LGBT discrimination). "While *Romer* is the most recent of the Court's recognized animus decisions, it is also the least helpful and most compromised. *Romer* is not a model of

and *Obergefell v. Hodges*[125] begin to look like mere epicycles. This Part considers the possibility that the Supreme Court is on its way toward reinterpreting these cases as Equal Protection decisions that establish suspect-class status for LGBT people. It argues that the Court should not forget *Lawrence*'s Establishment Clause valence, even if it does ultimately decide that the case applies suspect-class heightened scrutiny.

The use of disparate, idiosyncratic logics in these four opinions raises suspicion that a more parsimonious explanation exists. Judge Reinhardt, for one, has decided not to wait for an explicit suspect-class announcement from the Court. Writing in response to *Windsor*, he observed that the decision's "failure to afford [the Defense of Marriage Act a] presumption of validity . . . is unmistakable."[126]

> *Windsor* review is not rational basis review. In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.[127]

"Thus, there can no longer be any question that gays and lesbians are no longer a 'group or class of individuals normally subject to "rational basis" review.'"[128] This is therefore now the rule in the Ninth Circuit.[129]

---

doctrinal clarity . . . ." Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 890 (2012).

124 133 S. Ct. 2675, 2683, 2696 (2013) (invalidating Section 3 of the Defense of Marriage Act (DOMA), which proscribed federal recognition of same-sex marriages that were valid under state law). *Windsor* raised federalism concerns, as the federal government had intruded upon a traditional area of state power. *See id.* at 2689–90 ("By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.").

125 135 S. Ct. 2584, 2608 (2015) (invalidating state same-sex marriage bans). *Obergefell* occurred in a distinct decisional context, because marriage itself is a fundamental right that triggers strict scrutiny under a separate line of substantive due process case law. *See supra* note 26 and accompanying text (discussing judicial review of fundamental rights).

126 SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 483 (9th Cir. 2014) (holding that peremptory strikes on the basis of juror sexuality are unconstitutional).

127 *Id.* at 481.

128 *Id.* at 484 (quoting J.E.B. v. Alabama, 511 U.S. 127, 143 (1994).

129 While this was a bold reading of *Windsor*, the losing party, Abbott Laboratories, did not contest it en banc or in a petition for certiorari, leaving it to three of the Ninth Circuit's more conservative judges to call for rehearing and argue that Judge Reinhardt's interpretation was "egregiously" wrong. SmithKline Beecham Corp. v. Abbott Labs., 759 F.3d 990, 991 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc). LGBT people have been a quasi-suspect class in the Second Circuit since its decision in *Windsor*, albeit via Chief Judge Jacobs's own application of suspectness analysis rather than by inference from Justice Kennedy's opinions as in *SmithKline*. *See* Windsor v. United States, 699 F.3d 169, 186 (2d Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2675 (2013).

If Justice Kennedy was really "doing"[130] equal protection all along,[131] this would mean that the prospectively operative rule of law is that LGBT people constitute a suspect class[132]—mooting *Lawrence*'s secular purpose holding. On this theory, the Court's four liberals have repeatedly refrained from concurring to express the more straightforward equal protection view, letting Justice Kennedy hold the pen as the price of getting his vote—and so achieving de facto suspect-class status for LGBT people.[133]

For instance, in response to a question about how she would have written *Obergefell*, Justice Ginsburg said:

> "What would you think, based on what I've written?" . . . indicating she would have written more about the equal protection clause rationale for allowing same-sex marriage. . . . When . . . asked why she did not write a separate concurrence to flesh out that point, Ginsburg replied that "In this case, it was more powerful to have a single opinion" favoring same-sex marriage, while all four dissenters wrote separately.[134]

Indeed, Justice Scalia's *Obergefell* dissent hinted at such an arrangement—and underscored his disdain of tactical acquiescence to Justice Kennedy's idiosyncrasy: "If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began [with the

---

[130] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (describing "liberty-based dignity claim[s]" as "a way for the Court to 'do' equality in an era of increasing pluralism anxiety").

