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ARTICLES

FAITH, REASON, AND BARE ANIMOSITY

DANIEL A. CRANE*

At the break of day on May 10, 1775, the great Vermonter Ethan Allen burst into Fort Ticonderoga accompanied by a hundred of his Green Mountain Boys. Confronting a British lieutenant in a stairwell, Allen, with an ungodly string of oaths, demanded surrender. The bewildered officer asked to know in whose name this surrender was demanded. Drawing himself to his full towering height, Allen roared back: "In the name of the Great Jehovah and the Continental Congress!" Without a shot, he captured the fort.¹

The Great Jehovah may not have cared too much for Ethan Allen. Looking upon Allen's grave with "pious horror," the Reverend Nathan Perkins characterized the general as an "awful Infidel, one of ye wickedest men yt ever walked this guilty globe."² When Allen finally expired after a life of drunken carousing, the president of Yale University, Ezra Stiles, noted in his diary, "Gen-

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¹ This account is taken from Kenneth S. Davis, "In the Name of the Great Jehovah and the Continental Congress," in A Sense Of History: The Best Writing From The Pages Of American Heritage 96-98 (1985); see also John Pell, Ethan Allen 80-87 (1929).

² Id. at 103.
eral Ethan Allen of Vermont died and went to Hell this day.\textsuperscript{3} The Calvinist fathers of Revolutionary New England doubtlessly believed that Allen's heretical writings on Christianity and his licentious lifestyle earned him a seat near Lucifer himself. Yet, ironically, Allen fought under the holy mantra of "the Great Jehovah," and his pamphlet advocating a rationalistic deism\textsuperscript{4} influenced Vermont's rejection of a religious establishment.\textsuperscript{5}

Ethan Allen was neither the first nor the last American skeptical of traditional religion to enter the public sphere in the name of God. Throughout the nation's history, God-speak has rolled off the tongues of statesmen of all religious persuasions on all sides of political issues. One recalls the equally adamant pulpิต-pounding by Abolitionists and Southern slave holders,\textsuperscript{6} or the opposition of the Women's Christian Temperance Movement to the high church denominations' tolerance of alcohol,\textsuperscript{7} or the ecclesiastical divide over the civil rights movement in the South.\textsuperscript{8} Given the diversity of religious voices in our historical public square, it is surely fair to say that an American's religiosity, or lack thereof, is a poor predic-

\begin{enumerate}
\item \textit{Id.} at 104.
\item \textit{Id.} at 100; also G.W. & A.J. Matsell, \textit{Ethan Allen, Reason, The Only Oracle Of Man} 1836 (1784). Along with Jefferson and Paine, Allen believed that "[r]eason must be the standard, by which we determine the respective claims of revelation."
\end{enumerate}
tor of her political inclinations. Every religious argument in favor of conservatism encounters an equal and opposite religious argument supporting liberalism or radicalism. For every minister who preaches capitalism, another teaches redistribution. From the founding to the present, religious rhetoric has pervaded American political debate without predetermining ultimate outcomes.

The political rhetoric of religion has not always rested easily with the First Amendment’s nonestablishment principle. America, after all, has wedded itself to the causes of religious diversity and tolerance. Theocracy begone! Increasingly in recent years, the nonestablishment principle has been invoked in opposition to religious participation in public affairs. Most shades of this opposition remain for now in the ivory tower. The Supreme Court, however, has not been immune to the suggestion that religious justifications for state action impugn the action’s constitutionality. Justices Stevens¹⁰ and Blackmun,¹¹ in particular, have explicitly insisted that the “secular purpose” prong of the Lemon test¹² requires the invalidation of statutes that do not in fact rest upon secular justifications. At times, the Court itself has appeared to follow suit, rejecting a state’s secular justifications for statutes


12. In Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), the Supreme Court announced a three-part test to evaluate the constitutionality of state legislation under the establishment clause: “First, the statute 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 entanglement with religion.’” Although the Court has yet to abandon Lemon formally, its failure to apply the test in recent years and specific statements by individual justices suggest that the test may be on its deathbed. See Michael S. Paulsen, Lemon is Dead, 43 CASE W. RES. L. REV. 795 (1993); Daniel O. Conkle, Lemon Lives, 43 CASE W. RES. L. REV. 865 (1993); Ira C. Lupu, Which Old Witch? A Comment on Professor Paulsen’s Lemon is Dead, 43 CASE W. RES. L. REV. 883 (1993); Richard S. Meyers, A Comment on the Death of Lemon, 43 CASE W. RES. L. REV. 903 (1993); Ronald Y. Mykkelvdet, Souring on Lemon: The Supreme Court’s Establishment Clause Doctrine in Transition, 44 MERCER L. REV. 881 (1993).
that appeared too religious. Thus, although the Court's official policy remains that the mere coincidence of a state statute with religious dogma does not require the statute's invalidation, one can never be quite certain when the Court will conclude that the real reasons for a statute are religious, and that the statute therefore transgresses the nonestablishment principle.

A recent development in equal protection jurisprudence suggests that religious motivation for state action may also be subject to attack from sources other than the Establishment Clause. In Romer v. Evans, the Supreme Court invalidated Colorado's "Amendment 2," which prohibited the state or its subdivisions from implementing measures protecting homosexuals from discrimination. Although many supporters of Amendment 2 relied on religious convictions in advocating the measure, the Court found that the amendment rested upon "animosity" and a "bare desire to harm," and therefore lacked a rational basis. In so doing, the Court implicitly extended its "bare animosity"/rational basis jurisprudence to cover religiously motivated measures disadvantaging discrete minorities.

After Romer, then, two independent constitutional principles may limit the involvement of religion in formulating public policy. The nonestablishment principle forbids state action that does not in fact rest upon a secular motivation, whether or not it is clothed in secular justification. The bare animosity principle discounts religion as a justification for classifications imposing disabilities on groups of individuals. Thus, the nonestablishment principle invalidates state action because of its religious motivation, while the naked animosity principle invalidates state action in spite of its religious motivation.

This article critiques the convergence of the nonestablishment and "naked animosity" principles as applied to religiously motivated state action. Part I discusses the constitutional structure of the "bare animosity" equal protection cases and the "secular purpose" Establishment Clause cases. Part II draws parallels


16. Id. at 1628.
between the "secular purpose" principle and Jean-Jacques Rousseau's ideal of "religious intolerance," and between the "naked animosity" principle and John Rawls's ideal of "public reason." Part III considers how the convergence of the "no intolerance" and "public reason" principles disenfranchises the religious voice in society, and deprives the religiously devout of the ability to defend their own interests in a world increasingly hostile to their values. This article concludes by arguing that the philosophy underlying these two principles does not support the invalidation of religiously motivated state action creating "defensive rights." In short, this "defensive rights" model would allow state action motivated principally by religious ideals where the state action merely removed the threat of official sanction from private choices in the social or economic realm.

I. THE CONVERGENCE OF TWO CONSTITUTIONAL LINES

A. Religious Motivation and the Establishment Clause

Over the past few years, the commentary on the role of religion in shaping public policy in a liberal democracy has been voluminous. At the same time, the Supreme Court has maintained an official doctrine that permits religious participation in public deliberation so long as the resulting state action does not coerce compliance with overtly religious dogma. Nonetheless, reflec-
tions of the growing academic debate have crept into the opinions of individual justices, often appearing in dissenting opinions. Further, in some of the most recent establishment clause decisions, the "strict separationist" position has appeared as part of the Court's opinion.

1. The Official Version: Mere Coincidence Doesn't Matter

Formally, the Supreme Court's official position remains that state action, whether legislative or otherwise, does not violate the establishment clause merely because that action "happens to coincide or harmonize with the tenets of some or all religions."\(^{19}\) For example, in McGowan v. Maryland,\(^{20}\) the Court held that a Sunday Blue Law's coincidence with the Christian understanding of Sunday as a day of rest did not impugn the law's constitutionality. Even though "the original laws which dealt with Sunday labor were motivated by religious forces,"\(^{21}\) the State could now "conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation."\(^{22}\) Thus, the Decalogue's proscription of murder, theft, fraud,\(^{23}\) and adultery would not prevent the state from proscribing the same through its

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21. Id. at 431.

22. Id. at 442.

23. Presumably, the Court meant to refer to the Ninth Commandment's prohibition on giving false testimony. Exodus 21:16.
civil laws. 24 McGowan and its companion case 25 thus make clear that the mere fact that a statute could be, and historically has been, supported by religious justifications does not mean that the statute establishes a religion, so long as it can be independently supported by secular justifications.

Similarly, in Harris v. McRae, 26 the Court rejected the argument that the Hyde Amendment, 27 prohibiting the expenditure of federal Medicaid funds for the performance of most abortions, “violate[d] the Establishment Clause because it incorporate[d] into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences.” 28 Finding that the Hyde Amendment reflect[d] “traditionalist” values toward abortion as much as the views of any particular religion, the Court had no difficulty holding that this case, like McGowan, represented nothing more than a coincidence of public choice with religious preference. 29 The fact that Congressman Henry Hyde, the amendment’s sponsor and a staunch Roman Catholic, undoubtedly harbored religious, as opposed to merely “traditionalist,” reasons for opposing abortion would not damn the amendment.

Since Harris, the Court has reaffirmed the “mere coincidence” principle on several occasions. 30 Officially, then, the story remains that the state may exercise its coercive power in ways approved by particular religions, so long as it offers religion-neutral and otherwise permissible reasons for a particular exercise of its power.

2. The Other Version: Ferreting Out Religious Motivation

Despite the “mere coincidence” principle of McGowan and its progeny, individual justices, and the Court itself on some occasions, have taken the position that an act of the state that embod-

24. 366 U.S. at 442.
28. 448 U.S. at 319.
29. Id. at 319-20.
ies a predominantly religious viewpoint, although not stated in religious terms,\textsuperscript{31} violates the Establishment Clause.\textsuperscript{32} Justice Stevens, in particular, has voted to invalidate legislative acts because of their overly cozy fit with religious dogma. In \textit{Webster v. Reproductive Health Servs.},\textsuperscript{33} Stevens dissented from the plurality's refusal to invalidate the preamble to a Missouri statute declaring that life begins at conception and that conception occurs at fertilization.\textsuperscript{34} In Stevens's view, although the preamble made no overtly religious reference, it "reflect[ed] nothing more than a difference in theological doctrine."\textsuperscript{35} Thus, it lacked an identifiable secular purpose in contravention of the first prong of the \textit{Lemon} test.\textsuperscript{36} Stevens has made a similar statement in at least one other abortion case,\textsuperscript{37} and persuaded Justice Blackmun to follow suit on another occasion.\textsuperscript{38} Similarly, in \textit{Bowers v. Hardwick},\textsuperscript{39} Blackmun dissented from the majority's refusal to ground a right to engage in homosexual sodomy in the Fourteenth Amendment's due process clause, arguing that the state could not consistent with the Establishment Clause rely on theological justi-

\textsuperscript{31} A distinction can be drawn between acts of the state that support identifiable religious trappings—for example religious decorations on public property, prayer in public schools, or aid to religious institutions—and public policy positions that may be motivated exclusively by religious considerations but which are facially non-religious.

\textsuperscript{32} A similar line of reasoning has occasionally surfaced in the lower courts as well. One well-known example is a Western District of Missouri Judge's invalidation of a school district's policy restricting dancing on school premises. \textit{Clayton v. Place}, 690 F. Supp. 850 (W.D. Mo. 1988). Judge Clark relied, \textit{inter alia}, on an hour-long Sunday School discussion of the dancing issue by one the school board's members in concluding that the policy was "inherently religious," and thus violative of the \textit{Lemon} test. \textit{Id.} at 854-55. The Eighth Circuit reversed, noting that "this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions." \textit{Clayton v. Place}, 884 F.2d 376, 380 (1989), \textit{cert. denied}, 494 U.S. 1081 (1990).

\textsuperscript{33} 492 U.S. 490 (1989).

\textsuperscript{34} \textit{Id.} at 566.

\textsuperscript{35} \textit{Id.} at 568.

\textsuperscript{36} \textit{Id.} at 566-67.


\textsuperscript{39} 478 U.S. 186 (1986).
fications to support the anti-sodomy statute. To Blackmun, the statute amounted to an act of “religious intolerance.”

What is distinctive about the position of Justices Stevens and Blackmun is that it insists on ferreting beyond a statute’s religion-neutral facade to root out illegitimate religious motivation. In the typical Establishment Clause case, say one involving school prayer or state aid to parochial schools, the religious element appears on the face of the classification itself. By contrast, regulations of abortion or sodomy are not facially religious, and could be motivated by any number of nonreligious attitudes, ranging from populationism to bare (but nonreligious) animosity. The Stevens/Blackmun view of the Establishment Clause holds that the Court should strike down any legislative classification that does not in fact rest upon a non-theological justification, whether or not the classification could be independently justified. In several cases, a majority of the Court has undertaken actual basis review in Establishment Clause cases, although never quite saying as much.

For example, in *Epperson v. Arkansas*, the Court held that Arkansas’s “monkey law,” forbidding the teaching of evolution in the public schools, violated the Establishment Clause by enshrining “fundamentalist sectarian conviction” in state law. Facially, the statute said absolutely nothing about religion, whereas its undoubted inspiration, the Tennessee statute at issue in the famous Scopes trial, did. Nonetheless, the Court noted that “[n]o suggestion has been made that Arkansas’ law may be justified by considerations of state policy other than the religious views of some of its citizens.” In support of this proposition, the Court relied on a pro-monkey law advertisement with an explicitly reli-

40. *Id.* at 211-12 (Blackmun, J., dissenting).
41. *Id.* at 212.
42. 393 U.S. 97 (1968).
43. *Id.* at 108.
44. The Court noted that the Tennessee statute “candidly stated its purpose: to make it unlawful ‘to teach any theory that denies the story of Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.’” *Id.* at 108-09. The Tennessee Supreme Court upheld the Tennessee statute, *Scopes v. State*, 289 S.W. 363 (1927), but reversed Scopes conviction on the ground that the jury, and not the judge, should have assessed the $100 fine.
45. 393 U.S. at 107.
gious appeal printed in the Arkansas Gazette. Thus, despite the state’s effort to eliminate the explicitly religious language in the statute itself that would surely have doomed the statute at issue in Scopes, the Court had “no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, ‘denied’ the divine creation of man.”

