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Praying for America: The Anti-Theocracy and Equal Status Principles of the Free Exercise, Equal Protection and Establishment Clauses

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In this essay I argue that the Constitution's Equal Protection, Establishment, and Free Exercise Clauses share common principled limits on the role that religion can play in public life. Specifically, drawing on the free-exercise case of Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the equal protection case of* Romer v. Evans*, and the establishment clause case of* Town of Greece v. Galloway*, I propose two principles to describe the proper place of religious justification as a basis for law. The first requirement is that in addition to any religious reasons for laws, the state must have secular reasons available that can appeal to non-religious citizens. I call this the "anti-theocracy principle." The second, "equal status principle" states that even religious justifications that have secular equivalents must respect the equal status of persons in a democracy regardless of their race, gender or LGBTQ identity. In addition to the limits the anti-theocracy and equal status principles place on legitimate law making, I also argue they also limit state expression. Throughout the piece I draw from the ideal of "public reason" found in the political theory of John Locke and John Rawls. In addition to clarifying the Constitution's understanding of the role of religion in justifying law and in government sponsored expression, my aim is also to demonstrate how an understanding of public reason can be operationalized in*

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constitutional cases across the Free Exercise, Equal Protection, and Establishment Clauses. I, therefore, demonstrate a common role for public reason across three fundamental parts of the Constitution often thought distinct.

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INTRODUCTION

What role do religious justifications play in legitimate law making and government policy? The Free Exercise, Establishment, and Equal Protection Clauses each have a distinct text and history that bear on the question. In this essay, however, I argue that these three clauses have in common a commitment to two fundamental normative principles that underlie them and that clarify the legitimate place of religious justification for law and government expression. These principles are helpfully explicated by two principles of public reason that explain the proper limits on the kinds of justification for law in a liberal democracy.

The first principle bans *theocratic* justifications for law and government action. Legislation and government action are theocratic when they fail to satisfy a requirement of "secular independence," namely that the state must have available secular

reasons for laws in addition to any religious reasons. Although religious reasons might legitimately be given for laws, these reasons must also be explainable on non-religious terms. For example, President Lyndon Johnson gave religious justifications, drawn from the Civil Rights Movement, for the 1965 Voting Rights Act.[1] In his historic "We Shall Overcome" speech, he argued that racial equality is "right in the eyes of man and of God."[2] This was a religious form of state speech, but it was not theocratic. It satisfied the secular independence requirement because the reasons for the Voting Rights Act could also be explained on secular terms to non-religious citizens. In his speech, President Johnson invoked the secular principle that government should be by consent of the governed. He supported the Voting Rights Act by appealing to the Constitutional requirement that "no person shall be kept from voting because of his race or his color."[3] In contrast, a failure to give secular reasons for law or state expressions that accompany religious justifications and expressions is theocratic in my view because it fails to comply with the need to make government action justifiable to citizens who do not share one's religious beliefs. Citizens who regard each other as free and equal must be able to give reasons for laws to each other who are not co-sectarians or religious because it is not the business of the state to try to impose—by coercive force—answers to the ultimate questions of life that religious worldviews try to answer. The anti-theocracy principle is therefore rooted in a basic commitment in democracy to equal status. As an equal under law, I rightly demand government action be based in reasons that that do not require me to accept any particular theistic conception.

But while secular independence is necessary to make religious reasons for law constitutionally valid, it is not sufficient. The *second* criterion for religious state reasoning and expression requires that the reasons for government action comport with the constitutional value of equal status that underlies the anti-theocracy principle. It is invalid for the state to use religious reasons that violate equal status even if the reasons have secular equivalents. What I call the

1. President Lyndon B. Johnson, We Shall Overcome (Mar. 15, 1965) (transcript available at https://www.archives.gov/legislative/features/voting-rights-1965/johnson.html (last visited Feb. 18, 2022)).

2. *Id.*

3. *Id.*

equal status principle requires that the Supreme Court's prohibition on *animus*-based government action explicated in *Romer v. Evans* requires that, even if a policy is religiously based and can be translated into a secular rationale, those reasons still fail to be legitimate bases for law if they violate the ideal that, under the law, the idea of equal treatment bans status distinctions involving race, gender, or LGBTQ identities.[4]

Together the anti-theocracy and equal status principles curtail the role of religion in public life by prohibiting certain religious justifications for law. But they also protect and delineate a role for religious justifications for government action. Religious reasons and expression have an important and legitimate role in public life when they comport with the two principles because they often serve to reinforce the idea within public reason that religious justification often reinforces the core democratic commitment to free and equal citizenship. I argue against purely secularist political theories that government sponsored prayer should be welcomed into the public realm when it comports with the anti-theocracy and equal status principles. The anti-theocracy and equal status principles thus push back both against religious conservatives who aim for too capacious a role of religion in public life and secularist liberals who would provide too small a public role for religion.

My argument draws from both the jurisprudence of the United States Supreme Court and the tradition of public reason that was particularly influential on the thought of James Madison and that remains prominent in contemporary normative political theory. Part II draws on the Court's reasoning in *Lukumi* to show why the Constitution's protection of the free exercise of religion prohibits the government from relying on theocratic reasons for lawmaking. I read *Lukumi* in light of Locke's seminal argument in the *A Letter Concerning Toleration* about why theocratic reasoning threatens religious freedom. In Part III, I draw on the Court's opinion in *Romer v. Evans* to argue that in addition to the anti-theocracy principle, a second equal status principle is necessary to restrain even religious reasons which have secular equivalents, but which do not comport with the requirement that all persons should be treated as equals under law regardless of their race, gender, or LGBTQ status. I read *Romer* in light of Rawls' account of public

4. Romer v. Evans, 517 U.S. 620, 633–36 (1996).

reason, specifically showing its usefulness in explicating the "animus" doctrine the Court relied upon in *Romer*.