[131] Indeed, *Romer* immediately triggered speculation that Justice Kennedy had begun to forge suspect-class status for LGBT people. *See* Tobias Barrington Wolff, Case Note, *Principled Silence*, 106 YALE L.J. 247, 248, 252 (1996) ("*Romer* is the seminal decision in the jurisprudence of equal protection for gay people. . . . [I]t is the beginning of a story . . . . *Romer*'s very silence on the question of heightened scrutiny . . . . testif[ies] to a fundamental shift in the Court's attitude . . . .").

[132] Of course, the most parsimonious theory of all is that laws discriminating against LGBT people require no new suspect-class doctrine, for they are already unconstitutional under the Court's sex-discrimination cases. For a fuller articulation of this argument, see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994), and Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988). For an account of why judges have shown so little interest in this "obviously correct" theory, see Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2095 (2014).

[133] Importantly, however, some judges will not recognize suspect-class status for LGBT people until the Supreme Court explicitly orders them to do so. Just weeks after *Obergefell*, for instance, a Sixth Circuit panel insisted that LGBT-related laws still receive ordinary rational basis review. *See* Ondo v. City of Cleveland, 795 F.3d 597, 608–09 (6th Cir. 2015) (reading *Obergefell* as a right-to-marry decision that declined plaintiffs' invitation to mint a new suspect class).

[134] Tony Mauro, *Ginsburg Reflects on Gay Marriage, Death Penalty Rulings*, LAW.COM (July 30, 2015), http://www.law.com/sites/articles/2015/07/30/ginsburg-reflects-on-gay-marriage-death-penalty-rulings/.

first line of Justice Kennedy's majority opinion] I would hide my head in a bag."[135] Court-watchers criticized Justice Scalia's choice of words as uncollegial, but it is more interesting as a possible intimation that—perhaps ever since *Romer*—the liberals on the Court have understood Justice Kennedy's LGBT jurisprudence to be "doing" something more than—and different from—what it says on its face.[136] Therefore, it could be that *Lawrence* was always "really" an equal protection case, and we will see due process disestablishment "retire"[137] when Justice Kennedy leaves the Court.

Even if a future Supreme Court decides that Justice Kennedy's LGBT-rights jurisprudence really "does" equal protection, however, the de facto establishment problem he addressed in *Lawrence* could provide an answer to the difficult question that would then arise as to why we would consider LGBT people a class in the first place—suspect or otherwise. For it is not obvious what LGBT[138] people all have in common. They are hardly a prototypical "discrete and insular"[139] *Carolene Products* equal protection minority—if anything, they are heterogeneous, diffuse, and otherwise sui generis in ways that frustrate easy classification under the suspect-class rubric.[140]

---

135 Obergefell v. Hodges, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting).

136 As further potential evidence of the extent of Justice Kennedy's control over the *Romer* line of LGBT rights cases, consider the fact that the Court's two voluntarily unwed Justices (Kagan and Sotomayor) signed onto an opinion that suggests unmarried individuals are "condemned to live in loneliness." *Id.* at 2608 (majority opinion).

137 Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 137 (discussing the waning relevance of Justice O'Connor's "endorsement" theory of the Establishment Clause after she left the bench).

138 Indeed, the very difficulty of finding an English word to denote what lesbian, gay, bisexual, and transgender people have in common underscores the difficulty of conceptualizing sexual minorities as "a" class.

139 United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). *See* discussion *supra* notes 24–28 and accompanying text (discussing suspect-class criteria).