The Court took its “actual basis” Establishment Clause review to an even higher level, in Edwards v. Aguillard, where the state vigorously denied that any religious motivation for its law requiring the teaching of “creation science” to accompany the teaching of evolution in the public schools. Although the Court noted that it would normally defer to the state’s articulation of a secular purpose, “it is required that the statement of such purpose be sincere and not a sham.” As in Epperson, the Court relied on the statute’s legislative history, there the statements of the bill’s sponsor, to locate an invidious religious motivation underlying the statute. Similarly, in Wallace v. Jaffree, Stone v. Graham, and School Dist. of Abington Township v. Schempp, the Court rejected the states’ religion-neutral justifications for various semi-religious accouterments of public education, finding in each instance that the true motivation for the relevant state action was religious.

These cases exhibit a range of possible attitudes toward the propriety of religious motivations in the formation of public policy. For purposes of convenience, these can be broken down into three possible positions. First, religious motivations for a statute may not require its invalidation if the statute itself does not coerce con-

46. Id. at 108 n. 16. The advertisement provided as follows: “THE BIBLE OR ATHEISM, WHICH? All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1. . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of their children? The Gazette said Russian Bolshevists laughed at Tennessee. True, and that sort will laugh at Arkansas. Who cares? Vote FOR ACT NO. 1.” THE ARKANSAS GAZETTE, LITTLE ROCK, Nov. 4, 1928, p. 12, cols. 4-5.
47. 393 U.S. at 109.
49. Id. at 586-87.
50. Id. at 587, citing statement of Senator Bill Keith.
formity or nonconformity with religious dogma. Second, a statute supported by some religious considerations may not be invalid so long as it can be independently supported by nonreligious considerations, whether or not such considerations motivated the legislature or voters. Finally, any statute that in fact rests primarily on a religious justification may be presumptively invalid, whether or not it coerces conformity with religious dogma or could be supported by independent secular considerations. This article will refer to this third possibilities as the “strict separationist” position. 54

A majority of the Court has yet to adopt the strict separationist position as such. In all of the cases in which the Court has relied solely on Lemon’s “purpose prong” to invalidate state action, the state action itself could not be understood without reference to religion. School prayers, “creation science,” and the Ten Commandments are arguably facially religious products of religiously informed preferences. By contrast, restrictions on abortion and homosexuality, the paradigmatic evils in the Stevens/Blackmun model, make no explicit religious reference. That a majority of the Court has yet to join the strict separationist position suggests an implicit acceptance of the distinction between facially religious acts supported by religious justifications and acts that are not facially religious but which are nonetheless religiously motivated. But if the distinction continues to hold in the Establishment Clause context, in a nonobvious way it may have lost its grip in the equal protection context, to which we now turn.

B. “Bare Animosity” Rational Basis Review

Rational basis review under the equal protection clause of the Fourteenth Amendment or the equal protection component of the Fifth Amendment’s due process clause, now its identical twin, 55

54. I have chosen the “strict separationist” label at some peril, because the phrase is often used to denote a variety of different understandings of the Establishment Clause. However, I think it best encapsulates the modern secularist viewpoint that religion should play no overt or covert role in the formation of public policy. See Arlin M. Adams and Charles J. Emmerich, A Nation Dedicated To Religious Liberty 53 (1990) (describing strict separationist position).

55. In order to avoid the embarrassment of ordering Topeka’s public schools desegregated while permitting the District of Columbia’s schools to remain segregated, the Supreme Court found an equal protection component in the due process clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954). In Adarand v. Pena, 515 U.S. , 115 S. Ct. 2097, 2100-01 (1995), the Court
consists in fact of two very different sorts of review. The first version—let us call it conventional rational basis review—has been invoked hundreds of times since the “Switch in Time that Saved Nine” in 1937, and even occasionally before that time. The second version—bare animosity rational basis review—did not emerge until the 1970s and has only been used by the Supreme Court a handful of times since then.

1. Conventional Rational Basis Review

Conventional rational basis review is the offspring of the Carolene Products recreation of the constitutional universe. What began as a mere musing in a footnote by Justice Stone, soon became “[t]he great and modern charter for ordering the rel-

confirmed that the Fifth Amendment equal protection component is coextensive with the reach of the Fourteenth Amendment's equal protection clause.

As early as 1934, the Court had rejected a substantive due process and equal protection challenge to State-established price controls, holding that the only unconstitutional economic regulations are those “arbitrary, discriminatory, or demonstrably irrelevant to the policy of the Legislature.” See Nebbia v. New York, 291 U.S. 502, 539 (1934). Full blown rational basis review, however, did not emerge until the troika of anti-New Deal constitutional tools—narrow construction of Congress’ enumerated powers, equal protection, and substantive due process—came crashing down in 1937. The phrase “rational basis” first appeared in a Supreme Court opinion in 1944, in Stage Stores Co. v. Kansas, 323 U.S. 32, 35 (1944).


61. According to Justice Powell, by footnote 4 Justice Stone meant only to “spark debate over ideas that he had not developed fully” and not to outline “a comprehensive theory of constitutional adjudication.”) Lewis F. Powell, Jr., Carolene Products Revisited, 82 COLUM. L. REV. 1087, 1090 (1982), citing Alpheus Mason, Harlan Fiske Stone: Pillar Of The Law 513 (1956).
tions between judges and other agencies of government.”62 In the *Carolene Products* dispensation, state regulations in the social and economic realm would only need to meet the test of broadly defined rationality, absent some conflict with a specific prohibition of the Bill of Rights or the manifestation of prejudice against the rights of “discrete and insular minorities.”63 The two-tiered formulation of *Carolone Products* has since been flushed out to add further layers of scrutiny (exactly how many is the subject of some debate),64 but rational basis review clearly remains the bottom floor. Unless a legislative classification burdens a fundamental right, or draws lines on the basis of race, national origin, citizenship, sex, or legitimacy of birth, rational basis review applies.65

As a tool for examining the fit between means and ends, the rational basis standard has been particularly lax. The mere fact that in pursuing a legitimate end, a legislative classification treats people differently in the social or economic sphere will rarely, if ever, be sufficient to state a claim under the equal protection clause. Justice Douglas’s classic formulation of the standard leaves wide discretion to the state in fitting means to ends:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [citation omitted]. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative

62. Owen Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 6 (1979). See also Lea Brilmayer, *Carolene, Conflicts, and the Fate of the Inside-Outsider,* 134 U. Pa. L. Rev. 1291, 1291 (1986) (*Carolene Products* is no longer just a case, but instead “a line of reasoning, and one so venerable as to have achieved almost axiomatic status in a world where virtually every other proposition of Constitutional law is best considered controversial.”).

63. *Carolene Products*, 304 U.S. at 153 n. 4 (“There may be a narrower scope of operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”).

64. Until recently, classifications on the basis of gender and legitimacy seemed to occupy an intermediate scrutiny floor. The Supreme Court’s decision in *United States v. Virginia*, 116 S. Ct. 2264 (1996), invalidating Virginia’s maintenance of the single-sex Virginia Military Institution, leaves in some doubt the level of scrutiny as to gender classifications.

mind. [citation omitted]. The legislature may select one phase of one field and apply a remedy there, neglecting the others. [citation omitted]. The prohibition of the Equal Protection Clause goes no further than invidious discrimination.66

Except for the "bare animosity" cases discussed below, the Supreme Court has generally upheld state classifications when rational basis review has applied to equal protection challenges.67 Increasingly in the last three decades, however the Court has begun to use the rational basis test as a tool for ferreting out not only poor fits between means and ends, but legislative classifications motivated by illegitimate purposes.68 The "legitimate purpose" prong of rational basis review now appears to have sharper


teeth than the means/ends prong. The problems this inquiry raises, however, have proven significantly more challenging than the comparatively easier task of judging the fit between means and ends.

2. Bare Animosity Review

When the Supreme Court has invalidated state or federal classifications under the rational basis standard, it has often done so on the basis of the classification's illegitimate purpose. But how does the Court know an illegitimate purpose when it sees one? The Constitution contains no canon of impermissible purposes, or, for that matter, permissible ones. Nonetheless, the Supreme Court has flirted on again off again with making purpose relevant in reviewing the constitutionality of legislative or executive action. For purposes of equal protection review, it is now firmly established that "the invidious quality of a law claimed to be discriminatory must ultimately be traced to a racially discriminatory purpose."

In the arena of rational basis review, illegitimate purpose (as opposed to failure of means/ends rationality) may be subdivided into two categories. At a high level of generality, both categories involve the state's decision to allocate burdens or benefits on the basis of what Cass Sunstein has labeled "naked preferences." The state reveals its naked preferences when it distributes "resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Although nominally using equal protection rational basis review to root out all state legislation based on naked preferences, the Supreme Court has in

and that inquiry into the legitimacy of legislative purpose did not begin until the 1970s).

69. One might also ask how the Court even knows what the purpose of a statute is. Public choice theory has quite compellingly argued that legislatures do not act according to collective purposes. See, e.g., William N. Eskeridge, Jr. & Phillip P. Frickey, Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. PITT. L. REV. 691, 702-03 (1987).


73. Id. at 1689.
fact developed two separate standards of naked preference rational basis review.

The first category of impermissible purposes consists of state preferences for one group over another in the allocation of scarce resources. The Supreme Court has used this variant of naked preference review, for example, to prohibit state preferences for domestic industry over foreign industry and discriminatory taxation schemes against those who purchase automobiles out of state. These cases usually involve discriminatory treatment of out-of-state interests, and therefore overlap with the Court's privileges and immunities clause and negative commerce clause jurisprudence. What distinguishes these cases from the bare animosity cases discussed below is that the discriminatory state classifications are not usually motivated by a desire to harm an unpopular minority. Rather they are meant to favor politically powerful interests within the state at the expense of groups unrepresented in the political process. Thus, these cases reflect a representation-reinforcement model of equal protection review. Rewarding the well-represented at the expense of the unrepresented may be the course of business as usual, but it is not rational in a constitutionally salient sense.

In a second and distinct line of cases, the Supreme Court has invalidated legislative classifications that the Court has perceived to be motivated by nothing but naked animosity toward a particular group of people. Of course, if the state expressed animosity toward a suspect or quasi-suspect class, say a racial or ethnic minority, the classification would violate the equal protection

76. The privileges and immunities clause strand of this troika only applies when the plaintiff is a natural person. See Blake v. McClung, 172 U.S. 239 (1898) (corporation is not protected under Article IV, section 2’s privileges and immunities clause).
78. On the other hand, if one’s object is reelection, pork barreling is not only rational, but indispensable.
clause virtually *per se*. In each of the bare animosity cases, however, the Court has refrained, either explicitly or implicitly, from making the relevant class suspect or quasi-suspect, relying instead on the proposition that regardless of the nature of the class, the state behaves irrationally when it singles out a group of people for adverse treatment simply because it doesn’t like them.

In the earliest bare animosity case, *United States Dept. of Agriculture v. Moreno*, the Supreme Court invalidated an amendment to the federal Food Stamp Act of 1964 that excluded from participation in the food stamp program any household containing an individual who was unrelated to any other member of the household. Although the Government argued that its interest in minimizing fraud underlay the statute, Justice Brennan dug into the legislative history and discovered that the relevant amendment “was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.” This latent government interest could not sustain the amendment. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” Some “consideration[ ] in the public interest” would be required.

The Supreme Court took up the bare animosity mantra again in *Plyler v. Doe*, where it held that a Texas statute prohibiting the children of illegal immigrants to attend the public schools violated the equal protection clause. Although the precise standard of review employed in *Plyler* remains subject to some debate, the underlying theme of the opinion is that it is “illogical and unjust” to punish the children of illegal immigrants for the sins of their
parents. Rejecting the State's litany of proffered justifications, the Court insisted that the State "do more than justify its classification with a concise expression of an intention to discriminate." In other words, a mere dislike of the presence of illegal aliens within the borders of the United States would not justify the visiting of punishment upon their innocent children.

City of Cleburne v. Cleburne Living Center afforded the Court with another opportunity to voice its disapproval of classifications based on bare animosity. There, the Court held that a city's denial of a special use permit for the operation of a group home for the mentally retarded could not survive rational basis scrutiny. As in the prior bare animosity cases, the city offered various justifications for the denial, which the Court in turn rejected, finding that the real basis for the city's actions was "negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding." Basing the denial of the special use permit on such "private biases" would amount to an irrational discrimination against a non-suspect class in violation of the equal protection clause.

With the bare animosity principle firmly established, the Court undertook a much grander project in Romer. The countermajoritarian difficulty identified by Alexander Bickel is palpable enough when the Court invalidates ordinary legislation enacted in the usual course of business. When the Court invalidates a state constitutional amendment enacted by popular referendum after full and heated political deliberation, and in the process accuses 53% of the state's electorate of bare animosity and irrationality, the counter-majoritarian difficulty reaches its zenith. Nonetheless, in Romer the Court undertook to apply its rare breed of bare animosity rational basis review to a popularly ratified state-wide referendum, and, in so doing, took bare animosity review to a new level.

88. Id. at 227.
90. Id. at 448.
92. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16, 16-23 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our [democratic] system.").
Due to the high profile of the case, the facts of Romer are generally well known.93 Responding to anti-discrimination measures enacted by the cities of Aspen and Boulder and the City and County of Denver, Colorado’s voters adopted “Amendment 2” in a 1992 statewide referendum.94 Amendment 2 amended the Colorado constitution to prohibit the State of Colorado and any of its political subdivisions to “adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.”95 In the Supreme Court, the plaintiffs96 argued that Amendment 2 violated the equal protection clause by arbitrarily erecting barriers to the rights of gays, lesbians, and bi-sexuals to seek protected status through the political process. In a 6-3 opinion authored by Justice Kennedy, the Court agreed.97

Placing Romer within any particular tradition of constitutional doctrine is somewhat of a challenge, as evidenced by the fact that even those sympathetic to its result have been writing furiously ever since the opinion’s arrival to remodel it into a more coherent structure.98 I do not attempt here to critique the decision

93. For a comprehensive history of Amendment 2, see Michael J. Gallagher, Amendment 2, 4 Law & Sex. 123 (1994).
94. Romer, 116 S. Ct. at 1623.
96. The plaintiffs were homosexual individuals, a school district, and various cities and counties. See Evans v. Romer, 882 P.2d 1335 (Colo. 1994), aff’d, U.S., 116 S. Ct. 1620 (1996).
97. Although the Court declined explicitly to follow the “discriminatory structuring of government” path taken by the Colorado Supreme Court, 116 S. Ct. at 1624, it is impossible to understand Romer without some reference to the discriminatory structuring principle. See Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982); Gordon v. Lance, 403 U.S. 1 (1971); Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 36 (1967). As everyone concedes, if the voters of Boulder, Aspen, and Denver could repeal their gay-rights ordinances, then surely the voters of Colorado as a whole could accomplish the same end. See Akhil Reed Amar, Attainder and Amendment 2: Romer’s Rightness, 95 Mich. L. Rev. 203, 206 (1996). The understood difference between repeal and structural amendment (of which Justice Scalia so bitterly complains) must therefore account for something in the Court’s opinion. See Coalition for Economic Equality v. Wilson, 110 F.3d 1431, 1441 (9th Cir. 1997) (characterizing Romer as a “political structure” case).
in a comprehensive sense. For present purposes, it is enough to note that the majority opinion rests at least in part on the bare animosity principle of Moreno and its progeny. After explaining the effect of Amendment 2 in Section II of his opinion, Justice Kennedy turns in Section III to an explanation of how the amendment fails rational basis review under the equal protection clause. He first tells us that “[i]t is not within our constitutional tradition to enact laws” that “identify persons by a single trait and then deny them protection across the board.” Such a law is both overly narrow in identifying a person by a single trait, and overly broad in denying him or her protection across the board. Kennedy appeals to the text of the Fourteenth Amendment: “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is a denial of equal protection of the laws in the most literal sense.” Thus, the state cannot be protecting its citizens equally when it prohibits some of them, but not all of them, to seek the protection of the laws.