In Part IV, I examine the role the anti-theocracy and equal status principles play in Establishment Clause jurisprudence, looking closely at *Town of Greece v. Galloway*. I explain how the anti-theocracy and equal status principles are an alternative to Justice Kennedy's "coercion test" and offer a needed clarification of Justice O'Connor's "endorsement test." While much of the essay is devoted to the limits on religious justifications required by the anti-theocracy and equal status principles, this Part emphasizes why public reason protects a prominent place for government-sponsored religious expression.

Finally, in Part V, I turn to the Court's most recent free exercise cases, holding them up to the standard of the anti-theocracy and equal status principles. I argue that in *Masterpiece Cake Shop* and *Fulton v. City of Philadelphia*, the Court has turned away from these principles, and risks undermining its tradition of thinking about the role of religious reasons in public life, even hinting at its own theocratic reasoning, as well as disregarding the commitment to LGBTQ rights prominent in cases like *Romer*.

I. FREE EXERCISE AND LIMITS ON THE STATE USING THEOCRATIC REASONING: THE ANTI-THEOCRACY PRINCIPLE

Lukumi is one of the most influential and powerful statements of the Court's current approach to the free exercise of religion, and thus, it is a natural starting point in discerning the principles of religious freedom core to the Constitution.[5] There, the Court considered whether a ban on animal sacrifice by city officials in Hialeah, Florida had intentionally targeted a minority religious group, the Santería.[6] The Santería practiced live animal sacrifice as part of its religious practices.[7] Hialeah's law was designed to single out animal "sacrifice" for criminal sanction, although similar forms of animal slaughter were permitted for food processing.[8] The Court subjected the law to strict scrutiny and unanimously struck it down on the grounds that the ban targeted the beliefs of the Santería

5. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
6. *Id.* at 531.
7. *Id.* at 525.
8. *Id.* at 545.

religion and lacked a compelling interest that was narrowly tailored.[9] However, a crucial but often neglected point in the Court's opinion is that the government's *religious reasoning* for the law constituted an illegitimate purpose. Although the Court did not pursue this path, pointing to the exclusively religious reasoning for the law would have been enough for the Court to strike the law down even on much less demanding rational basis review.[10] In examining the finding that the law was based in animus, we can develop an account of how a restriction on theocratic reasoning is crucial to free exercise protections.

Prior to *Employment Division v. Smith*, the Court had employed a strict scrutiny test for protecting the free exercise of religion.[11] The strict scrutiny test required the government to show that it had a compelling interest for denying exemptions to religious citizens when laws substantially affected their core religious beliefs.[12] The government also had to demonstrate that it had no alternative means to pursue its compelling interest other than denying the exemption.[13] The Court in *Smith*—in considering the constitutionality of Oregon's prohibition on peyote use for religious purposes and its denial of a religious exemption allowing such a use—replaced the strict scrutiny test with a weaker standard that required the government to show merely a "rational basis" for legislation that affects religious belief.[14]

While *Smith* concerned laws that have an unintended adverse effect on religion, *Lukumi* raised issues regarding laws that intentionally discriminate against a religion. The Court held that a more demanding strict scrutiny test would be appropriate when the state engages in purposeful religious discrimination. The Court

9. *Id.* at 546–47.

10. *See id.* at 547 (holding that "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures").

11. Emp. Div. v. Smith, 494 U.S. 872(1990). For example, the Court applied strict scrutiny in *Sherbert v. Verner*, 374 U.S. 398 (1963).

12. *Smith*, 494 U.S. at 907.

13. *Sherbert*, 374 U.S. at 406 ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice.").

14. *Smith*, 494 U.S. at 888 ("[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.").

used several techniques to examine whether Hialeah's law intended to discriminate. First, the Court rejected arguments that the law had a purpose other than discriminating against the religious beliefs of the Santería. While the town claimed that the law was concerned with animal welfare, the Court noted that Hialeah did not outlaw other painful ways of killing animals, such as in food processing.[15]

Second, the Court noted that on its face, the law seemed to discriminate. Justice Scalia wrote in his concurring opinion that the law's use of the term "sacrifice" indicated an intent to discriminate against the Santería.[16] If the purpose was to stop animal cruelty, the city council would have passed an ordinance without using a religious reference like the word "sacrifice."[17] The city council would have referred to animal slaughter in secular terms if it had lacked discriminatory intent.

A third source used by the Court in *Lukumi* to find discriminatory intent was the legislative record. Justice Kennedy wrote in the majority opinion that the city council transcript revealed a discriminatory motive.[18] One councilman justified his opposition to the practice of animal sacrifice by stating, "I don't believe that the Bible allows that."[19] The chaplain of the Hialeah police department described Santería practices as "an abomination to the Lord"and the worship of "demons."[20]

The intent of the town councilmen to discriminate against the Santería led the Court to subject the ordinance to strict scrutiny. When laws have no intent to discriminate against religious belief, like the drug regulations in *Employment Division v. Smith*, they are subject only to rational basis analysis. Since the law in *Lukumi* was discriminatory in intent, it was subject to the more demanding standard of strict scrutiny. The Court's decision in *Lukumi* thus stands as a paradigm of securing the freedom of religious belief

15. *Lukumi*, 508 U.S. at 527–28. ("The ordinance contained an exemption for slaughtering by 'licensed establishment[s]' of animals 'specifically raised for food purposes.'").

16. *Id.* at 534–36.

17. *Id.* at 543. ("Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice.").

18. *Id.* at 541–42.

19. *Id.* at 541.

20. *Id.* at 541; Corey Brettschneider, *A Transformative Theory of Religious Freedom: Promoting the Reasons for Rights*, 38 POL. THEORY 187 (2010).

from intentional discrimination. The Santería's beliefs, although unpopular, were protected by the First Amendment guarantee of the free exercise of religion.