140 The three black-letter traits of a suspect class are a history of discrimination, political powerlessness, and immutability. *See* Frontiero v. Richardson, 411 U.S. 677, 683–86 (1972) (invalidating differential benefits for members of the armed services on the basis of their sex). There is no debating what LGBT people have suffered. As Judge Posner put it, "homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014) (invalidating state same-sex marriage bans). Partisans point to evidence on both sides of the powerlessness prong, an inquiry that is in any event plagued by pervasive methodological problems. *See* Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1527–45 (2015) (explaining that it is hard to measure how much political power a group has, and even harder to decide whether a group has less political power than it should). The immutability prong has always been an uneasy fit. There is immense historical irony in the fact that *Frontiero* has incentivized the LGBT movement to retreat from emancipationist theories of choice to the claim of being, as the song goes, "born this way"—which manages to sound like an apology while also being, of course, rather less than the whole story. *See* Frank Furedi, *Lady Gaga's Crazy Anthem to Biological Determinism*, SPIKED (Feb. 28, 2011), http://www.spiked-online.com/newsite/

Conclusively accounting for Justice Kennedy's enigmatic "Dignitas Quartet" is of course beyond the scope of this Note. However, sensitivity to de facto establishment could help explain why his LGBT-rights decisions have so often referred to dignitary concerns while conspicuously declining to announce a suspect class.[141] Perhaps what he understands LGBT people as having in common is the indignity of subjection to state sponsorship of an Abrahamic concept of personhood that deems them deviant. In the end, then, it may be that his due process doesn't ultimately "do" equal protection, but disestablishment.[142] This would be fitting. Freedom from de facto religious establishment is a liberty interest, after all—just ask Michael Hardwick or John Lawrence.

B. A Place at the Table

It is important to remember that judicial review under *Lawrence* preserves a role for religious motivation in the legislative process. For it "look[s] at legislative outcomes rather than legislative

article/10247#.V8nODpMrI_U. "[Y]ou don't have to be a queer theorist to know that the 'ethnic' model of homosexuality is fundamentally flawed: sexual boundaries *are* flexible and permeable; desire is a complex, unwieldy thing; and homosexuality is not always confined to homosexuals—even small-town Oregonians know this." ARLENE STEIN, THE STRANGER NEXT DOOR: THE STORY OF A SMALL COMMUNITY'S BATTLE OVER SEX, FAITH, AND CIVIL RIGHTS 219 (2001) (conducting an ethnography of a timber town's debate over an anti-LGBT municipal referendum modeled on the Colorado ballot initiative struck down in *Romer*). For arguments why LGBT-rights activists should not stipulate to immutability despite the tactical incentive to do so, see Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994), and Jonathan Pickhardt, Note, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921 (1998).

141 *Compare* Romer v. Evans, 517 U.S. 620, 635 (1996) ("Amendment 2 classifies homosexuals . . . to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."), *and* Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("[*Bowers*] demeans the lives of homosexual persons. . . . [Sodomy is] a criminal offense with all that imports for the dignity of the persons charged."), *with* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence."), *and* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) ("[The same-sex couples] ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

142 Justice Kennedy would not be the first to appreciate that anti-LGBT discrimination's constitutional defect is not so much the suspect-class status of LGBT people, as the absence of a rationale sounding in public reason. *See* David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 524–25, 549 (1994) (rejecting the "Procrustean model" of equal protection suspect-class status in favor of heightened scrutiny under the First Amendment's Religion Clauses, on the grounds that anti-LGBT discrimination has no basis but "sectarian religious convictions—sectarian in the sense that they rest on perceptions internal to religious convictions and not on public arguments available in contemporary terms to all persons").

inputs."[143] "[A] statute's constitutionality is not impugned by the mere fact that some people supported it for religious reasons."[144] Therefore, critics of the secular purpose test like Stephen Carter[145] and Michael McConnell[146] need not fear second-class citizenship for those whose political agenda is driven by religious conviction. For "there is nothing wrong with a legislative process that is influenced by religious people."[147]

Lawrence review serves only as an ex post check to ensure that the outputs of the legislative process—which is always driven by a variety of overlapping motives—have at least one justification based in public reason.[148] In this sense, the privileged status of majoritarian preference under the rational basis default—and judicial review's traditional deference to hypothetical ex post rationalization—is preserved.[149]

Indeed, the Establishment Clause does not require judges—and it would be unthinkable—to "forbid[] legislators . . . to act upon their religious convictions."[150] Yet the devout must do more than ask that

---

143 Koppelman, *Secular Purpose*, *supra* note 101, at 118.

144 *Id.* at 89.