Kennedy then moves beyond the literal "equal protection" argument to condemn Amendment 2 on a second ground. “A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantaged imposed is born of animosity toward the class of persons affected.” Moreno pro-

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99. 116 S. Ct. at 1628.
100. Id. Curiously, Justice Kennedy sees no conflict between this principle and numerous legislative classifications that define a class by a single trait and then deprive its members of a broad panorama of legal entitlements. For example, although Kennedy believes that the principle of Richardson v. Ramirez, 418 U.S. 24 (1974) “is not implicated by our decision and is unexceptionable,” felons are unquestionably identified by a single trait (the commission of a felony) and are denied a whole host of legal entitlements, such as the right to vote, the right to own a firearm, and the right to hold public office. Kennedy may see a difference here if he understands felons to be identified by a trait of conduct and gays, lesbians, and bi-sexuals to be identified by a trait of personality, but the broad principle he states makes no such differentiation.

101. 116 S. Ct. at 1628.
102. Id.
vides support for this proposition: "[A] bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." 103 Kennedy distinguishes Amendment 2 from laws that further legitimate public policies and only incidentally burden discrete groups of persons. 104 "Amendment 2 . . . in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." 105

So there we have it. Whatever the state may try to argue, the Court knows that Amendment 2 isn't really about respecting freedom of association or religion, or preserving scarce legal resources on the anti-discrimination front, or in achieving statewide uniformity and deterring factionalism. 106 The Court can smell a rat, and an malodorous one at that. The amendment does not serve any legitimate public purpose. Rather, it was "born of animosity" and founded on "a bare desire to harm" gays, lesbians, and bi-sexuals. In short, it violates the constitutional naked animosity principle.

Romer breaks no new ground in announcing that the state may not single out a class of persons for unfavorable treatment simply because it doesn't like them. As discussed above, this equal protection principle saw fruit in at least three earlier cases. What is new about Romer is that the arguments advanced in favor of the legislative classification were not nakedly hostile to gays, lesbians, and bi-sexuals in the same way that the arguments against "hippie communes" were nakedly expressed in Moreno, or the naked fears of the mentally handicapped were implicit (though unexpressed) in Cleburne. 107 Rather, the citizens of Colorado clothed their support (and opposition) to Amendment 2 in the

103. Id., citing Moreno, 413 U.S. at 534.
104. Id.
105. Id.
106. The State argued all of these things in its appellate briefs. Appellant's Opening Brief at 41-47, 1995 WL 310026.
107. Apparently, naked animosity rational basis review is unaffected by whether the illegitimate purpose to harm is explicitly expressed in the legislative classification itself (which it never is), is explicitly expressed by the classification's supporters (as in Romer and Moreno), or is never overtly expressed, but is nonetheless implicit in the classification (as in Cleburne and Plyler). The Court apparently feels free to infer naked animus from either legislative statement, legislative history, or legislative effect.
lofty language of morality, political theory, and economics. And, above all, they clothed their arguments in the language of religion.

3. The Role of Religion in Romer

Standing "at the window of his high-ceilinged chambers, waiting to go on the bench, looking down at the crowd of competing protestors in the plaza below," Justice Kennedy must have been aware of the religious subtext of the controversy over Amendment 2. The popular media billed the referendum as a showdown between the "religious right" and the gay rights movement. Although Colorado for Family Values, the amendment's principal sponsor, vigorously resisted being labeled as a group composed solely of religious conservatives, numerous religious organizations campaigned in favor of Amendment 2. More often than not, the amendment's supporters couched their arguments in explicitly religious language, relying principally on Biblical passages condemning homosexuality. Charged with

108. This is how Terry Carter, a writer for California Lawyer, described Justice Kennedy the morning the Court handed down its decision in Casey, as quoted in Jeffrey Rosen, Annals of Law: The Agonizer, The New Yorker, Nov. 11, 1996 at 82, 87.


112. See, e.g., Dire, God, Gays, and the Law, supra note 111 at A1 (citing comment of Colorado Springs mailroom clerk Mark Williams: "I base what I feel totally on the word of God . . . And the word of God definitely speaks against homosexuality."); Booth, Colorado Gay-Rights Battlefield, supra note 110 at 1A (citing comment of Rev. Woodie Stevens, pastor of First Church of the Nazarene in Colorado Springs in support of Amendment 2: "The traditional values of this
improperly introducing religious dogma into public debate, leaders of the pro-Amendment 2 movement remained unfazed. Kevin Tebedo, son of a Republican state representative and one of Colorado for Family Value’s organizers, offered the following candid rebuttal: “You see, we say we should have the separation of church and state, but you see, Jesus Christ is the king of kings and the lord of lords. That is politics; that is rule; that is authority. So whose authority is going to rule?”

This sort of theocratic admission, of course, is just what it takes to fan the flames of the “culture war” into white heat. The religious consensus, however, was by no means monolithic. In the battle over Amendment 2, religious rhetoric played a dominant role on both sides of the issue. As one newspaper account noted, “[c]hurch groups are sharply divided over Amendment 2 . . . but the most vocal religious organizations are those opposing the measure.” Many Christian and Jewish religious groups vocally opposed the measure. Public argument over Amendment 2 often took a bizarre form as supporters relied on the Biblical condemnation of homosexuality and the demise of Sodom and Gomorrah and opponents countered with examples of the compassion and inclusivity of Jesus. The debate flowed with Sunday School rhetoric, but, alas, without Sunday School manners.

The State wisely avoided any mention of this religious outburst in its appeal to the Supreme Court. In its opening brief, the State offered three justifications for Amendment 2—(1) that it maintains the integrity of civil rights laws; (2) that it enhances individual freedoms; and (3) that it achieves statewide uniformity and deters factionalism. Only the second of these touched at all
on a religious theme, and even there the State stayed away from any mention of the religious rhetoric that had permeated Colorado in the Fall of 1992. Arguing that Amendment 2 secured religious liberty and freedom of association, the Attorney General carefully eschewed any attempt to justify the measure as an expression of public moral sentiment founded upon religious conviction. Instead, she focused on the invasive impact that anti-gay discrimination ordinances could have on religious associations, such as churches, and private religious individuals. The brief thus portrayed Amendment 2 as a shield of religious liberty rather than as a sword of the religious right.

Thousands of miles away in Washington, the six members of the majority could easily compare the State’s sweetened version with the raw reports from the trenches and choose to cut through the sugar-coating. At its heart, the battle over Amendment 2 was ground zero in the emergent culture war between religious conservatives and social progressives. As the Court surely saw it, the winning side, the religious conservatives, appropriated the coercive power of the state to inflict harm on a discrete group of people, and for no better reason that the religious conservatives didn’t like gays and lesbians. To Justice Kennedy and the five supporting justices, this amounted to nothing less than naked hostility—and naked hostility of a religious nature at that. The lesson of Romer, then, is that the state may not impose disabilities on a discrete group of persons merely because it disapproves of them (or their conduct) for religious reasons. Religious disapproval, in short, does not count as a legitimate public purpose for a law.

How far this equation of religious disapproval with illegitimate government purpose may travel remains to be seen. Certainly, Romer puts a new twist on bare animosity rational basis review by disqualifying a whole new set of private motivations from consideration in public discourse, at least when the imposition of a disability is at issue. But what is the source of this principle of mandatory separation between religious views of morality and the exercise of state power? The following section considers the “strict separation” and “bare animosity” principles in the con-

118. For further details of the religious nature of the struggle, see Gallagher, supra note 94.

text of the philosophical positions that best explain them—Jean-Jacques Rousseau’s “no intolerance” principle and John Rawls’s “public reason” principle.

II. THE PHILOSOPHY OF SEPARATION

A. Rousseau on Intolerant Religions—Precursor to the “Strict Separationists”

If Jean-Jacques Rousseau is the “Father of the Modern World,” he is even more the father of the “modern” strand of liberalism, at least insofar as it manifests critical skepticism toward religion. Although some of the criticisms of Rousseau have missed the mark—he has falsely been accused of harboring atheistic beliefs and advocating totalitarianism—he did lay the foundation for the modern intolerance of religious participation in public affairs. And this, despite the fact that the single negative dogma of his famous (or infamous) civil religion is “no intolerance!”

Upon closer examination, it appears that this “no intolerance” maxim is founded upon the understanding that “[i]ntolerance is something which belongs to the religions we have rejected.” Rousseau thus rejects religious intolerance by advocating intolerance of intolerant religions. Intolerant religions are inimical to

120. THOMAS P. NEILL, MAKERS OF THE MODERN MIND 189 (1949).
121. By “modern” liberalism, I mean to refer to “[a] liberalism based on individualism, independence, and rationalism [which] has a tendency to see traditional religion as authoritarian, irrational, and divisive—as a potential threat to our democratic institutions.” Michael W. McConnell, “God is Dead and We Have Killed Him!” Freedom of Religion in the Post-Modern Age, 1993 B.Y.U. L. REV. 163, 173.
124. Id.
125. As one commentator has noted: “Rousseau specifies intolerance as the single negative dogma of the civil religion; on the other hand, Rousseau wants an intolerant religion. He cannot tolerate rejection of his civil religion, though he will tolerate beliefs which go beyond it.” Theodore J. Koontz, Religion and Political Cohesion: John Locke and Jean Jacques Rousseau, 23 J. CHURCH & STATE 95, 111 (1981).
the civil state because it is impossible to distinguish between theological intolerance and religious intolerance; "[t]hese two forms of intolerance are inseparable."126 This follows from the (empirical?) fact that "[i]t is impossible to live in peace with people one believes to be damned; to love them would be to hate God who punishes them; it is an absolute duty either to redeem or to torture them."127 In any society where intolerant religions are tolerated, "civil consequences" are inevitable: "[T]he sovereign is no longer sovereign, even in the temporal sphere; at this stage the priests become the real masters, and kings are only their officers."128

In support of this intolerance paradigm, Rousseau offers the example of a fictitious country in which, due to a spirit of religious intolerance, the clergy capture the sole right to license marriages.129 This single power over the making of one type of civil contract will soon leave the prince without subjects, and the church in sole control of the civil state:

Enable priests to decide whether to marry people according to their assent to this or that doctrine, their assent to this or that formula, or according to their being more or less devout, then is it not clear that if the clergy acts shrewdly and holds firm, it will in time alone dispose of inheritances, offices, the citizens and the state itself, since the latter cannot endure if composed only of bastards?130

To counteract this intolerance effect, Rousseau proposes the establishment of a civil religion. Rousseau's choice of terminology should not lead the reader to understand that he supports the establishment of a religion in the traditional sense. His civil religion bears few of the marks of contemporary European state religions—for example the established churches of England,131 Russia, or pre-revolutionary France.132 Rousseau wants only to

126. Id.
127. Id. at 186-87.
128. Id. at 187.
129. Id.
130. Id.
132. Rousseau had no use for the traditional European established churches. See Judith N. Shklar, Men And Citizens: A Study Of Rousseau's Social Thought 117 (1969). Indeed, French clergymen blamed on Rousseau the National Assembly's requirement that all French clergymen take an oath of allegiance to the goals of the French Revolution, which purportedly was intended
control the outward manifestations of religious belief insofar as they impact upon others. He has no interest in maintaining the purity of religious dogma, or involving the state in the adjudication of religious disputes.

The right which the social pact give the sovereign over subjects does not... go beyond the boundaries of public utility. Subjects have no duty to account to the sovereign for their beliefs except when those beliefs are important to the community. Now it is very important to the state that each citizen should have a religion which makes him love his duty, but the dogmas of that religion are of interest neither to the state nor its members, except in so far as those dogmas concern morals and the duties which everyone who professes that religion is bound to perform towards others. Moreover, everyone may hold whatever opinions he pleases, without the sovereign having any business to take cognizance of them. For the sovereign has not competence in the other world; whatever may be the fate of the subjects in the life to come, it is nothing to do with the sovereign, so long as they are good citizens in this life.133

Thus, despite Rousseau's lip service to a "no intolerance" maxim, he in fact proposes to establish a civil religion to which all citizens must adhere, saving however the liberty to maintain tolerant personal beliefs as one likes them. On the one hand, this formulation resembles the belief/action distinction first enunciated in Reynolds v. United States134 and resurrected in Employment Division v. Smith.135 But while Rousseau's proposition contains a weak "free exercise" component akin to the current First Amendment standard, it contains a corollary "no intolerance" component that in effect disenfranchises most traditional religions from participation in public affairs, and probably even residence within the boundaries of the state. Unlike Enlightenment separationists, such as John Locke136 and Thomas Jeffer-
son, who proposed to separate the institutions of church and state, Rousseau is skeptical that an orderly society can rest upon a separation between political and religious ideals. "Rousseau privatizes religion by deinstitutionalizing religions dealing with matters of personal salvation, attaining a pure understanding of God and the like, while also creating another separate religion concerned with undergirding the state." Religion must play a positive role in society, "both in providing justification for the social contract and in enhancing the civic spirit, while preventing the intolerance and warlikeness apt to result from a pure 'religion of the citizen.'"

The "tolerant" religion Rousseau would allow the citizen finds expression in The Creed of a Priest of Savoy. Speaking as an old priest instructing his acolyte, Rousseau sets forth his princi-

moral actions, which belong "to the jurisdiction of the outward and inward court, . . . both of the magistrate and conscience." John Locke, A Letter Concerning Toleration, in POLITICAL WRITINGS OF JOHN LOCKE 421 (David Wootton, ed. 1993). Locke's general political theory provides support for a libertarian limitation on the use of state power, extending the magistrate's jurisdiction only to such evils as are "prejudicial to other men's rights" or "break the peace of societies." Id. at 417. However, the range of negative externalities over which the magistrate exercises jurisdiction should not be understood in the narrow modern sense. The magistrate retained the power to punish the perpetrators of moral externalities, such as those who "lustfully pollute themselves in promiscuous uncleanness." Id. at 414. For Locke's views on the establishment question, see generally Koontz, supra note 126.