But, less obviously, the evidence that the Court used to show the intent to discriminate against the Santería also demonstrates how the Constitution—properly—must sometimes limit the use of religious reasons as a basis for law making. To protect the Santería's religious freedom, the Court had to reject the city council's use of religious reasons as the basis for law. As Justice Kennedy writes in his majority decision, the Free Exercise Clause prohibits laws based on animosity or animus towards a religion: "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."[21]

Justice Kennedy says explicitly that constitutional laws cannot be based on animus towards religion. But implicitly given that the councilman employed *religious* reasons hostile to religion, his statement should also stand as a rebuke to some forms of religious reasoning itself. To the extent that the chaplain spoke in favor of the law on the basis that the Santería practices were "'an abomination to the Lord,'and the worship of 'demons,'"[22] those sentiments were based in religion and constituted animus because they were hostile to religion. In other words, the religious statements of those in favor of the law show that the animus doctrine does not protect the role of all religious sentiment as a basis for law, particularly when religion is used in opposition to other religions.

But what counts as an illegitimate religious reason hostile to religion? This category includes animus but is much broader. Consider, for instance, the statement of the councilman who justified his support of the anti-Santería law on the grounds that "I don't believe that the Bible allows that."[23] That sentiment lacks the hostility of labelling the Santería an "abomination." It simply relies on a religiously based authority to declare that the practices of the Santería are prohibited. But such a form of reasoning is also

21. *Lukumi*, 508 U.S. at 547; Brettschneider, *supra* note 20.

22. *Lukumi*, 508 U.S. at 541.

23. *Id.*

illegitimate on the Court's rational basis test because it lacks a secular equivalent. The Santería are prohibited from their religious practice simply because another religion prohibits it. That form of reason is a paradigm of theocratic reasoning in that it would use a form of reasoning—exclusive to one religion—to prohibit the practice of another.

We can draw from that paradigmatic, illegitimate, theocratic reasoning to discern a broader principle about the limits on religious reasoning that are necessary to preserve its free exercise. The law examined in *Lukumi* was a particularly egregious example of constitutionally invalid "theocratic" forms of reasoning, not only because it was based in animosity towards religion, but also because it relied on an exclusively religious rationale to limit the free exercise of another. Such reasoning would fail a rational basis review because it would not meet the threshold requirement of having a legitimate governmental purpose. The constitutional violation lies in the lack of a secular equivalent for the claim that the law is based in what the Bible requires.

To clarify why reasoning for law that lacks a secular translation is invalid, it is helpful to turn to John Locke's seminal statement of religious freedom in the *Letter Concerning Toleration,* first published in 1689. The *Letter* was a major influence on the thinking of James Madison,[24] and, given Madison's role as the most important force behind the passage and crafting of the First Amendment, it is an essential source to understand the Constitution's protection of religious freedom. In his *Letter*, Locke argues that while religious beliefs must be respected in a free society, they must not be allowed to serve as the exclusive basis for lawmaking, lest a nation devolve into theocratic reasoning,[25] Locke asks his reader to imagine a conflict between an Armenian and a Calvinist church, both of which attempt to impose their theocratic principles on citizens.[26] He imagines that when each of the churches come to power it would seek to impose its vision of true theology on the adherents of the other church.[27] Inevitably, Locke argues, the desire of each church

24. *See* Kevin Vance, *The Golden Thread of Religious Liberty: Comparing the Thought of John Locke and James Madison*, 6 OXFORD J.L. & RELIGION 227 (2017).

25. John Locke, *A Letter Concerning Toleration*, *in* LOCKE ON TOLERATION 3, 4–5 (Richard Vernon ed., 2010).

26. *Id.* at 14–15.

27. *Id.* at 15.

to make law based on the true theological doctrine would result in a limit on the religious practices by the other church that would conflict with the true doctrine enforced by the other.[28] But the danger of theocracy also takes less obvious forms, Locke argues. On his view, theocratic lawmaking is a danger within legislatures that are not governed directly by religious figures when it is governed by exclusively religious reasoning for two reasons. First, the state is not qualified to judge the truth of different churches. Only God can settle the question of which church is right, not the government. As Locke writes,"[t]he verdict on this question rests solely with the supreme judge of all men, and he alone will correct the party in error."[29] Exclusively religious-based laws conflate God's judgment therefore with secular judgment.

Second, even if the state were qualified to judge the religious truth of different churches, the coercive means available to it would be inappropriate for inducing sincere and inward religious belief. Imprisonment might compel outward conformity, but religious belief must be held by the internal conscience of the individual, which is beyond the reach of coercion. In Locke's view, "fire and sword are not suitable instruments for disproving errors and forming or changing people's minds."[30] Locke concludes that law to avoid problems of theocracy must have a secular basis that can be shared by persons regardless of whether they adhere to a particular religious view. Religious freedom is therefore not just the freedom to worship as one wishes; it is also the freedom from law made without reasons that are based in the religion of the legislature—reasons that not all citizens in a liberal democracy should reasonably be expected to share.

Locke therefore uses the furthest reaching example of theocracy in which one church attempts to establish itself as sovereign over all matters to capture a more subtle danger of theocratic law making. Specifically, laws within even procedurally democratic regimes can carry with them the same dangers of theocracy found in the example of the two feuding churches. Laws that appeal to solely theological doctrines without secular equivalence replicate the problem of theocracy writ largely because they impose a

28. *Id.*
29. *Id.* at 14.
30. *Id.*

religious belief on those who reasonably do not share it. Only when law is based in secular reasons, he argues, can lawmakers avoid the problem of theocracy.

Lukumi is a contemporary iteration of Locke's example of the two warring churches and an illustration of the dangers of theocratic lawmaking within otherwise democratic systems of government. Just as one church uses its own religious rationale to limit the freedom of the other church in Locke's letter, so too the Christian councilmen were willing to use their religion to limit the freedom of the Santería. But the violation of religious freedom in *Lukumi*, as Locke shows us, is not only about the limit on the Santería's practices. The violation comes in the exclusively religious reasoning employed by the councilmen. Even absent their obvious hostility to the Santería, the council relied on what the Bible permits or does not permit, unconstitutionally relying on religious beliefs to prohibit the practices of the Santería. The councilmen therefore illustrate Locke's point that solely religious-based rationales as a basis for law replicate the problem of theocracy. An anti-theocracy principle is therefore rightly thought to be at the center of the Free Exercise Clause. It prohibits not only religious reasoning hostile to religious practice of the kind exemplified by the Hialeah chaplain but also reasoning like the council's that rely on justifications of solely religious rationales.