145 Carter worries that the fencing out of religious belief from "the dialogue that determines public policy" threatens to demote religion to "a kind of hobby: something so private that it is as irrelevant to public life as the building of model airplanes." Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 978; *see also* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 113 (1993) (criticizing the secular purpose requirement on the grounds that it "represents a sweeping rejection of the deepest beliefs of millions of Americans, who are being told, in effect, that their views do not matter").

146 *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 144 (1992) (characterizing the secular purpose requirement as "a not-so-subtle suggestion that those whose understandings of justice are derived from religious sources are second-class citizens, forbidden to work for their principles in the public sphere").

147 Koppelman, *Secular Purpose*, *supra* note 101, at 118.

148 *See* Sullivan, *supra* note 100, at 197 n.9 ("[A]n articulable secular rationale is all that is required; a requirement of secular motivation trenches too far on the freedoms of conscience and expression of citizens and legislators."). For further articulation of this point, see Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217 (2001), and Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 673–75 (2001).

149 Indeed, one might pose the opposite objection—that the *Lawrence* test is not too strong but still too weak. Are we content to let stand, say, a liquor ban in a state where an electoral majority adheres to an alcohol-banning religion, just because it serves an attenuated public health purpose—perhaps a diminution in traffic deaths—that surely was not the subjective motivation behind its enactment? The law stands under *Lawrence*—for only a law that lacks *any* public justification inflicts an Establishment Clause injury upon those made subject to it without adhering to the theological tenet it enforces.

150 Edwards v. Aguillard, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting). For more on *Edwards*, see note 52 and accompanying text.

the law codify their creed. They must be able to justify the legislation they propose to those who do not share their faith by appeal to public reason: reasons that citizens of another (or no) faith "can not only understand—as Servetus could understand why Calvin wanted to burn him at the stake—but reasons we might reasonably expect that they, as free and equal citizens, might reasonably also accept."[151] For the right to enter the public forum motivated by religious conviction, sacred as it is, does not relieve one once there of the "obligation to pull, haul, and trade to find common political ground"[152] with non-coreligionists in devising laws whose rationales are "open to all."[153]

CONCLUSION

The founding generation expected nonestablishment to protect liberty. By banning national religion, the Establishment Clause aimed to prevent any one sect from predominating as an electoral majority, gaining control of the instrumentalities of the state, and using them to impose its beliefs on nonadherents. Yet as the national experiment unfolded, we learned how the very liberty-protecting religious diversity fostered by nonestablishment can also oppress. If enough sects share a tenet, it can become law despite its theological nature—because it belongs to no one sect and therefore looks like an ordinary overlapping policy consensus of the sort to which judicial review is designed to defer.

Judicial review under *Lawrence* solves this de facto establishment problem. It does not require that a statute be the product of an idealized deliberative exchange, or that it represent the optimally rational solution to the policy problem it addresses. Rather, it insists only on the important but rather modest requirement that legislative choice have some basis in public reason—in a rationale that all Americans can understand and appraise.

---

151 Rawls, *Public Reason*, *supra* note 96, at 771. To be sure, one might object that this model allows nonreligious Americans to advocate for their entire political agenda, while the devout must devise public-reason pretexts for policy preferences they hold on theological grounds (and to refrain entirely from advocating for those preferences that cannot be publicly justified). On such a view, requiring this extra work of the devout imposes a burden at best and second-class citizenship at worst. Yet this seems unavoidable—in a pluralist democracy that constitutionalizes nonestablishment as a first principle, it is hard to agree that *Deus lo volt* is as good a justification for legislation (and hence for bringing the coercive power of the state to bear upon citizens of differing—or no—faith) as any.

152 Johnson v. De Grandy, 512 U.S. 997, 1020 (1994) (Souter, J.) (upholding a state legislative redistricting plan challenged under § 2 of the Voting Rights Act).

153 THE FEDERALIST NO. 1, at 6 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).