137. Jefferson drafted Virginia's landmark Bill for Establishing Religious Freedom which contained a strong disestablishment principle. His famous Danbury Baptist letter reappropriated Roger Williams's "wall of separation metaphor," which eventually made into the lexicography of establishment clause jurisprudence. See Everson v. Board of Education, 330 U.S. 1, 16 (1947). Additionally, Jefferson wrote derisively of the common law jurists such as Sir Matthew Hale, Lord Mansfield, and William Blackstone who called Christianity part of the common law of England. See Letter to Dr. Thomas Cooper of February 10, 1814 in JEFFERSON: WRITINGS at 1321-29 (Merrill D. Peterson, ed., 1984). Nonetheless, Jefferson was overall a conventional moralist. In 1778, he drafted a Bill for Proportioning Crimes and Punishments for the Virginia Legislature, which included the prohibition of sodomy, although not bestiality which "cannot be injurious to society." Id. at 356 n. 25.

138. See Koontz, supra note 126 at 99 ("Although Rousseau shares Locke's interest in making religion a private matter he is skeptical of the view that a wall of separation can be erected between the institutions of church and state.").

139. Id.

140. Id. at 96.

141. For the recognition of this linkage between Rousseau's description of the "religion of man" in the civil religion chapter of THE SOCIAL CONTRACT and the
amples of naturalistic deism: the will moves the universe and animates nature; divine intelligence governs the universe; happiness results from justice; conscience derives from innate ideas and not from learning. These broad, innocuous principles of natural religion contrast with the intolerant creeds of Christianity, Judaism, and Islam. Traditional religions, with their macabre fixation on damnation and salvation, threaten the very fabric of social order.

The duty of following and loving the religion of one's country does not extend to dogmas contrary to good morality, such as that of intolerance. It is that horrible dogma which arms men against on another, and makes them all enemies of mankind. The distinction between civil tolerance and religious tolerance is childish and vain. Those two tolerances are inseparable, and one cannot omit one without the other. Even angels cannot live in peace with men whom they regard as enemies of God.

In practical effect, Rousseau creates two religious requirements for citizenship. First, the citizen must at least adhere to the minimal requirements of the civil religion, that is that every citizen "love his duty." Second, the citizen may adhere to further religious beliefs, but such beliefs may not be "intolerant." Indeed, if the savoyard priest is to be our model, then these private and tolerant beliefs should not even be disclosed to others.

passage that follows from The Creed Of A Priest Of Savoy, I am indebted to Koontz, supra note 126 at 99.

143. Id. at 16.
144. Id. at 29.
145. Id. at 42.
147. Rousseau equates his notion of intolerance, which he raises continuously in The Creed Of A Priest Of Savoy, with a belief in damnation. See id. at 76 ("God forbid that I should ever preach to them the cruel doctrine of intolerance, that I should ever incline them to detest their fellow man, to say to other men, You will be damned!").
148. Id. at 76 n. 18.
149. Social Contract at 185. Rousseau specifies further tenants of the civil religion, "the existence of an omnipotent, intelligent benevolent divinity that foresees and provides; the life to come; the happiness of the just; the punishment of sinners; the sanctity of social contract and law," Id. at 187, but each of these requirements seems tailored to the necessity of social control, this "love of duty."
150. At the conclusion of his creed, the priest tells his young acolyte: I have just, my young friend, recited to you orally my profession of faith as God reads it in my heart. You are the first to whom I have presented it; you are
Thus, Rousseau creates a minimum religious requirement for citizenship—adherence to the social values required by the civil religion—and a maximum allowance for religious beliefs beyond the requirements of civil religion—that they be tolerant of other views and quietly held.

How, then, does Rousseau's paradigm figure in the strand of Establishment Clause thinking that denies to religion any right to participate in the formulation of public policy? On the one hand, the formal distinction between Rousseau's proposal to establish a state religion and our constitutional prohibition on the establishment of religion would seem to place the two positions in direct opposition. On the other hand, Rousseau's civil religion, concerned as it is with love of duty and civic virtue, shares far more with the republican ethicism of Robert Bellah and his legal academic followers than with the theistic Judaism, Christianity, and Islam that Rousseau considered "intolerant." Far from "establishing a religion," as that concept is commonly understood in historical context, Rousseau's civil "religion" requires no more than a commitment to the ethical goals of the state, a requirement which by contemporary standards does not seem particularly religious.

perhaps the only one to whom I shall ever do so. So long as there remains some good belief among men, one must not disturb peaceful souls nor alarm the faith of simple people by difficulties which they cannot resolve, and which worry them without enlightening them.

CREED OF A PRIEST OF SAVOY at 78.

151. Focusing on the link between republican civic virtue and the need for a unifying civil religion, Bellah asserts that "the American case" includes "the worship of a higher reality that upholds the standards the republic attempts to embody." Robert N. Bellah, Religion and Legitimation in the American Republic, in ROBERT N. BELLAH AND PHILLIP E. HAMMOND, VARIETIES OF CIVIL RELIGION 12-13 (1980). Sanford Levinson has adapted Bellah's sociology to the language of law by focusing on the Constitution as the sacred text of the American civil religion. SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988). For other sources of discussion on this topic, see Thomas C. Grey, The Constitution as Scripture, 37 STAN. L. REV. 1 (1984); W. Lance Bennett, Imitation, Ambiguity, and Drama in Political Life: Civil Religion and the Dilemmas of Public Morality, 41 J. POL. 106 (1979); GAIL GEHRIG, AMERICAN CIVIL RELIGION: AN ASSESSMENT (1979)

152. See supra note 132.

153. Rousseau's notion of a civil religion was not dissimilar to the republican virtues many of the framers, including committed separationists, believed must undergird the American democratic experiment. See Jerry H. Combe, Religious Roots of the Rights of Man, in RELIGION AND POLITICS (Fred E. Baumann and Kenneth M. Jensen eds, 1989).
I have chosen Rousseau as a paradigm of Establishment Clause thinking not for what he says about the establishment of a civil religion (which, in the modern context, I do not find particularly interesting), but for what he says about the role of theistic religion in civil society. In particular, his labeling of traditional theistic dogma as dangerously intolerant strikes me as the precise philosophy underlying actual purpose review under the Establishment Clause. Of course, modern constitutionalists who believe that state action should not rest upon religious conviction would vigorously deny that this principle extends to state prohibition of private religious beliefs, intolerant though they are, as Rousseau seems to advocate. Nonetheless, in denying to the religiously devout the right to participate in the formation of public policy, the strict separationist position erects a religious classification for citizenship, similar in kind, if not equal in degree, to Rousseau's.

To appreciate this point, one need only consider the extent to which contemporary constitutional culture has focused on representation reinforcement as the keystone to equal citizenship. After all, footnote four of Carolene Products, that "great and modern charter" of American constitutionalism, invites the strictest of scrutinies on "legislation which restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation." In the modern dispensation, the chief political function of the courts is to inquire "whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted." Unsurprisingly, many of the Supreme Court's landmark decisions since the New Deal have focused on "clearing the channels of political change," striking down barriers to process-oriented functions such as free speech, free association, voting rights, campaign financing, and jury participation.


157. Ely, supra note 78 at 77.

158. Id. at 105-34.
This emphasis on structure and process has been driven by an obsession with equality of citizenship, the principle that "[e]ach individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member." In the modern context, the state cannot sin more gravely than to exclude any voice from the public forum, from an equal say in the formation of public policy. Indeed, Frank Michelman defines citizenship as "direct participation . . . in the determination of common affairs." Just as for Aristotle the man outside the polis is no man at all, but rather a beast or a god, the American resident without a political voice is no citizen at all, but rather an alien or an outsider.

If the right to participate in public deliberation makes one a citizen, it is not too difficult to see that a rule prohibiting a class of residents from seeking legal sanction for their religiously informed preferences has the effect of denying citizenship to members of that class. Thus, Rousseau, who would forbid Catholics to remain in the state, differs only in degree from the strict separationist who would permit Catholics to stay, but would forbid them any participation in the process of self-governance. Both Rousseau and the separationist draw a citizenship classification on the basis of religion. That Rousseau banishes the Catholic

159. KENNETH L. KARST, BEYOND THE CONSTITUTION (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, The Supreme Court, 1976 term—Foreward: Equal Citizenship under the Fourteenth Amendment, 91 HARV. L. REV. 1 (1977).

160. Id. at 3.

161. Frank I. Michelman, The Supreme Court 1985 Term—Foreward: Traces of Self-Government, 100 HARV. L. REV. 4, 27 (1987); see also James L. Fleming, Securing Deliberative Autonomy, 48 STAN. L. REV. 1, 22 (1995) (advancing theory of constitutional constructivism whose first theme is "to secure the preconditions for political self-government, conceiving our political system as a public facility for deliberation concerning the common good.").


163. Much of Rousseau's discussion of religion in THE SOCIAL CONTRACT appears to be directed against Roman Catholicism, which belonged to "his most despised category of religion." Koontz, supra note 126 at 101.

164. At this point I anticipate the response that no one proposes to exclude Catholics and other traditional religionists from public debate, but merely to forbid them to bring their Catholic viewpoints to the public forum. This is much the same as saying, "We won't exclude Marxists from public debate so long as they don't advance any Marxist views."
while the strict separationist allows him to remain as a resident alien is a distinction with minimal significance.

Not only do Rousseau and the strict separationists concur in eliminating the privileges of citizenship of traditional religionists, but they concur in motivation as well. The single great theme of Rousseau's discussion of religion in *The Social Contract* is the disruptive effect on civil society of intolerant religion. Intolerance, again, "is that horrible dogma which arms men against one another, and makes them all enemies of mankind." By insisting that those who do not share their religious convictions will be damned, Rousseau believes, the "intolerant" introduce a dangerous and destructive element into society.

Much the same motivation appears to inspire the strict separationists. As Justice Stevens explained in *Wallace v. Jaffree*, "the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain. Intolerance, then, is the touchstone of the Establishment Clause. But what is meant by "intolerance?" Whereas Rousseau defines intolerance as a belief in damnation, the strict separationists understand intolerance as the insistence that others behave the way the religious think they should behave for no better reason than that religious teachings support that behavioral norm. Not surprisingly, strict separationists often characterize the legal norms that have drawn their most intense fire, especially prohibitions on abortion and homosexual conduct, as the products of "religious intolerance." Rarely do they take after public policy initiatives which are motivated by religious views but nonetheless are not "intolerant," for example welfare bills motivated by Christian beneficence or environmental regulations motivated by the desire to preserve "the Lord's creation." Like Rousseau, the strict separationists find offense and danger in religions that seek to impose "intolerant" moral standards on persons outside of the religious community.

165. CREED OF A PRIEST OF SAVOY, supra note 142 at 76 n. 18.


In short, both Rousseau and the strict separationists would exclude from full citizenship adherents to traditional, "intolerant" religions. To understand the full implications of this position for the role of religion in modern life, we must first turn to the philosophical roots of the other head of constitutional doctrine that is beginning to challenge religious participation in public affairs.

B. Rawls on Religion and Public Reason—The Philosophy of Bare Animosity and Religion

In the past several years, few writers on the role of religion in political choice have captured the imagination of the legal academic community more than John Rawls. His *Political Liberalism* has become a central focus of discussion in the ongoing dialogue over religion and public reason. In his earlier classic, *A Theory of Justice*, Rawls assumed the existence of a "well-ordered society" in which all citizens adopt a "comprehensive philosophical doctrine" which accepts "justice as fairness." In *Political Liberalism*, Rawls confronts the problem with this assumption, namely that "[a] modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines, but by a pluralism of incompatible yet reasonable comprehensive doctrines." Since not all citizens affirm any single comprehensive philosophical doctrine, and it is unreasonable to believe that they will at any time in the foreseeable future, Rawls asks the following question: "how is it possible for there to exist over time a just and stable society of free and equal citizens who still remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"


171. *Id.*

172. *Id.*

173. *Id.* at 47.
Rawls answers this question at some length, but the short answer is that "the basic structure of such a [just and stable] society is effectively regulated by a political conception of justice that is the focus of an overlapping consensus of at least the reasonable comprehensive doctrines affirmed by its citizens."\textsuperscript{174} Thus, the state may legitimately exercise its coercive power only pursuant to constitutional principles and aspirations within the zone of the overlapping consensus, which "all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."\textsuperscript{175} From this, it follows that reasons given in support of the exercise of the state's coercive power, at least as to "constitutional essentials,"\textsuperscript{176} must derive from the zone of overlapping consensus. Borrowing on a phrase from Kant,\textsuperscript{177} Rawls sets out to define the appropriate domain in democratic society of "public reason," that is "the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution."\textsuperscript{178}

Not surprisingly, the public reason criterion does not bode well for religious participation in the formation of public policy. According to Rawls, the content of public reason must be based on "presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."\textsuperscript{179} Obviously, religion is out. "[I]n discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individual members of associations see as the whole truth . . . . "\textsuperscript{180} Rawls pauses briefly to consider whether this principle undermines the moral authority (understood in terms of liberal democratic legitimacy) of the abolitionists and civil rights movement advocates who appealed

\textsuperscript{174.} Id. at 48.
\textsuperscript{175.} Id. at 217.
\textsuperscript{176.} See infra text accompanying notes 181.
\textsuperscript{177.} Rawls, supra note 169 at 213 n. 2. See also Solum, supra note 170 at 1463 n. 9, citing Immanuel Kant, An Answer to the Question: 'What is Enlightenment', in POLITICAL WRITINGS 54 (H. Reiss ed. & H.B. Nisbet trans., 2d ed. 1991).
\textsuperscript{179.} Id. at 224.
\textsuperscript{180.} Id. at 224-25.
directly to divine authority in confronting the evils of slavery and segregation.\textsuperscript{181} He concludes that it does not, but only because their appeal to comprehensive religious views was "required to give sufficient strength to the political conception to be subsequently realized."\textsuperscript{182} In other words, an appeal to comprehensive religious views is appropriate only when contextually necessary to establish an overlapping political consensus, which will in turn provide the basis for future moral claims on the same subject, and presumably make further religious appeals inappropriate.\textsuperscript{183}

Two limitations on the domain of public reason should be noted. First, Rawls would confine the limits of public reason to issues involving "constitutional essentials and questions of basic justice."\textsuperscript{184} Public reason is "to settle such fundamental questions as: who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property."\textsuperscript{185} This leaves many political questions—such as tax legislation, property regulations, environmental controls, and funding for the arts—beyond the requirements of public reason.\textsuperscript{186}

Second, Rawls urges public reason as a hortatory norm of public discourse, not as a constitutional principle to be enforced by the courts. Although the norm of public reason applies "to the judiciary and above all to a supreme court in a constitutional democracy with judicial review,"\textsuperscript{187} it not a matter of law.\textsuperscript{188} In other words, the judiciary should strive to speak in the language of public reason, but it need not consider itself nor the citizens whose actions it judges legally bound to such a standard.