The anti-theocracy principle, following Locke, requires that religious justifications for law be translatable into secular equivalents if they are to serve as a rational basis for law. Although the anti-theocracy principle draws from Locke's arguments in the *Letter*, he mistakenly refused to extend religious freedom to those groups he perceived as illiberal and also relied on an excessively contingent account of the relationship between theocracy and true belief. The anti-theocracy principle avoids these two mistakes. In Locke's view, people who advocated theocracy should be denied religious freedom themselves. Locke was therefore notoriously hostile to the notion that Catholics should be granted religious freedom, because he believed they were wedded to the theocratic notion that the Pope had both religious authority and the political authority to rule on earth.[31] Locke conflates the correct principle

31. For example, as Locke explains:

A church can have no right to be tolerated by a ruler if those who join it transfer their loyalty and obedience to another prince simply by joining.

that laws should be based on non-theocratic reasons with the mistaken notion that people who hold theocratic beliefs should be denied their rights.[32] The great insight of the First Amendment is that rights protections should not be conditioned on the beliefs of rights holders. To return to *Lukumi*, it is irrelevant as a constitutional matter whether or not members of the Santería themselves reject theocracy. If it were entered into evidence that Santería members wanted to pass laws discriminating against Christian beliefs, this would not be sufficient to show the case was wrongly decided. Locke, to the contrary, might condition the Santería's rights of free exercise on their rejection of theocratic reasoning. But that is a misguided conflation of the concern to limit theocracy, which concerns a danger of government making law based on solely religious reasons with a matter of a person's right to free expression. Free exercise protections require restricting the reliance on exclusively theocratic reasons as a legitimate basis for law, but they do not limit the rights of those persons who themselves endorse theocracy. Citizens have a right to advocate theocratic beliefs, but not a right to use government power to impose those beliefs on other citizens.

A second mistake made by Locke is that he rests his argument for religious toleration in part on the ineffectiveness of state coercion for compelling inward belief. But this aspect of his argument is too contingent. If a form of coercion, such as brainwashing, emerged that could force individuals to change their minds and adopt a true religious belief, Locke's argument would be weakened since state coercion would be effective. By contrast, the anti-theocracy principle is not based on contingent facts about the ineffectiveness of state coercion, but rather on Locke's more fundamental point that theocratic reasons for law are invalid because they wrongly impose upon non-believers laws based in religious doctrines that non-believers have a right to reject based on fundamental principles of religious tolerance.

The anti-theocracy principle would therefore prohibit justifications for law based exclusively on religion but would still

> Any ruler who granted such toleration would be giving a foothold in his own territories and cities to a foreign jurisdiction; he would be giving permission for soldiers to be conscripted from his own citizens against his own country.

Id. at 36.

32. *Id.*

admit many forms of religious reasoning as valid bases for law. They key is that these reasons be translatable into secular reasons. And the burden to avoid the anti-theocracy principle is not that lawmakers explicitly do the translation. A principle of charitable interpretation should allow a law to stand if it is potentially grounded in non-theocratic reasons, and the theocratic reasons are criticized as illegitimate for the state to invoke. The well-documented difficulties in discerning the actual reasons for a law suggest that it is appropriate to take an approach that is generous to the motives of state legislators.[33] Namely, there is good reason for the Court to look at possible rather than actual rationales to determine if legislation is based in theocratic reasons.

McGowan v. Maryland serves as an example of how the principle of charity has operated in the Court's jurisprudence of Establishment.[34] But it is equally valuable in discerning how to think about rational basis under the Free Exercise Clause. In that case Jewish store owners challenged the constitutionality of Maryland's so called "blue laws" that forced all businesses to shutter their doors on Sunday.[35] The owners contended that Sunday closing improperly burdened their ability to observe the Sabbath on Saturday when Jews traditionally observe their theologically mandated day of rest.[36] The Supreme Court denied the Free Exercise claim and instead analyzed the laws on Establishment grounds.[37] It found that while historically the blue laws had been based in a religious basis of mandating a Sunday sabbath, over time that rationale had been replaced by a secular one, namely that most people simply preferred to rest on Sunday.[38]

Despite the Court's refusal to consider the case under the Free Exercise Clause, it stands as a strong example of the reasoning behind the anti-theocracy principle. The Court acknowledges that a valid basis for law must have a secular equivalent and it is willing

33. Justice Scalia argues that the Court should reject the use of legislative histories when interpreting statutes. As evidence he cites a senate floor debate involving Senator Robert Dole, he suggests that "as for committee reports, it is not even certain that the members of the issuing *committees* have found time to read them." ANTONIN SCALIA, A MATTER OF INTERPRETATION 32 (1997).

34. *See* McGowan v. Maryland, 366 U.S. 420 (1961).

35. *Id.* at 422.

36. *Id.* at 429.

37. *Id.* at 453.

38. *Id.* at 434.

to supplement the actual reasons given for a law with a possible rationale.[39] But what the Court failed to see in *McGowen* was that the reason why a majority preferred Sunday to a Saturday closing was itself based in religion. The Sunday closing favored the Christian observation of the Sabbath. Even the principle of charity would require striking down Maryland's blue laws. An analysis moreover that would have considered the store owner's free exercise claim would have made clear why the blue laws were not innocuous. They were based in religious reasons that adversely effected the free exercise of religion.

So far, I have focused on developing the anti-theocracy principle as fundamental to the protection of Free Exercise. But the anti-theocracy principle is not limited to a single clause. In the next Parts I argue that the anti-theocracy principle is also central to the logic of the Equal Protection and Establishment Clauses and that it needs to be supplemented with a distinct second principle.

