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

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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.

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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

The Establishment Clause 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


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.

rule demonstrates that it reflects a preexisting consensus. 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. 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.” The Framers expected nonestablishment to preserve liberty—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. 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

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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

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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*, 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*-era substantive due process to the ground in the late 1930s, “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.”

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

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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.”).
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


\(^{18}\) 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.”).


concluded” and “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”

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.” Over the decades, courts have come to do so when statutes discriminate on the basis of a “suspect” classification or infringe a “fundamental” right—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, Congress could ban “filled milk” just because an electoral majority deemed it proper—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).


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).


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.” 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” to become law—and allow the state to find itself recruited into the business of punishing “heresy.” 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. There, defendants had been fined for violating Maryland’s Sunday-closing laws when they made sales at a discount department store. 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).

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).

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.

Id.


Id. at 422, 424.
default. But they also raised an Establishment Clause defense. 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.” 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.” 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.” 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.

The defendants lost their appeal; Maryland’s Sunday-closing law stood. 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.

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

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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”).
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;\textsuperscript{52} 5) permitting prayer before public school athletic events;\textsuperscript{53} and 6) mandating display of the Ten Commandments in courthouses.\textsuperscript{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.\textsuperscript{55}

\section*{C. Lemon’s Limits}

Lemon’s requirement that all laws “have a secular legislative purpose”\textsuperscript{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.”\textsuperscript{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-

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{56} Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
  \item \textsuperscript{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, \textit{Morals and the Constitution: The Sin of Obscenity}, 63 \textit{Columbia L. Rev.} 391, 413 n.68 (1963)).
\end{itemize}
fighting, bestiality, suicide, drug use, prostitution, and sodomy.”

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.” Indeed, when the Court decided Lemon in 1971, morality enforcement already had a long pedigree as a valid—indeed axiomatic—rationale for state action.

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, 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.

Yet Lemon’s anomaly was the law, impeding Establishment Clause challenges to morals legislation. The Supreme Court’s decision


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.


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* illustrates this state of affairs. In *Bowers*, Michael Hardwick challenged Georgia’s sodomy ban—a classic piece of “morals legislation.” 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.” 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.”

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,” 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” during the English Reformation when powers of the ecclesiastical courts were transferred to the King’s Courts—that is, when England broke with Roman Catholicism and formally established the Church of England. That ban “became the received law of Georgia” 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[s] in Judeo-Christian moral and ethical standards” sufficed to place it within Georgia’s legislative authority.

In dissent, Justice Blackmun agreed that “[t]he theological nature of the origin of Anglo-American antisodomy statutes is patent.” 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.”

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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).
McGowan73 and Stone74 (as discussed supra, the Supreme Court’s first use of the secular purpose requirement it created in Lemon75)—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.
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)).
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. The Lawrence Court couched its decision in due process, explicitly overruling its due process holding in Bowers and thereby invalidating state sodomy bans nationwide. 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. 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. 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.”

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.” So why did rational basis “bite” in Lawrence?

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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 Judeo-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 Holosycz-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).


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. 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.

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-

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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-


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].
inciple of American political culture by making “adherence to religion relevant to a person’s standing in the political community.” 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.”

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”—sodomy bans did not just “cast a pall of orthodoxy.” They recruited the state into punishing nonadherence to religious law. Enlisting the state’s “coercive powers to enforce religious truth” violates the core precept that “[h]eresy trials are foreign to our Constitution” and is therefore properly banned by the Establishment Clause.

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.” Recalling Justice White’s

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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).


104 Koppelman, Secular Purpose, supra note 101, at 93.


107 Koppelman, Secular Purpose, supra note 101, at 112.


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 Barnes117 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

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111 See supra note 67 and accompanying text.
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.
116 Koppelman, Secular Purpose, supra note 101, at 93.
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 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

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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; 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* 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.”

*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.

“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.’” This is therefore now the rule in the Ninth Circuit.

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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.


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 class132—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


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 . . . . testifies 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).

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 LGBT138 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


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.


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.\footnote{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.\footnote{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

\footnote{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.”).

\footnote{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.” Therefore, critics of the secular purpose test like Stephen Carter and Michael McConnell 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.”

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. 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.

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

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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 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).
148 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.
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 voli* 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.