Neither of these limitations that Rawls places on the domain of public reason has particularly affected the scope of the public reason principle as reflected in Supreme Court decisions under

\begin{itemize}
\item \textsuperscript{181} \textit{Id.} at 249-51.
\item \textsuperscript{182} \textit{Id.} at 251.
\item \textsuperscript{183} In a footnote, Rawls states this fairly explicitly: "This suggests that it may happen for a well-ordered society to come about in which public discussion may require that comprehensive reasons be invoked to strengthen those values." \textit{The Domain of the Political and Overlapping Consensus}, 64 N.Y.U. L. Rev. at 251 n. 41. Of course, once the well-ordered society is in place, the usual constraints of public reason would apply.
\item \textsuperscript{184} \textit{Id.} at 214.
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} \textit{Id.} at 216.
\item \textsuperscript{188} \textit{Id.} at 213 ("That public reason should be so understood and honored by citizens is not, of course, a matter of law.").
\end{itemize}
the establishment or equal protection clauses. Because legal decisions under these clauses inevitably concern "constitutional essentials," public reason should be used in every such case, presumably by the state actors whose decisions are under review, and by the Court itself.  

Although Rawls may understand public reason as a moral goal of democratic citizenship rather than a legal doctrine, it is a small step to convert the public reason principle into a constitutional doctrine, as I argue the Supreme Court itself has done. It has thus become clear that the idea of public reason, with all its attendant implications, is a fair ground for discussion in constitutional cases and controversies.

The political norm of public reason is easily recast into the mold of equal protection rational basis review. To say that a use of coercive state power must rest, at a minimum, upon a rational basis is to exclude from the province of legitimate public deliberation at least irrational bases for state action. After Romer, the rational basis standard also appears to exclude the exercise of coercive state power on the basis of extra-rational premises. Translating this theory into the language of Rawls, the set of public reasons sufficient to sustain the constitutionality of state action excludes both irrational and extra-rational bases. Assuming that religion belongs to the set of extra-rational bases, an assumption not free from controversy but one nonetheless implicitly

189. Additionally, it did not take too long for the legal academic community to expand the public reason principle beyond "constitutional essentials" to cover all political issues. See Perry, Religious Arguments in Public Political Debate, supra note 170 at 1447-48 (discussing the "ideal of public reason . . . as if it applied to political questions beyond just "constitutional essentials" and matters of basic justice"); Lawrence B. Solum, Constructing an Ideal of Public Reason, 30 SAN DIEGO L. REV. 729, 738-39 (1993) (arguing for extension of public reason principle to "all coercive uses of state power").

190. I assume that if the principle belonged solely to the realm of political philosophy, as Rawls perhaps intended, it would not have made such a splash in the law reviews.

191. The facile differentiation between religion and rationality or reason remains the target of substantial discussion. See, e.g., Carter, supra note 17 at 175 (defending creationism as a rational explanation "[given its starting point and methodology"); Richard S. Myers, The Supreme Court and the Privatization of Religion, 41 CATH. U. L. REV. 19, 71-72 (1991) (rejecting binary distinction between rationality and religion); Kent Greenawalt, Religious Convictions and Political Choice: Some Further Thoughts, 39 DePaul L. REV. 1019, 1029-32 (1990) (discussing five bases for religious convictions and concluding that "religious convictions as a whole [cannot] be lumped into a big category called nonrational"). Nonetheless, the distinction continues to play a considerable role in the debate over the role of religion in the formation of public policy. See
accepted by the Court in Romer, religion too falls outside of the class of public reason.\textsuperscript{193}

In the early "bare animosity" cases, the prejudices underlying the unconstitutional legislative classifications were irrational in the sense that they lacked any mooring in a comprehensive view of the public good. An unthinking, knee-jerk dislike of hippies, the children of illegal aliens, and the mentally retarded might be beyond the reaches of the law because the law has no power to coerce the mind directly, but it could not form the basis of state action disadvantaging those groups. One recalls the oft-quoted maxim of \textit{Palmore v. Sidoti} that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."\textsuperscript{197} In other words, although private

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Suzanna Sherry, \textit{Enlightening the Religion Clauses,} 7 \textit{J. Contemp. Legal Issues} 473, 478 (1996) ("The most basic tenets of reach religion tend to be supported primarily by faith rather than reason, and indeed few religious claims could be justified by observation and rational argument."); Dmitry N. Feofanov, \textit{Defining Religion: An Immodest Proposal}, 23 \textit{Hofstra L. Rev.} 309, 385-91 (1994) (defining religion as "a manifestly non-rational (i.e. faith-based) belief concerning the alleged nature of the universe"); Frederick M. Gedicks, \textit{Public Life and Hostility to Religion}, 78 \textit{Va. L. Rev.} 671, 678 (1992) (Religious belief in the Western tradition centers on a transcendent force of belief—that is, a force of belief beyond the material, phenomenal world. As such, religious belief is not subject to verification or falsification according to the objectivist conventions of public life.); Stephen G. Gey, \textit{Why is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment}, 52 \textit{U. Pitt. L. Rev.} 75, 167 (1990) ("Religious principles are not based on logic or reason, and, therefore, may not be proved or disproved.");


193. Rawls does not necessarily dismiss religion as unreasonable; rather he posits that it falls outside the boundaries of public reason. To the extent that Rawls defines reasonableness in Kantian terms as the "willingness to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so," Rawls, \textit{supra} note 169 at 49, there is no particular impediment to religion informing public policy, because religions generally agree that their own adherents should be bound by the standards that they seek to universalize. Nonetheless, Rawls also insists that reasonable persons propose social constructs in terms that, given the constraint of immutable difference of opinion on fundamental matters, other free and equal persons could be expected to accept. \textit{Id.} at 50. This specification excludes religion, even if reasonable, from the domain of public reason.


action, or at least attitude, may rest upon mere bias, law may not. Naked animosity does not appear in the unwritten canon of constitutional “public reasons.”

In the language of Rawls, these classic forms of naked animosity might be said to represent a species of “object-dependent desires,” or perhaps “object-dependent dislikes.” That is to say, “the object of the desire [or dislike], or the state of affairs that fulfills it, can be described without the use of moral conceptions, or reasonable or rational principles.” Object-dependent desires include “such bodily desires as those for food and drink and sleep; desires to engage in pleasurable activities of innumerable kinds as well as desires that depend on social life: desires for status, power and glory, and for property and wealth.” We might add to this our own list of object-dependent dislikes, for example a raw negative utility function for the color of a person’s skin or dislike for a person’s behavior based upon subliminal psychological factors. When the state gives these object-dependent desires (or dislikes) immediate legal sanction, the resulting state action cannot be said to rest upon a viable public reason, but rather upon a matter of pure (usually selfish) taste, or, to put it in Cass Sunstein’s words, a naked preference.

Unlike true naked preferences or object-dependent desires, religious motivations fall into the category of “conception-dependent desires.” The actor motivated by a conception-dependent desire wishes to be “seen as belonging to, and as helping to articulate, a certain rational or reasonable conception, or political ideal.” For Rawls, the operative conception-dependent desire of political liberalism “is the ideal of citizenship as characterized in justice as fairness.” By examining the “structure and content of this conception of justice” we discover how, “by the use of the original position, the principles and standards of justice for society’s basic institutions belong to and help to articulate the conception of reasonable and rational citizens as free and equal.” The conception-dependent desire of political liberalism—justice as fairness—leads us again to the “free and equal citizen” specification,
which provides the normative basis for insisting on rule according to overlapping consensus rather than comprehensive religious (or otherwise) world views. Thus, even though religion may fall into the category of conception-dependent desires, as opposed to object-dependent desires, which clearly may form the basis of public policy, religious considerations are not the sort of conception-dependent desires that can properly form the basis of public policy in a liberal democratic society.

Understood as a principle of constitutional government, Rawls' "public reason" principle informs the "legitimate purpose" prong of rational basis analysis. In determining whether or not a particular end of state of action is legitimate, judges cannot simply flip open their pocket constitutions to the "legitimate purposes" article. Rather, they must write (or perhaps they simply have written) their own list. As of yet, the Supreme Court has not enunciated a single system for determining what purposes appear in the good book. Some particularly "invidious" purposes are out—racial preference being the obvious example. Beyond the

205. Traditional rational basis review consists of two distinct prongs. The means/ends prong asks whether the means chosen is rationally related to the end. The legitimate purpose prong asks whether the end is itself legitimate. For the seminal article on this point, see Joseph Tussman & Jacobus tenBroeck, The Equal Protection of the Laws, 37 CAL. L. REV. 341 (1949); see also Laurence H. Tribe, American Constitutional Law § 16-2, at 1439-40 (2d ed. 1988).

206. See Farell, supra note 71 at 43 ("Although the Supreme Court speaks frequently of permissible and impermissible purposes (i.e. every time it states the doctrine of rationality review), it has not systematically articulated the criteria that distinguish permissible from impermissible legislative purposes.").

207. Although the Supreme Court has stated that the equal protection clause prohibits "invidious discrimination," see Williamson v. Lee Optical, 348 U.S. 483, 489 (1955), I have yet to see a definition of the word "invidious" appear in a Supreme Court opinion. I rather suspect that "invidious" signifies "mean-spirited," which is an appealing moral concept, but hardly translates well into a doctrine of constitutional law.

obvious gremlins, however, determining what purposes count as "rational" is no easy task. 209

Rawls' formulation of the principle of public reason offers an appealing conceptual framework within which to state the problem and attempt to organize a solution. Reading Romer in light of its precedents, an implicit Rawls-like paradigm begins to emerge. I do not suggest here that Political Liberalism and its philosophical antecedents are necessarily responsible for the Romer opinion in a causal sense, i.e. that they informed the majority's thinking, although I do not discard that possibility either. 210 Rather, I think that in the modern context, any attempt to justify the emergent pattern as coherent and correct would likely take a Rawlsian form. In particular, the connection between what I have called the earlier object-dependent desire cases, Moreno, Cleburne, and Plyler, and Romer, which appears to me be a clear case of the expression of a conception-dependent desire that the Court nonetheless found illegitimate, must rest upon the assumption that the political liberal regime established by the equal protection clause (and the Constitution more generally) impugns all purposes of a certain character, whether object-dependent or conception-dependent.

But what is that "certain character" that accounts for the delegitimization of so wide a panoply of possible state interests? Extrapolating from the case outcomes, it is fair at least to hypothesize that the entire set of excluded interests consists of those that are irrational or extrarational according to the criteria of liberal democratic public reason, understood, as Rawls understands them, as the products of the overlapping consensus which "all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational." 211 Such a formulation explains the inclusion in the category of

209. See Welch, supra note 69 at 83 (noting that the modifier "legitimate" is not an immediately obvious component of equal protection clause review).

210. The majority's treatment of illegitimate purpose in Romer cannot easily be pinned to any comprehensive constitutional standard of legitimacy because the Court merely rests upon the finding that the State failed to link Amendment 2 to any legitimate purpose, leaving the classification "naked" for purposes of equal protection review. Romer, 116 S. Ct. at 1629 ("We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective."). Above, I have argued that the Court implicitly rejected the religious bases for the amendment, which although not advanced by the State were certainly common knowledge, and, in any event, were "conceivable bases" for the amendment, if that remains the standard.

211. Rawls, supra note 169 at 217.
excluded public purposes of both object-dependent dislikes, nakedly expressed in *Moreno, Cleburne,* and *Plyler,* and of conception-dependent dislikes, overtly expressed (and well-understood) in religious terms in *Romer.* The overlapping consensus model of rational basis review also fits well with the strict separationist position that I have identified with Rousseau. 212 To a synthesis of these positions I now turn.

### III. Decanonizing Enlightenment Agnosticism

The preceding sections have attempted to link Rousseau’s proposal to exclude from society “intolerant” religions with the “strict separationist” view of the Establishment Clause, and Rawls’s view of public reason with the Supreme Court’s emergent standard of “bare animosity” rational basis review, as recently expressed in *Romer.* This final section will attempt to demonstrate the interplay between the Rousseau/strict separationist position and the Rawls/bare animosity positions, respond to some potential objections to this characterization, and then offer a partial solution to the unfair (and ironic) outworking of this interplay.

#### A. When Rawls and Rousseau Merge

The first step—demonstrating the interplay between the Rawls and Rousseau principles—is not particularly challenging because, upon analysis, the two principles present two sides of the same Enlightenment coin. Although Rawls denies that his political liberalism is merely another variant of Enlightenment liberalism, 213 there can be no serious question that Rawls, as much as Rousseau, 214 is thoroughly a child of the Enlightenment. 215 In

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212. By this I mean that a strict separationist would find an independent constitutional basis for affirming, as does Rawls, that the domain of legitimate purposes excludes religious ones.

213. Rawls, supra note 169 at xl (“Political liberalism is not a form of Enlightenment liberalism, that is, a comprehensive liberal and often secular doctrine founded on reason and viewed as suitable for the modern age now that the religious authority of Christian ages is said to be no longer dominant. Political liberalism has no such aims.”).

214. See supra text accompanying notes 121-22.

practical effect, both the Rawls and Rousseau principles have the effect of privileging as a constitutional norm the Enlightenment posture of deep suspicion toward the participation of traditional religions in the formation of public policy. Both views lend theoretical support to the increasingly held view that “[t]he establishment clause should be viewed as a reflection of the secular, relativist political values of the Enlightenment, which are incompatible with the fundamental nature of religious faith,” and that “[a]s an embodiment of these Enlightenment values, the establishment clause requires that the political influence of religion be substantially diminished.” Both positions even provide support for classical-liberal pragmatists of Richard Posner’s stripe, for whom “the significance of pragmatism in relation to the Enlightenment is in unmasking and challenging the Platonic, traditionalist, and theological vestiges in Enlightenment thinking.” In short, both the Rousseau and the Rawls principles provide a constitutional basis for completing the Enlightenment’s political project with respect to religion—complete privatization.