II. ANIMUS AND THE LIMIT ON RELIGIOUS REASONS UNDER THE EQUAL PROTECTION CLAUSE

In addition to the role the anti-theocracy principle plays in free exercise jurisprudence, it is also essential to the Court's equal protection jurisprudence, and it plays an important implicit role in *Romer v. Evans*. But *Romer* also reveals a second principle that compliments the anti-theocracy principle in limiting the role of religious reasons as a legitimate basis for law. Even if religious justifications for law can be translated into secular reasons, as the anti-theocracy principle requires, those reasons must also be consistent with an ideal of equal status regardless of race, gender, or LGBTQ identities. I call this second limit on religious rationales for lawmaking "the equal status principle" and it is essential to understanding the reasoning behind the Court's animus doctrine. The anti-theocracy and equal status principles are related in that both are justifiable by a deeper commitment to equality under law. The anti-theocracy principle bans exclusively religious reasons for law out of the belief that such reasons place one religious view in a position of domination over those who do not share that religion. The equal status principle extends that idea to other kinds of equal status in democracy in cases of race, gender, or LBGTQ identity.

39. *Id.* at 436.

A. The Anti-Theocracy and Equal Status Principles in the Animus Doctrine of the Equal Protection Clause

To understand how anti-theocracy and equal status principles work in tandem, it is helpful to first examine closely the history of the Court's animus doctrine. The Court has regularly invoked its animus doctrine in major cases involving equal protection. In the early versions of this doctrine, the Court's test for animus was whether the law or state actions showed "invidious discrimination." For example, the Court held in *Department of Agriculture v. Moreno* that the government could not deny food stamps to citizens who share a home but are unrelated by blood.[40] The Court looked at the legislative record and found that the law showed animus to "hippies" who co-habited.[41]

While the Court in *Moreno* cited the legislative record to show that the law was based on animus, it applied a more general test for animus in *City of Cleburne v. Cleburne Living Center.*[42] The test for animus in *Cleburne* was the absence of a potentially legitimate purpose for the law. The Court in the case struck down a zoning ordinance that denied permits to build a group home for people with cognitive disabilities.[43] The Court ruled that the city's only potential basis for denying the permits was "irrational prejudice" against people with cognitive disabilities.[44]

In both *Moreno* and *Cleburne*, the Court ruled that laws cannot be based on reasons of animus. These cases concerned forms of bias and discrimination that did not rely on religious reasoning. They were examples of secular animus. But as with *Lukumi*, the Court's more recent gay rights decisions implicitly raise the question of whether *religious* reasons can also violate the animus doctrine. In *Romer v. Evans,* the Court struck down a Colorado referendum that restricted gay rights in the areas of employment and housing.[45] The Court ruled that the only possible motivation for the referendum was animus against gay people. Justice Kennedy argued in his majority opinion that the law showed animus because its intent was

40. Dep't of Agric. v. Moreno, 413 U.S. 528, 538, 545 (1973).
41. *Id.* at 534.
42. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).
43. *Id.* at 450.
44. *Id.*
45. Romer v. Evans, 517 U.S. 620, 635 (1996).

to lower the status of gay people below that of other persons.[46] The law targeted gay people as a group and singled them out to deny their rights. Drawing on similar reasoning, the Court in *United States v. Windsor* struck down the Defense of Marriage Act on the grounds that it lowered the status of gay people and invidiously discriminated against them.[47] The very title of the "Defense of Marriage Act" implied that gay people threatened marriage and did not deserve the same marital rights of other citizens. Justice Kennedy, writing for the majority, argued that lowering the status of people and invidiously discriminating against them cannot constitute a "legitimate purpose," even on rational basis review, the Court's least demanding level of scrutiny.[48]

As in *Lukumi*, in none of these cases does the Court explicitly address the question of whether religious justifications might themselves run afoul of the animus doctrine. But also as in *Lukumi*, religious justifications did play a role in the passage of the legislation at issues in these cases. For example, many of the proponents of the discriminatory referendum in *Romer* based the proposed amendment on religious reasons that condemned homosexuality. Former University of Colorado football coach Bill McCartney, board member of Colorado for Family Values, called homosexuality "an abomination of almighty God."[49] While the Court in *Romer* never explicitly examined the validity of these religious reasons for law, they also did not find that they constituted a legitimate purpose. Implicitly, therefore, as in *Lukumi*, the Court recognized that exclusively religious reasons do not constitute a legitimate basis for law.

Opponents of the Court's decision might argue that religious reasons are often based in love for the persons to whom animus is

46. *Id.* at 633.

47. United States v. Windsor, 570 U.S. 744, 770 (2013) ("DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

48. *Id.* at 2696.

49. Adam Teicher, *Schism Develops at Colorado Over Coach's Beliefs, Comments*, CHI. TRIB. (Dec. 5, 1992), https://www.chicagotribune.com/news/ct-xpm-1992-12-06-9204210057-story.html.

supposedly shown. However, animus-based religious reasons need not be motivated by a feeling of hate to lack a legitimate Constitutional purpose. For example, some proponents of the anti-gay referendum claimed, "God calls us to hate the sin but love the sinner."[50] They said that they were motivated not by hatred of gays, but by a desire to save them from sin. But that sentiment is not a legitimate purpose, even if it is not based in hate per se, because it fails to respect the equal status of gays.

If animus is not defined by hate, how are we to understand this doctrine? Although it has never been identified as part of the Court's equal protection jurisprudence, I propose that implicit in its jurisprudence on the role religious reasons can play in public life, the Court's decisions are delineated by the anti-theocracy and equal status principles, just as they were in the realm of Free Exercise. Specifically, the argument that the Colorado law was needed to "save" gay persons was rightfully rejected by the Court as a rational basis because it violates the anti-theocracy principle. The reasoning for the law was theocratic because it sought to impose a religious conception on people in a way that could not be supported by any legitimate secular justification. Legitimate governmental purposes must be based on reasons based in law that can appeal to citizens who are non-religious, and this kind of justification failed that requirement.

While the argument that the Colorado law was based in a desire to save sinners is paradigmatically anti-theocratic, a more nuanced attempt to translate religious arguments into secular ones was made by "new natural law" thinkers, John Finnis and Robert George, who gave testimony in defense of the Colorado referendum in *Romer*. George and Finnis claimed that their arguments were based in biblical teaching but that their arguments in defense of the Colorado law met the standard of rational basis because they were able to translate them into secular terms. It is therefore useful to examine their arguments to clarify the requirements of the anti-theocracy principle. The Supreme Court

50. Chuck Colson, *Who are the Hatemongers?*, BREAK POINT (Jan. 5, 1993), https://www.breakpoint.org/who-are-the-hatemongers/.

refused to accept (or even address) their claims as a rational basis for the Colorado law. But was the Court incorrect in doing so?[51]

George and Finnis argue that laws that discriminate against LGBTQ people enforce an idea of "sexual complementarity" and derive a rational basis from this fundamental principle of sexual and family morality.[52] This argument claims that the physical features of heterosexual relations make these couples "fit" together in a way that gay couples do not.[53] Sexual complementarity for George and Finnis is what makes possible the "one flesh union" only possible within heterosexual marriage. Such arguments purport to translate religious doctrine prohibiting gay sex and gay marriage into secular terms. The admittedly biblically based idea of a "one flesh union" can be translated, according to George and Finnis, into a secular argument about the exclusive sexual complementarity of heterosexual couples.[54] As George put it, "complementarity . . . makes it possible for two human beings to become, in the language of the Bible, one flesh . . . ."[55] But it is difficult to understand in secular terms without the aid of biblical or theological explanation why gay bodies physically fit with one another less well than straight bodies. Nor is it understandable on secular terms why a supposed empirical point about bodies fitting together is salient enough normatively to justify denying marital rights to gay people. George and Finnis purport to translate the biblical idea of "one flesh union" into a secular argument from "sexual complementarity," but from a secular perspective, the argument is incomprehensible without the biblical explanation. It is telling that in his testimony "one flesh" is actually the reason that makes complementarity normatively valuable, but that is an idea that he explicated by referencing "the language of the [B]ible."

51. Rebuttal Affidavit of John Finnis (Oct. 21, 1993), Evans v. Romer, 63 Empl. Prac. Dec. (CCH) 42,719 (Colo. D. Ct. 1993), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 517 U.S. 620 (1996) (No. 92CV7223); Rebuttal Affidavit of Robert George (Oct. 22, 1993), *id.*

52. ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM 32 (2013).

53. John Finnis, *Law, Morality, and "Sexual Orientation"*, *in* SAME SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY 31 (John Corvino ed., 1997); Patrick Lee & Robert P. George, *Quaestio Disputata: What Male-Female Complementarity Makes Possible: Marriage as a Two-In-One-Flesh Union*, 69 THEOLOGICAL STUD. 641 (2008).

54. *Id.*

55. Robert P. George, *What Marriage Is – And What It Isn't*, FIRST THINGS (Aug. 2009), http://www.firstthings.com/article/2009/08/what-marriage-is-and-what-it-isnt.

Finnis and George illustrate, despite their ambitions, why merely claiming to translate the religious to the secular is not enough to avoid conflict with the anti-theocracy principle.

While the argument for bodily complementarity stands as an example of a religiously based argument that cannot successfully be translated into secular terms and thus fails the anti-theocracy principle, other religious rationales for limiting LGBTQ rights can more easily be translated into secular terms. But the Court has made it clear that translation of religious arguments into secular arguments is not sufficient to show them to be legitimate rational bases for law. In other words, the anti-theocracy principle is a necessary but not a sufficient condition for a rationale to rise to the level of a rational basis under the Equal Protection Clause. Consider the argument that since the purpose of marriage is procreation and gay people cannot procreate, they can be denied rights to marry. That argument has a religious basis in the idea of a "one flesh union" and related biblical rationales. But unlike the idea of "sexual complementarity," it does translate into a secular argument. Yet that argument was not accepted by the Court in *Romer* or any decision since as a reason to deny LGBTQ rights. Indeed, as scholars like Princeton political theorist Stephen Macedo and Justice Kagan have pointed out, the procreation argument would also justify laws banning marriage by straight infertile couples, clearly an unconstitutional result.[56] The procreative argument is an example of a reason for a law that can be translated into a secular purpose but fails to meet a second principle that religious reasons must satisfy if they are to be legitimate bases for lawmaking: the equal status principle. The equal status principle says that only those religious reasons which have been successfully translated into secular terms are valid if they are consistent with the equal status of people based on race, gender, and LGBTQ identities.

56. Transcript of Oral Argument at 24, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144) (Justice Kagan says: "[S]uppose a State said because we think that the focus of marriage really should be on procreation, we are not going to give marriage licenses anymore to any couple where both people are over the age of 55. Would that be constitutional?").

B. Public Reason and the Normative Rationale of Anti-Theocracy and Equal Status Principle

So far in this Part I have grounded the equal status and secular independence requirements in the Court's free exercise and equal protection jurisprudence. Now I move to consider a wider normative framework for defending the two principles. We have already begun this work in considering the foundations of free exercise law in the work of John Locke. Now I turn to a more contemporary debate in the field of political theory on the role of religious reasons in public life. Specifically, political theorists have addressed that topic as part of a broader consideration about "public reason." Prominently, theorist Jürgen Habermas defends a wide view of the role of religious reasons in public debate, accepting the anti-theocracy principle but rejecting the equal status principle.[57] According to Habermas, excluding religious reasons from government risks alienating religious citizens. He also suggests that religious reasons have epistemic value, enlightening secular citizens with ideas that can then be translated into terms they can understand.[58] There is a contradiction, however, between Habermas's desire for a wide range of religious views as a basis for government action and his acceptance of the anti-theocracy principle. The reason why Habermas accepts the burden of translating religious to secular views is that he acknowledges a duty of equality. As the anti-theocracy principle states, it would be a denial of the equal status of citizens to force them to live under a coercive regime based on religious reasons they rejected. But if Habermas accepts the underlying ideal of equal status that lies beneath the anti-theocracy principle, then he also should acknowledge the importance of limiting religious reasons that deny that principle.[59]