Despite the convergence of the two principles in practical effect, on a doctrinal level they remain analytically distinct. Theoretically, a religiously motivated act of the state could transgress the strict “separation principle” principle but not the bare animosity principle. Although it has become a matter of conventional wisdom that all laws classify, not all implicit classifications single out an identifiable group for disadvantageous treatment in a

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216. Gey, Why is Religion Special?, supra note 155 at 79.


way that appears to reflect animosity toward that group. For example, I have trouble envisioning the result reached in Edwards v. Aguillard\(^{219}\) being justified on equal protection grounds, because the state action at issue—requiring the teaching “creation science” in the public schools—did not place at disadvantage the group whose interests were threatened by the religious intrusion—secularist adherents to a Darwinist explanation of human origins.\(^{220}\) As a result of an earlier decision,\(^{221}\) 393 U.S. 97 (1968),\(^{222}\) that group already enjoyed the teaching of its views in the schools. The sole question in Edwards was whether the constitutional prohibition on establishing religions prevented the religiously motivated teaching of creationism alongside evolution. Thus, the strict separationist position would invalidate religiously motivated classifications that would bring the religiously supported position into equilibrium with the secularly supported position.\(^{223}\) By contrast, the bare animosity principle focuses, facially at least, on whether the religiously supported position singles out some group for disadvantage. Although an equal protection model of Establishment Clause jurisprudence has its merits,\(^{224}\) the strict

many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law.”).


220. The Louisiana statute did of course relatively disadvantage Darwinists vis-à-vis creationists insofar as before the law Darwinists held a monopoly on teaching origins, and after the law they had to compete for the minds of the young. This disadvantage, however, was comparative only, and in an absolute sense, the law merely placed the Darwinists and creationists on an even keel.

221. Epperson v. Arkansas,


223. Of course, any reading of the Establishment Clause must take into account the rather obvious fact that the clause necessarily disadvantages religion to some extent. See Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 206 (1992) (noting that Establishment Clause places unique disabilities on religion); Michael W. McConnell, A Response to Professor Marshall, 58 U. Chi. L. Rev. 329, 329 (1991) (noting that Establishment Clause sometimes singles out religion for disadvantageous treatment). It is a rather long jump from that realization, however, to the strict separationist position which supports invalidation of all acts of the state that rest primarily upon a religious motivation, whether or not the act itself is particularly religious in nature.

separationist and bare animosity models remain doctrinally distinct as to the role of religion in the formation of public policy.

Nonetheless, in practical effect the two principles work conjunctively and at times indistinguishably to ferret out the religious motivations lurking behind coercive uses of state power. On the one hand, the bare animosity principle insists that the religious translate their views into non-religious terms when presenting public policy justifications for classifications disadvantaging groups of individuals.225 The Supreme Court, however, offers no assurances that it will accept the translated version at face value. If the translated arguments look like nothing more than a cover for a naked religious preference, as apparently they did in Romer, they will be discounted, and the state action will be found to rest on bare animosity.226 Similarly, the strict separationist principle requires the Court to second-guess the state's proffered justifications for a particular policy and ask whether it in fact rests upon an “intolerant” religious motivation. If it does, the policy may be found to violate Establishment Clause.227

At a more theoretical level, the interplay between the strict separation and bare animosity principles results in a rather perverse irony. Presumably, the function of “bare animosity” review is to ensure that a use of the state's coercive power rests upon some basis other than (in Rawls's terms) an object-dependent

225. See infra text accompanying notes 238-39.
226. Romer involves an unusual “translation” situation, because Amendment 2 arose from a popularly initiated referendum, where the relevant “legislative history” would have to be pieced together from newspaper accounts of the debate over the amendment, rather than from sources traditionally referenced in the search for the elusive legislative purpose, such as committee reports and the like. This makes the translation enterprise in this context suspect for at least two reasons. First, it is unreasonable to expect that news media accounts of a hotly contested public referendum campaign will be able to distinguish citizens' statements of their personal and intuitive views on the referendum from the statements they might make if they were trying to persuade others to join their side. Legislators, on the other hand, should be expected to go on record making only those statements that reflect generalized public (i.e. “translated”) appeals. Second, if public choice theory has disabused us of the notion that even a body as small as the United States Senate has a single “purpose” (which, if religiously motivated, we would expect the Senators to “translate”), how ridiculous it is to imagine that the citizenry of Colorado has a single “purpose” which, if motivated by religious sentiment, could be translated into secular terms.
227. As indicated supra at text accompanying note 55, a majority of the Court has never adopted the strict separationist position as such, insofar as it would involve invalidating a non-obviously religious legislative enactment motivated primarily by religious considerations.
desire or (in my terms) an object-dependent dislike. In this sense, a classification is naked or bare when it reflects nothing more than a raw human reaction to a set of stimuli. Rational basis review sets a standard for deliberative democracy, demanding that legislative classifications result from thought and discussion rather than naked passion. All that is (arguably) well and good until the bare animosity principle intersects the strict separation principle. Consider the instance of a citizen reflecting on a proposed referendum which imposes a unique disability on a discrete group of people—say smokers. Intuitively, she dislikes smokers and might well speak out in favor of the referendum simply on the basis of her animosity. But having become aware of the bare animosity principle, she resolves to reflect further on the issue to see if her dislike of smokers has any basis in a comprehensive view of social relationships. Upon reflection, she discovers that in fact her animosity arises from her religiously informed beliefs in the need to maintain a “pure” body and the imperative of avoiding addictions. Now confident that she may speak out of a comprehensive conviction rather than a knee-jerk reaction, our citizen enters the arena of public debate.

To her surprise, our hypothetical citizen finds that in terms of constitutional no-nos she has leapt from the frying pan into the fire. Her reflection led her to a comprehensive view, but one outside of Rawls’s “overlapping consensus.” Although our citizen accepted the challenge of “deliberative democracy” and formulated a justification for her vote that did not rest upon “bare animosity,” her religiously informed justification will fare no better than her nakedly hostile reaction to smokers. The justifications that the bare animosity principle nudged her to formulate will run smack dab into the waiting arms of the strict separation “no intolerance” principle. In the end, it will make no difference whether she speaks before thinking or after thinking. The bare animosity principle, as informed by the strict separation principle, will discount any religious justification she may give for her vote,

228. See supra text accompanying notes 200.
229. In Romer, the majority characterized equal protection “nakedness” as “a classification of persons undertaken for its own sake.” 116 S. Ct. at 1629.
230. Cass Sunstein, in particular, has advocated the use of rational basis review as a means nourishing “deliberative democracy” by ensuring “that all decisions are supported by reasons of the right kind.” Cass R. Sunstein, The Supreme Court 1995 Term—Foreward: Leaving Things Undecided, 110 Harv. L. Rev. 4, 37 (1996).
231. See supra text accompanying notes 175.
leaving her political choice "naked" for purposes of rational basis review. Our citizen will be deprived of any constitutionally permissible voice on the referendum, and in the process lose one of the chief attributes of her putative citizenship.

I anticipate at least two responses to this description of the disenfranchising effect of the bare animosity and strict separation principles. First, some would doubtlessly argue that my anti-smoker example is flawed because restrictions on smoking can easily be justified by innumerable secular justifications, whereas the constitutional limitation on religious purposes for coercive uses of state power extends only to legislative classifications that can only be supported by religious dogma. For example, Michael Perry argues that "under the nonestablishment norm, government may not make a political choice about the morality of human conduct unless a plausible secular rationale supports the choice." He does not believe that such a norm prevents legislators and other public officials from "present[ing] religious arguments, including religious arguments about the morality of human conduct, in public political debate." Justice Stevens sounded a similar note in his Webster dissent, arguing the abortion statute's preamble "reflect[ed] nothing more than a difference in theological doctrine" and therefore lacked an identifiable secular purpose. In his view, the Missouri statute transgressed the establishment principle because it could only be supported by a religious belief. Thus, one could argue that the twin constitutional norms discussed in this article do not require invalidation of state action informed by religious beliefs so long as the action could be independently supported by secular considerations.


233. See supra text accompanying notes 155-166.

234. Perry, supra note 170 at 1426.

235. Id. at 1426-27.

236. 492 U.S. at 568.

237. Id. at 566-67.
This view appears to be predicated on the assumption that the religious citizen or legislator who presents an argument in favor of a public policy position should rely on a parallel secular justification for the policy choice instead of on a religious basis. Professor Greenawalt has argued that legislators at least should couch their arguments regarding public policy initiatives in the language of public reason, even if their actual judgment rests upon some religious view.\textsuperscript{238} Similarly, Robert Audi has argued that “citizens [should] apply a kind of separation of church and state in their public use of religious arguments,” and that “whatever religious arguments one may have . . . , one should also be willing to offer, and be to a certain extend motivated by, adequate secular arguments for the same conclusions.”\textsuperscript{239} Presumably, so long as the political proposition can be and is stated in secular terms, it falls on the “mere coincidence” side of the Establishment Clause line.

Although “translation” may be a fitting hortatory aspiration of liberal democracy, for at least three reasons it makes a poor constitutional requirement. First, it fails as a matter of empirical observation of Supreme Court practice.\textsuperscript{240} As discussed in Section I,\textsuperscript{241} on a number of occasions the Court has stricken statutes despite the state’s proffered secular justifications because the Court has found that the classification \textit{in fact} rested upon a religious purpose. For example, in the creationism cases, \textit{Epperson} and \textit{Edwards}, the Court engaged in “actual basis review” of the legislature’s purpose in invalidating the creationist statutes.\textsuperscript{242} Similarly, in \textit{Wallace v. Jafree} the Court held that “[i]n applying the purpose test, it is appropriate to ask ‘whether government’s

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\item \textsuperscript{239} Robert Audi, \textit{The Place of Religious Argument in a Free and Democratic Society}, 30 San Diego L. Rev. 677, 677 (1993).
\item \textsuperscript{240} In Professor Perry’s case, at least, I suppose that my empirical rebuttal to his theoretical model may seem to miss the target because he is not responsible for the Supreme Court’s use of actual basis review. Nonetheless, to the extent to which he has written favorably of my three examples of “actual basis review,” see Michael J. Perry, \textit{Religion, Politics, and the Constitution}, 7 J. Contemp. Legal Issues 407, 422-23 n. 39, 424-25 (1996) (approving of \textit{Epperson}, \textit{Aguillard}, and \textit{Wallace}), my rebuttal is fair.
\item \textsuperscript{241} See supra text accompanying notes 42-50. In addition to the three actual basis cases discussed here, I think that \textit{Stone v. Graham}, 449 U.S. 39 (1980), and \textit{School Dist. of Abington Township v. Schempp}, 374 U.S. 203 (1963), qualify as “actual purpose” cases.
\item \textsuperscript{242} See supra text accompanying notes 42-50.
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actual purpose is to endorse or disapprove of religion,"\(^\text{243}\) and proceeded to dissect the legislative history to uncover the legislature's "actual purpose."\(^\text{244}\) Under that test, it would not have mattered if the state could have justified its moment of silence by twenty hypothetical and independent secular justifications because the single, actual purpose of the statute was religious.

Simply put, a "translation" norm would not seem to undo the mischief of the hard-searching "actual purpose" review characteristic of \textit{Romer} and its Establishment Clause cousins.\(^\text{245}\) In \textit{Romer}, the State bent over backwards in trying to "translate" into secular terms the message sent by the citizens of Colorado. Plausibly, the translated version of "I object to civil rights protections for homosexuals because for religious reasons I disapprove of who they are or what they do" is "we should respect freedom of association and religion by not granting protected status to persons whose conduct or orientation offends a large number of people in this community."\(^\text{246}\) The Court in \textit{Romer}, however, would have none of the translated version and insisted on looking for the "real version." In short, "actual purpose" review belies the suggestion that, at least for constitutional purposes, "translation" can sufficiently purge a religious viewpoint on an issue of public policy from its offense to liberal democracy.

At a very minimum, the actual basis standard requires the religious citizen to persuade citizens with secular persuasions to join her position if she is to have any legitimate voice in public policy debate.\(^\text{247}\) If she speaks on her own, without the actual backing of independent secular voices, and succeeds in implementing her views through law, her victory will be held unconsti-


\(^{244}\) Id. at 56-61.

\(^{245}\) Particularly as expressed in Justices Stevens and Blackmun's concurring or dissenting positions in \textit{Bowers}, \textit{Webster}, and \textit{Casey}, but also in the majority opinions in the "actual purpose" cases discussed \textit{supra} at text accompanying notes 31-55.

\(^{246}\) Colorado gave this as one of its justifications for Amendment 2 before the Supreme Court. \textit{See supra} text accompanying note 118.

\(^{247}\) This assumes that under the prevailing model, a statute could be supported by a religious purpose so long it was not the sole purpose of the statute, which I think is at least Perry's view. \textit{See Perry, supra} note 170 at 1458 n. 45 ("[B]ecause of the role that [ ] religious arguments inevitably play in the political process, it is important that such arguments, no less than secular moral arguments, be presented—so that they can be tested—in public political debate.")
tutional whether or not the state action could conceivably be explained in secular terms. Oddly, this standard makes the legitimacy of the religious citizen’s exercise of her prerogative as a citizen contingent upon the existence of agreement with her objectives by secularly motivated citizens. If there is a persuasive justification for disenfranchising religiously motivated citizens until they find secularly motivated citizens willing to corroborate their policy objectives, I have yet to see it.

A second reason to reject a constitutional “translation” standard is that such a requirement would essentially privilege conventional religions at the expense of less traditional religions. W. Burlette Carter has made the following convincing point with reference to Rev. Martin Luther King, Jr.:

King was indeed fortunate that he shared in common with the founding fathers a language of religious concept of a creator that permitted him to manipulate the secular language of reason so that it confirmed the values in the language of his religion—and that he had the talent to perform this translation. Would one whose culture or religious tradition diverged to a greater degree from that of the mainstream (or one with less talent than King) be able to find a similar secular or religious translational hook?

Perhaps the greatest irony of the strict separation position is that in its rush to “disestablishment” it privileges the views of the mainstream religionists, who find a ready secular translation for

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248. Professor Koppelman has observed that, to date, “efforts to translate religious objections to homosexual conduct into secular terms have been . . . a conspicuous failure.” Romer v. Evans and Invidious Intent, 6 WM. & MARY BILL RTS. J. 89, 130 (1997). From this observation, he concludes that “laws discriminating against gays” simply may be doomed to perpetual constitutional failure for want of any purpose permitted by the Establishment Clause. Id.