The Court's embrace of the equal status principle means that it has rejected Habermas's broad idea of the role of religious reasons

57. JÜRGEN HABERMAS, BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS 99–148 (Ciaran Cronin trans., 2008).

58. *Id.* at 5. For example, he suggests that "contributions formulated in religious language could have a rational content." *Id.*

59. For a more elaborate response to Habermas, *see* COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF GOVERNMENT 28–53 (2007); Anna Stilz, *On the Relation Between Democracy and Rights*, 47 REPRESENTATION 9, 9–17 (2011) (excellent analysis of my critique of Habermas).

when it comes to the justifications of law.[60] A better fit with the Court's view is found in the view of public reason defended by John Rawls, especially in his essay "The Idea of Public Reason Revisited."[61] That approach explains more carefully than Habermas does how public reason might balance the inclusion of religious reasons as a basis for law and the benefits of the rights of minorities. And it highlights the normative justification behind the Court's approach in cases like *Romer*. Rawls argues for a "proviso" to the requirement of public reason that all laws be potentially justifiable to free and equal citizens on the basis of their shared status, not on theological or other "comprehensive" doctrines that they can reasonably reject.[62] The proviso clarifies that religious reasons have a fundamental role in public life as long as they are translatable in secular terms and respect the equal status of persons.

In Rawls's view, when we decide on laws, we must consider whether state actions can be made justifiable to citizens who do not share our religious beliefs. It must be possible for us to give reasons for laws to other citizens who are not co-sectarians or religious. This allows us to reason together based on a common set of ideals, including respect for rights, equal status, and the aims of government given by the Constitution.[63] Rawls's argument is that reasonable people, who respect each other's rights, can disagree on matters of religion, including the existence of God, the afterlife, and the question of what gives life ultimate meaning. Not only do people reasonably disagree about religious issues, but they should have the freedom to do so under liberty of conscience.[64] It is therefore not the business of the state to try to impose by coercive force answers to these questions. Even if a law is not literally coercively imposing a religious view, we can discern from Locke's argument in the *Letter* that when law is exclusively based on religious reasons, it disrespects the equal status of citizens who do not endorse the religious view from which those reasons were derived. The proviso makes clear that public reason's limits on religious reasons, far from dispensing of all religious justification

60. JOHN RAWLS, POLITICAL LIBERALISM (2005).

61. John Rawls, *The Idea of Public Reason Revisited*, 64 UNIV. CHI. L. REV. 765 (1997).

62. *See* RAWLS, *supra* note 60, at 215–19; BRETTSCHNEIDER, *supra* note 59, at 7–27.

63. For a brief description, see RAWLS, *supra* note 60, at 216–19.

64. *Id.* at 36, 54–56 (describing the fact of reasonable pluralism and the burdens of judgment).

for law, still protects a place for religious reasons as a basis for law so long as they can be translated into secular terms and are consistent with the idea of equal status.

One argument in favor of Habermas's approach to public reason over Rawls could turn to the role theological arguments have often played in the adoption and implementation of the promises of equal protection itself. For example, Martin Luther King, Jr. drew on his Christian beliefs to support desegregation and racial equality.[65] The distinctively religious contributions to these debates cannot be denied. And a conception of public reason that would rule those views illegitimate would do away with major foundations of the principles of public reason itself. But far from counting against the equal status principle, King's example bolsters the normative case for the anti-theocracy and equal status principles and generally for the Rawlsian approach to public reason.

King's writing, especially his *Letter from a Birmingham Jail*, is an exemplar of how theological views should inform the law. In the letter, King appeals partly to theological ideals such as Aquinas's notion of natural law, biblical references like the Babylonian captivity and the teachings of Jesus.[66] King asks rhetorically, "Was not Jesus an extremist in love?"[67] King uses Jesus and other theological sources to defend his use of civil disobedience and in his general arguments against segregation. But alongside those religious appeals come secular and independent principles. Specifically, as much as the letter builds on these religious arguments, it carefully translates those arguments into independent secular reasons. In the letter, for instance, King argues that "an unjust law is a code that a majority inflicts on a minority that is not binding on itself."[68] When President Johnson paid homage to King and other leaders in the civil rights movement in his famous "We Shall Overcome" speech, he, like King, gave religious reasons for the movement, but those reasons were consistent with equality and were accompanied by secular

65. MARTIN LUTHER KING, JR., *Letter from a Birmingham Jail*, *in* I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 83–100 (James Washington ed., 1992).

66. *Id.* at 84, 89, 92, 94.

67. *Id.* at 94.

68. *Id.* at 89.

reasons supporting the Voting Rights Act.[69] By contrast, the Hialeah ordinance against the Santería and the Colorado anti-gay referendum were illegitimate attempts to impose religious beliefs. The reasons for the Hialeah and Colorado laws were theocratic, failing both the equal status and secular independence requirements. Therefore, King and Johnson, far from offering counterexamples to the anti-theocracy and equal status principles, exemplify how religious leaders can bring their own theological views to reinforce fundamental constitutional ideals in defense of these principles.

In sum, religious reasons can support independent secular principles consistent with the principles underlying the Free Exercise and Equal Protection Clauses. It is only when religious reasons lack a secular equivalent or when they conflict with the ideal of equal status that they are illegitimate for the government to use and fail to constitute a rational basis for law under these two clauses. In cases in which the anti-theocracy principle is violated, laws that fail to have secular rationales treat non-co-religionists as less than equal. That deeper commitment to equality in turn is also recognized in the equal status principles' protection against those religious views that can be translated into secular terms but that undermine the equality of persons based on their racial, gender, or LGBTQ identities.