249. I am not arguing here against the radically anti-religious participation position that would deny to religion any voice in political affairs, see, e.g., Sullivan, supra note 223 at 222 (arguing that establishment principle requires “the banishment of religion from the public square”), which seems to me more logically coherent than the “actual basis” standard which would allow state action to rest in part, but not entirely, on religious considerations.

their views,\textsuperscript{251} over those of religious newcomers. This smacks more of establishment than of disestablishment.

Third, the insistence on translation has the effect of forcing many religious citizens either to cover up the real nature of their political positions or to withdraw from participation in politics altogether. Professor Greenawalt insists that the translation proposal does not "endorse dishonesty and concealment" because "no one expects legislators to reveal all their grounds for decision."\textsuperscript{252} But in the area of religion, the Supreme Court rarely takes the state at its word when it insists that a particular policy initiative rests upon a secular justification despite its coincidence with religious dogma. The very function of actual basis review is to ferret out "the real story." Confronted with the prospect of having even the "translated" version declared unconstitutional if the "translating" is too thin, the religious citizen or legislator faces a strong incentive to conceal the real basis of her vote. Far from encouraging open presentation of competing viewpoints in the public forum, the translation position encourages a cover-up of the legislator or citizen's real motivation.

Admittedly, neither the "strict separationist" nor the "bare animosity as applied to religion" principle necessarily has the effect of totally disenfranchising the religious citizen, insofar as she remains free to express her non-religious views on political issues. For example, a committed Roman Catholic might support a measure to increase the capital gains tax out of an economic commitment to a balanced budget without ever considering the religious implications of the issue.\textsuperscript{253} Therefore, the disenfranchisement effect may only extend to those facets of the citi-

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251. Probably because historically the views of their religious traditions shaped the dominant institutions and values, which are no longer recognized as being religiously informed, as was the case in \textit{McGowan} and \textit{Gallagher}. & \\
252. Greenawalt, \textit{supra} note 238 at 639. & \\
253. On the other hand, one might argue that even this Catholic citizen's values regarding the national deficit arise from her religiously informed beliefs regarding the virtues of frugality and stewardship, and therefore that her economic beliefs are merely an offshoot of her religious beliefs. For a thoughtful person whose foundational world view is entirely religious, it is probably true that her views on specific political issues owe their existence to a comprehensive (and, in Rawlsian terms, non-overlapping) and therefore politically inadmissible understanding of reality. However, the presumptive consensus seems to be that the separation of the ultimate political view from the base religious conception by sufficient layers of reasoning informed by non-religious influences, such as experience or logic, sufficiently dilutes the religious character of the resulting view to make it "non-religious" for constitutional purposes. A contrary
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zen's political beliefs that she cannot divorce from her comprehensive religious worldview. This is of little comfort to anyone seriously concerned with equality of citizenship. The disenfranchising effect, whether partial or total, runs contrary to the inclusivity aspiration of liberal democracy.

A second response to my disenfranchisement model would admit my characterization of the strict separationist position and simply argue that the Establishment Clause itself requires this outcome, or that it is the necessary consequence of living in a liberal democracy dedicated to the disestablishment of religion. On a jurisprudential level, I would posit that in historical context the Establishment Clause cannot be read to preclude religious participation in the formation of public policy without seriously undermining the test oaths clause of Article VI. More fundamentally, I would deny both that the hard separationist position has any mooring in the original meaning of the Establishment Clause and that the bare animosity position (as applied to religiously motivated state action) has any mooring in the original meaning of the Equal Protection Clause. In this article, however, I have not engaged the constitutional issues on a historical level, but rather on a theoretical level. In keeping with this structure, I will respond to this final critique on its own terms. In this article's final subsection, I argue that the underlying philosophy of the strict separationist and bare animosity (as applied to religion) positions support (or at least do not preclude) a "defensive rights" model which would permit religious considerations in the formation of public policy under certain limited circumstances.

understanding would totally prohibit any religious person from ever taking part in public affairs, a proposition I have not yet heard advocated.

254. See Sullivan, supra note 223 at 199 ("Secular governance of public affairs is simply an entailment of the settlement by the Establishment Clause of the war of all sects against all.").

B. A Modest Proposal for Defensive Rights

The preceding sections have painted the "hard separationist" and "bare animosity as applied to religious motivations" positions according to what I perceive to be their philosophical bases. I have suggested that the hard separationist position, which would invalidate any state action that in fact rests upon a religiously informed view of morality, correlates closely with the Enlightenment suspicion of "religious intolerance" as embodied in Rousseau's *Social Contract*. I have further suggested that the bare animosity position exemplified by *Romer* embodies the Rawlsian strand of Enlightenment thinking that insists that state action rest upon a legitimate "public reason," and that the domain of "public reason," as implicitly understood by the Supreme Court, excludes religion. In the preceding subsection, I argued that the convergence in constitutional doctrine of these twin principles unjustifiably disenfranchises religious citizens. Despite my criticisms of these principles, I have not yet offered any comprehensive solution to the problem, nor do I propose to do so in this final subsection. Rather, I will argue that by their very own logic neither the bare animosity nor the hard separationist position can be consistently applied to exclude religiously motivated advocacy of a certain set of political proposals—those proposals advancing what I will describe as "defensive rights."

First, some definition. By "defensive rights" I mean those legally enforceable immunities held by individuals which they may assert to prevent others from using the coercive power of the state to diminish the liberties that they would have enjoyed, absent the contrary state action. Some immediate questions present themselves. What baseline does this model invoke? What is meant by immunities? Why should "defensive rights" be privileged in a constructivist world? Why should religious considerations be admissible in the debate over defensive rights but not on other issues? I will attempt to answer some of these questions in developing the model.

The distinction between positive and negative rights is a familiar one in constitutional discourse, though not one without substantial ambiguities and controversies. We generally

understand the prohibitions of the Bill of Rights to be defensive because they merely prevent the state from depriving people of certain things rather than requiring the state to grant them entitlements. The positive/negative divide, however, does not suffice when describing the legitimacy of motivation in the advocacy of public policy positions. A third category requires our attention. The negative and positive categories are usually discussed in the context of individual rights, as in “what can the state do to me” and “what can I demand of the state?” This formulation, though helpful, fails to account for the advocacy of actions by the state that impose disabilities on others. When a speaker advocates the criminalization of marijuana use or the prohibition of employment discrimination she seeks to justify the intrusion of the state upon someone else’s freedom of action (and, of course, her own). Although she may frame her argument in terms of her own rights; i.e. “I have the right to live in a society free from the negative externalities of drug use,” or “I have the right to work free from discrimination,” she uses the term “right” differently than it is understood in the Enlightenment paradigm of which our Constitution is one manifestation. She does not ask that the government keep from imposing on her (or others) a disability or grant her (or others) some entitlement, but that the government exercise its coercive power to prohibit certain conduct. A traditional rights-based argument would be the response to her proposal that “I have the right to smoke marijuana” or that “I have the right to choose whom to hire on whatever basis I please.” Advocacy of public policy positions, then, can take three distinct forms: it can

257. See, generally, David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986); Charles Fried, Right and Wrong 110 (1978); see also DeShaney v. Winnebago County Dept. of Social Servs. 489 U.S. 189 (1989) (holding that state did not deprive boy of due process of law by failing to remove him from the custody of his abusive father because state had no affirmative duty to protect).

258. The natural rights theory of the Enlightenment generally conceived of rights as negative prohibitions on actions by others. See Ian Shapiro, The Evolution Of Rights in Liberal Theory 147 (1986). This is not to say that the Enlightenment tradition understood rights as only extending to limitations on conduct by the sovereign, because it also understood rights as prohibiting one person to do certain things to another. However, the argument that the state take X action to prevent person Y from invading the rights of person Z is not precisely an argument based on natural rights. While Z may have a natural right to be free from harm from person Y, he does not have a natural right to demand that the state do anything, since the state is not a natural being, but rather a creature of social contract.
argue (a) that certain benefits be conferred or not be conferred on certain persons,\textsuperscript{259} (b) that certain disabilities be imposed on certain persons, or (c) that certain disabilities not be imposed on certain persons.\textsuperscript{260} This third category can be conceived either as the (negative) argument against (b) or the (positive) argument in favor of erecting a structural injunction against (b) if (b) should ever be proposed or attempted. I refer to advocacy of this third position, whether expressed as immediate opposition to a proposal of (b) or as a structural injunction against future action, as the advocacy of “defensive rights.”

Of course, the very phrase “defensive rights” “necessarily rest[s] on our culturally based understanding of institutional boundaries.”\textsuperscript{261} A social constructivist might argue that any model beginning with the assumption that certain rights are merely defensive in nature contains an implicit normative and socially constructed baseline which is in no sense neutral or “natural.”\textsuperscript{262} But although the baseline implicit in a defensive rights

\textsuperscript{259} This division into three categories may seem asymmetrical, because we could subdivide the first category into two categories, for and against entitlements, to match the discrete “for and against” disabilities categories. My division into three categories reflects my bias in favor of using a minimal state baseline (discussed below) under which the individual retains all liberties which the state is not given the authority to invade. Beginning with that baseline, the arguments in category (b) advocate extending the baseline in favor of more use of coercive state power, those in category (c) advocate preserving the minimal state baseline against expansive uses of state power, and those in category (a) concern the expansion or retention of the baseline only indirectly (insofar as they touch on the mandatory nature of taxation or the coercion implicit in allocating benefits).

\textsuperscript{260} Obviously, these distinctions encounter some difficulty at the margin. For example, an argument against conferring benefits may be couched in the language of defensive rights, as in “Your use of my tax dollars, collected by the coercive power of the state, forces me to subsidize X activity to which I object on Y grounds.” But I would reject the argument that marginal ambiguities swallow the general rule in this instance. For the same reasons as the Supreme Court (with the notable exception of expenditures in contravention of the Establishment Clause; see \textit{Flast v. Cohen}, 329 U.S. 83 (1968)) has refused to permit taxpayers standing to assert generalized grievances against government spending, \textit{Frothingham v. Mellon}, 262 U.S. 447 (1923), one can rationally argue that arguments against public expenditures are more properly characterized as anti-entitlement than pro-defensive rights, whatever form the argument actually takes.


\textsuperscript{262} Professor Sherry describes the constructivist or postmodernist view as embodying the belief that “any standard that purports to be neutral or objective
model reflects a normative judgment, it also reflects a descriptive model accepted by Enlightenment thinkers whose claims about religious participation in the formation of public policy this article critiques. Thus, while my defensive rights model may not answer the claims of social constructivists, it does not need to do so because it was developed only to demonstrate an internal flaw in the bare animosity and strict separationist paradigms, which are themselves products of Enlightenment thinking.

What, then, does the defensive rights model assert? In short, it claims that neither the strict separation/"no intolerance" principle nor the bare animosity/public reason principle can legitimately be invoked to prevent religiously motivated action by the state creating defensive rights for individuals. In other words, a law forbidding state actors to impose a certain kind of disability on individuals should not be held unconstitutional merely because its "actual purpose" is primarily or entirely religious. In application, the defensive rights model would permit religious arguments in favor of such public policy choices as parental rights laws, home schooling rights, drug use liberalization laws, and constitutional amendments erecting barriers to the expansion of anti-discrimination legislation. This last example, of course, is *Romer* itself, the paradigmatic case breaking my "defensive rights" rule. But more on *Romer* in a moment.

To understand why the "public reason" and "no intolerance" principles should not be applied to the advocacy of defensive rights, we must look back to the philosophical underpinnings of these theories. Beginning with the "no intolerance" principle, we said, following Rousseau, that strict separationists understand is simply a mask for the desires of the powerful elites in society.” Suzanna Sherry, *All the Supreme Court Really Needs to Know it Learned from the Warren Court*, 50 VAND. L. REV. 459, 482 (1997).

263. This is not to say that all Enlightenment thinkers would necessarily grant that the baseline between negative and positive rights should be used in the allocation of social goods and disabilities. It merely means that the Enlightenment understanding of rights accepts a formulation of the problem distinguishing between positive and negative rights. In *A Theory of Justice*, Rawls accepts the premise that society could be ordered according to a system of "natural liberty" where "the initial distribution is regulated by the arrangements implicit in the conception of careers open to talents" against a backdrop of "equal liberty" and a free market economy. *Rawls, A THEORY OF JUSTICE* at 72. Although Rawls accepts the possibility of social ordering according to a system of natural rights, he argues that such using a baseline is unjust because "it permits distributive shares to be improperly influenced by factors arbitrary from a moral point of view." *Id.*
intolerance as the insistence that others behave the way the religious think they should behave for no better reason than that religious teachings support that behavioral norm.

Although Rousseau would have excluded the holders of even private intolerant beliefs from civil society, we observed that in modern translation the "intolerance" principle means only that the religious may not coopt the coercive power of the state to force others to conform to the standards their religious beliefs require. Putting aside Rousseau's outdated assumption that the state has an interest in suppressing private intolerant beliefs, the thrust of the intolerance argument goes to the evil of religious crusading in the public arena. Again according to Rousseau, religious intolerance threatens civil society by displacing the sovereign as sovereign even in the temporal sphere and making the priests "the real masters, and kings [only their officers]." Thus, the Enlightenment model tends to demand complete privatization of "intolerant" religious beliefs. These may be quietly held, but not flaunted in the public arena.

Nothing in the modern "no intolerance" principle suggests that it should be universalized to prohibit private choices. To the contrary, the very idea seems to be that religious intolerance must be kept private. Thus, the intolerance principle provides a powerful justification for the defensive rights model, as applied to religiously motivated advocacy of public policy positions. If a citizen or legislator makes a purely religious argument in favor of erecting structural barriers to encroachments on her prerogative to contract, associate, or raise her children without the constraint of

264. See supra text accompanying note 148-50.

265. Given the constraints of the First Amendment, it would be constitutionally heretical to assert that the "no intolerance" principle requires the government to suppress private intolerant beliefs. Given the constraints of the state action doctrine, it would be constitutionally incorrect (even if not quite heretical) to assert that the anti-establishment principle forbids a private person from acting intolerantly toward another person on the basis of a religious belief.

266. I hope this assumption is outdated.

267. Rousseau, supra note 124 at 187.

268. Reflecting the dominant Enlightenment view, the Supreme Court in Lemon remarked that religion "is a private matter for the individual, the family, and the institutions of private choice." 403 U.S. at 625. For an excellent discussion of "enlightened" culture's efforts to privatize religion, see McConnell, supra note 122.

269. The education of children may not represent a pure "defensive rights" situation because the distinct interests of the children and the parents add dimensions to the issue. Nonetheless, I would follow Professor Gilles in viewing
state sanction, she is not coopting the coercive power of the state to impose her intolerant choices upon others. Rather, she is asking that the realm of free private choice be kept large and that the authority of the state to invade that private realm be restrained. While she may seek protection of private choices that are themselves “intolerant,” the state action defending her right to make those private choices does not impose upon others the “intolerant” dogma, but merely permits private choices, both religiously “intolerant” and otherwise, to proceed free from state regulation. Thus, the defensive rights model fits comfortably even with the rhetoric of strict separation.

Similarly, the public reason principle associated with rational basis review provides no justification for prohibiting citizens or legislators to advocate defensive rights against the encroachment of the state on private choices. Turning back to Rawls, we recall that the public reason constraint arose from the fact that in “[a] modern democratic society […] characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines” not all citizens affirm any single comprehensive philosophical doctrine, and it is unreasonable to believe that they will at any time in the foreseeable future. Therefore, when exercising its coercive power, the state should always frame the justifications for that exercise of power so that those subject to the coercive standard can “reasonably be expected to endorse [the justification] in the light of principles and ideals acceptable to them as reasonable and rational.” But why should we apply the public reason constraint to arguments in favor of defensive rights? Since defensive rights merely prevent the state from invading preexisting zones of private choice, even if the justification for the defensive rights is framed in terms outside the “overlapping consensus” there is no injury to those citizens who do not endorse that comprehensive view because the defensive rights do not require the citizen to endorse the private choices those rights allow.

Imagine the effect of a contrary rule—that public reason should apply even to the argument that the state not invade the realm of private choices. Someone proposes a law to limit discrim-

parents as having a strong claim to direct the education of their children free from intervention by the state. See Stephen G. Gilles, On Educating Children: A Parentalist Manifesto, 63 U. Chi. L. Rev. 937 (1996).

270. Rawls, supra note 169 at xviii.

271. Id. at 217.
ination in private contracting and association. Arguing against the proposal, a citizen asserts that she should have the right to continue discriminating in contracting and associating. Pressed to give an explanation for her desire to continue discriminating, she offers a religious justification. Should we discount her justification on the basis of the public reason principle? Surely not. To do so would be to demand that the citizen justify her private choices on the basis of public reason. But if the public reason principle means that citizens must explain their private choices on the basis of public reason, we have moved from structuring a foundation upon which to build a "just and stable society of free and equal citizens who still remain profoundly divided by reasonable religious, philosophical, and moral doctrines" to constructing a "least common denominator" norm for private behavior. This is totalitarianism, not liberal democracy.

The public reason principle cannot consistently deny citizens the right to raise religious argument against the intrusion of the state into their private choices. In the equal protection context, this means that even if the state acts to restrict its future ability to invade the realm of private rights, it may ground its decision to do so on a purely religious basis. This brings us again to Romer. Analyzing Romer as a religion case, this Article previously observed that the case adheres to the following reasoning: Amendment 2 imposes a unique disability on gays, lesbians, and bi-sexuals. It therefore must satisfy rational basis review. Under this standard, Amendment 2 must rest upon some permissible governmental purpose. We, the Court, implicitly understand that Amendment 2 rests upon religious disapproval of homosexual conduct or status. Religious disapproval is not a legitimate "public reason," and we therefore must discount this justification. With religion gone, Amendment 2 has no justification, rests solely on "bare animosity," and therefore lacks a rational basis. We could also frame Romer as a religious intolerance case, as some have already done.

272. Id. at 47.
273. I would concede that this may mean that the state may ground its justification of defensive rights on purely irrational bases, such as truly naked animosity (i.e. not even supported by extra-rational justifications), which is only the same thing as saying that the state has no duty to prevent spiteful private behavior.
274. See Kimball, supra note 120 at 242 (describing Amendment 2 as "an example of religious intolerance against homosexuals").
being the product of a religious movement's success in imposing a
disability upon homosexuals simply because the religious group
disapproved of their conduct or status for religious reasons. Since
the Establishment clause forbids the imposition of disabilities for
purely religious reasons, this classification must be invalidated.

Both of these lines of analysis distort the very idea of the pub-
lic reason and "no intolerance" principles. Frame the matter from
the standpoint of the religious citizen, and the matter appears
quite differently. Beginning with the baseline of the minimal
state, which reflects the line of demarcation between positive
and negative rights in the paradigm accepted by the Enlighten-
ment, we would say that the individual (religious or otherwise)
has the right to contract and associate or decline to contract and
associate on whatever basis she chooses unless the state grants
another person a positive right to forbid her to contract or associ-
ate on that particular basis. Accepting the premise that there is
no state action in private choices, we need not worry that individ-
uals will decide not to contract or associate on the basis of consid-
erations that violate the norms of public reason or the "no
intolerance" maxim. These considerations do not apply to private
choices. At the same time, society may decide for a variety of
moral or economic reasons to impose constraints on private con-
tracting and association. Society may freely move beyond the
baseline of the minimal state so long as it does not trench upon
zones of autonomy protected by the Constitution. But when some
members of society argue for the imposition of constraints on con-
tracting or associating, for example anti-discrimination laws,
other members may wish to argue against such proposals and
even argue for the erection of legal barriers to the imposition of
such standards. Insofar as such arguments merely reflect a desire
to prevent the state from invading the realm of private choice,
they need not be framed in the language of public reason.

The upshot of this argument is that for purposes of the public
reason and "no intolerance" principles, Amendment 2 did not
impose a disability, but merely erected a structural barrier to the
imposition of a disability on the making of private choices. Some
will immediately object that of course Amendment 2 imposed a

275. In the traditional Enlightenment (or at least Lockean) model, the minimal
state serves only to protect against force, theft, fraud, and to enforce contracts.
ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974). Thus, the minimal
state serves as the line of demarcation for determining whether an action by the
state is offensive or defensive. See id. at 276.
disability because it prevented gays, lesbians, and bi-sexuals from seeking the sorts of anti-discrimination protection that other groups enjoy. This response ignores my caveat that for purposes of the public reason and "no intolerance" principles Amendment 2 did not impose a disability. Recall that the "no intolerance" maxim focuses only on the propensity of religious crusaders to use the coercive power of the state to require others to conform to religious norms. Amendment 2 did no such thing. Nor did it violate the norm of public reason by asking those outside of a particular comprehensive view to assent to that view's position on a particular issue. The amendment did not require gays, lesbians, and bi-sexuals to assent to a religious norm, but merely impeded them from imposing a disability on persons wishing not to contract or associate with gays, lesbians, and bi-sexuals. Whether or not Amendment 2 imposed a disability in some sense, it did not do so in any sense relevant to the public reason or "no intolerance" norms. 276 Romer's implicit assumptions were wrong. 277

To make the point even clearer, consider the following characterization of what the state must say to the individual after Romer: "We may in the future conclude that you may not refuse to contract or associate on the basis of sexual orientation, and you may not use religious argument in seeking to prevent or repeal this prohibition on your private choices. Furthermore, if you succeed in reversing this prohibition on your decision not to contract or associate on certain basis, we will scrutinize your

276. As previously noted, whatever else Justice Kennedy may have said, Romer must be understood as a discriminatory structuring of government case. See supra note 98. But it is one thing to say that the state may not, without compelling justification, "place special burdens on the ability of minority groups to achieve beneficial legislation," Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 467 (1982), and another thing altogether to say that when the very question is whether or not the new government structure is based upon a permissible consideration for purposes of rational basis review, religious considerations are inadmissible because they impose "burdens" upon others to which the others cannot be expected to assent. Whether or not the minimal state should be considered the baseline for determining if a "discriminatory structure" has been imposed, it should be the baseline for determining whether or not the structure rests upon a permissible consideration. A contrary assertion cannot be supported either by the "no intolerance" principle or the "public reason" principle.

277. This is not to say that the Court could not have reached the same result on some different ground, for example by holding sexual orientation to be a suspect or quasi-suspect class requiring the state to meet the compelling interest/narrow tailoring formulation.
motives to determine whether you procured this reversal on the basis of religious beliefs. If we find that you did, we will reinstate the constraint on the set of considerations that you may refer to in deciding whether or not to contract and associate, and punish you if you choose not to associate or contract on the basis of an impermissible consideration.” In essence, this standard permits anti-discrimination advocates to universalize their secularly informed preferences that the religious (and others) be required to contract or associate with gays, lesbians, and bi-sexuals when the religious cannot universalize their religiously informed preference that they not be required to associate or contract with gays, lesbians, and bi-sexuals.278

Underneath Romer’s sweeping rhetorical prose lurks a subtle bait-and-switch. To the modern mind, accustomed as it is to thinking of a comprehensive anti-discrimination prohibition as the norm and any deviation therefrom as an aberration, a referendum prohibiting the state to impose sanctions for a particular form of discrimination may seem to be an offensive, rather than a defensive, move. Accepting the status quo as a baseline, this may well be. But the “no intolerance” and “public reason” positions do not begin at the status quo. They begin in comprehensive political philosophies incorporating the Enlightenment understanding of social contract and natural liberties.279 They insist that religious standards of moral behavior hold sway solely in the private realm and not be foisted upon others through the coercive power of the state. Romer begins where the “no intolerance” and “public reason” principles conclude, never stopping to consider where they came from and whether they even apply in context. In so doing, Romer insists that public reasons be given to justify pri-

278. Someone may rebut this argument by suggesting that although religiously motivated individuals could permissibly seek a legislative exemption from generally applicable anti-discrimination statutes, Amendment 2 was overbroad because it not only prevented the state from imposing a disability on the religiously motivated, but it also prevented the state from imposing a disability on non-religious citizens motivated by true “naked animosity”—i.e. irrational hatred for homosexuals. Ironically, a narrower statutory provision, exempting only religiously motivated discriminators, would run afoul of the Establishment Clause as perceived by Justice Stevens, the dean of the “no intolerance” position. See City of Boerne v. Flores, U.S., 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring) (arguing that statutory exemption for religiously motivated acts from laws of general applicability violated Establishment Clause by advantaging religious adherents over atheists).

279. See supra note 262.
vate choices, and that purely defensive rights satisfy the "no intolerance" specification. Using the Enlightenment suspicion of religion as bait, the Court quietly switched the rules of the game.

Note that I am not making the full libertarian argument against all anti-discrimination laws or other regulations on defensive private choices, as others have done. The defensive rights model does not privilege Robert Nozick's minimal state paradigm over its chief competitor, John Rawls's difference principle, other than to use the minimal state as a baseline for determining whether state action is offensive of defensive. Rather, I suggest only that religious argument and rationale should be admissible in our collective decision whether or not to impose prohibitions on refusing to contract or associate for purportedly immoral reasons. As the modern regulatory state moves farther and farther from the minimal state baseline, the realm of genuine private choice grows smaller and smaller. To say that religious considerations are inadmissible to erect hedges around the realm of private choice is to take from the religious not only an essential prerogative of their citizenship, but the most basic tool for the defense of their moral convictions. Neither the "public reason" nor the "no intolerance" position requires a denial of the privilege to urge defensive rights for religious reasons. If the modern state wants to be intolerant of unpopular private choices, let it say so in explicit terms. But to couch its justification in the maxim "no intolerance" is to create a supreme irony—public intolerance for private prejudices based on the principle that private prejudices cannot justify public intolerances.

CONCLUSION

With the advent of Romer, the Enlightenment project of completely privatizing religious belief finds two constitutional arrows in its quiver. Exercises of state power that are found to rest pri-


281. Nozick, supra note 275 at ix. Nozick argues that moral philosophy requires a minimal state, limited to the prevention of force, fraud, and theft and the enforcement of contracts.

282. Alasdair MacIntyre describes Rawls and Nozick as embodying the two basic paradigms of contemporary American political thought. Alasdair MacIntyre, After Virtue 244-46 (2d ed. 1984).

283. Rawls's difference principle requires that primary social goods be distributed equally unless an unequal distribution would redound to the benefit of the least advantaged in society. Rawls, A Theory Of Justice at 302-03.
arily upon a religious motivation, and not merely to coincide with religious beliefs, may be held to violate the “secular purpose” prong of the much-maligned but still-kicking Lemon test. Exercises of state power disadvantaging a discrete group of people may be said to rest upon “bare animosity” even if supported by a religiously motivated religious belief, thus failing rational basis review under the Equal Protection Clause. The conjunction of these two principles presents a “damned if you do, damned if you don’t” dilemma for religious citizens. Stating a religiously motivated political view in religious terms subjects the citizen to a direct Establishment Clause attack. Quietly voting for a proposal without explaining the vote at all subjects the citizen to a charge of bare animosity. In essence, the Enlightenment project, as reflected in the bare animosity and strict separationist principles, would completely disenfranchise the religious citizen unless she checked all of her religious “baggage” at the gate to the public square.

I have argued in this Article that the justification for these “strict separation” and “bare animosity” principles correlates closely with the theories of two Enlightenment philosophers, one early and one late. The “strict separation” principle correlates strongly with Rousseau’s proposal to exclude “intolerant” religions from the state because of their tendency to disrupt civil peace and to seek monopolies over political power. In modern translation, this “no intolerance” principle means that the religious may not coopt the coercive power of the state to impose upon others moral standards particular to a given religion. Similarly, the “bare animosity” principle, as applied to religion correlates closely with John Rawls’s ideal of public reason, which would exclude from public policy deliberation any consideration founded upon a comprehensive worldview. In tandem, the public reason and “no intolerance” principles provide a powerful justification for the belief that religious considerations may not be given legal sanction to impose esoteric moral standards upon others.

But what of the religious citizen who does not ask that the coercive power of the state be exercised to impose her intolerant beliefs upon others, but merely that a structural barrier be erected so that the coercive power of the state not be exercised to restrict her private choices in contracting or associating? Must she justify by public reasons even her desire to remain free from government sanction in her private choices? Do her private reasons for not wanting to contract or associate on a particular basis become "reli-
gious intolerance” when expressed as a constitutional injunction against anti-discrimination legislation? If the answer is yes, we have gone from insisting that public choices rest upon non-”intolerant” public reasons to insisting that even private choices rest upon non-”intolerant” public reasons. Perhaps there is a good defense for this position, but if so, it has yet to be explained.

Year by year, the values of mainstream Western liberalism move further and further from the values of traditional Western religions. As traditional religious morality becomes less and less palatable to mainstream culture, the assertion that the Establishment Clause prohibits religious considerations in public discourse will resonate louder and louder. But it is supremely ironic that the very constitutional norms that would push religious values out of the public square under the “wall of separation” mantra would hunt down those same religious values in the private realm as well. Of course, an attack on the distinction between the concepts of public and private undermines the force of this argument, but it also undermines the “no intolerance” and “public reason” norms that rest upon this very distinction. In the final analysis, the legitimacy of a defensive rights model is the very least that the “no intolerance” and “public reason” principles must concede.