III. THE LIMITS ON RELIGIOUS STATE SPEECH

In this Part, I turn from the question of what kinds of religious reasons can serve as the basis for secular law to consider what kind of state speech or expression is legitimate under the anti-theocracy and equal status principles.[70] If the state cannot constitutionally use theocratic reasons or those that violate the equal status principle as the basis for legislation or coercive state action, it is also prohibited from using such rationales as the basis for its own speech or expressive state action.

In my view, state speech is unconstitutional when it violates the requirements of the anti-theocracy or equal status principles.

69. Lyndon B. Johnson, President of the U.S., Address to a Joint Session of Congress on Voting Legislation: We Shall Overcome (Mar. 15, 1965).

70. Rust v. Sullivan, 500 U.S. 173 (1991); Town of Greece v. Galloway, 572 U.S. 565 (2014); COREY BRETTSCHNEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY (2012).

These principles provide an alternative to the coercion test proposed by Justice Kennedy.[71] Kennedy claims that religious state speech is inappropriate when it coercively forces a message on citizens.[72] The anti-theocracy principle differs in explaining why the government should be excluded from using theocratic state speech, even when the speech is non-coercive. For example, the anti-theocracy principle can show why a non-binding government declaration that Islam is a false religion would be a prohibited form of state speech since it would violate the anti-theocracy principle. Likewise, a secular expression claiming "Islam is an evil religion" would also violate the equal status principle.

In addition to offering an alternative to the coercion test in establishment jurisprudence, the anti-theocracy principle's ban on theocratic state speech can also inform the meaning of the Court's formal test of Establishment as outlined in *Lemon v. Kurtzman*.[73] The first prong of the test outlined in *Lemon* requires that all government action endorse a secular purpose.[74] This prong of the *Lemon* test is in agreement with the secular independence requirement of the anti-theocracy principle. However, the Court has been vague regarding what would be a legitimate secular purpose for state speech to endorse. I clarify that legitimate state speech must comport with the anti-theocracy principle. And it would add a requirement of respect for equal status, which is missing from the *Lemon* test. Together, the anti-theocracy and equal status principles define what would be a legitimate secular purpose by importing the Court's equal protection jurisprudence, especially the gay rights cases of *Romer* and *Windsor*, into the first prong of *Lemon*.

71. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 659–79 (1989), *abrogated by Galloway*, 572 U.S. 565.

72. *Galloway*, 572 U.S. at 586 ("It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'"); Lee v. Weisman, 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise[.]").

73. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) ("Three such tests may be gleaned from our cases. 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 government entanglement with religion.'") (internal citations omitted).

74. *Id.* at 612.

I also argue that the anti-theocracy and equal status principles help to clarify Justice O'Connor's endorsement test, as outlined in *Lynch v. Donnelly*.[75] Critics suggest the test is imprecise because it relies on a "reasonable observer"[76] to determine whether the government has endorsed religion. I argue the test should more explicitly be defined using the anti-theocracy and equal status principles. State speech that invokes religion to endorse equality is permissible, while religious state speech that sends a message of inequality based on religious affiliation, gender, race, or sexual orientation is banned under the Establishment Clause.

In addition to offering an account of how the anti-theocracy and equal status principles clarify the role of religious state expression under the Establishment Clause, I also aim in this Part to further demonstrate that these principles are consistent with some state sponsored religious expression, including some state sponsored prayer. I thus continue to offer a reply to the objection to these principles, which accuses them of unduly excluding religion from a place in public life.

A. Why Extend Anti-Theocracy from Coercion to Expression?

Before examining how the anti-theocracy and equal status principles clarify the Establishment Clause approach to legitimate government speech, I first need to better justify extending the equal status and secular independence requirements to state *expressive* action. Although I have focused so far on limiting theocratic reasons from serving as the basis for *coercively* enforced state laws, I take the argument also to show that theocratic reasons have no rightful role in the state expression. For example, consider the hypothetical case of a state government putting up advertisements criticizing gay people without passing laws to punish them. While there would be no coercive anti-gay law, the advertisements would be illegitimate on similar grounds. In both instances, the state would be wrong to send a message of unequal status. The expressive harm to equal status would be present in both laws discriminating against gay people as well as in state speech that denigrates gay people. This hypothetical example of state speech would fail to meet the standard of rational review. Like the

75. Lynch v. Donnelly, 465 U.S. 668, 689, 694 (1984) (O'Connor, J., concurring)

76. *Allegheny,* 492 U.S. at 631 (O'Connor, J., concurring).

Colorado referendum in *Romer*, there would be no reason for the anti-gay advertisements that would constitute a legitimate government purpose. The fact that the advertisements would be an act of state expression rather than coercion makes no difference in discerning the rationality of the state's reasons. In both cases it would fail rational review.

We can apply this kind of analysis to the Free Exercise Clause as well. Imagine that instead of having a ban on animal sacrifice, the Hialeah councilmen only issued condemnations of the Santería practice of animal sacrifice. This would not be a coercive law, but it would still have all the failures associated with the ordinance at issue in *Lukumi*. It would intentionally target religious belief, and it would also fail rational basis review because it would be based on an illegitimate governmental purpose.[77]

These examples suggest that there should be constitutional limits on purely expressive state speech. But an objection to my application of the anti-theocracy and equal status principles to expressive state speech might suggest that expression, unlike coercion, lacks the potential to harm. The claim that there is no harm in racist or discriminatory state speech, however, lacks clear empirical support. Expression by the state might damage citizens psychologically. But more fundamentally, apart from issues of harm, the anti-theocratic and equal status principles concern the question of what government action is legitimately authorized under the Constitution. What matters in assessing legitimate law is not just the effect of law but the legitimacy of the reasons for it. Consider two laws where the coercive impact is the same but the constitutional validity of the reasons for the law differs. For instance, compare the Hialeah ordinance with an alternative law that would ban inhumane animal slaughter, but without the intent to discriminate against the Santería. The alternative ban would prohibit animal slaughter, like the Hialeah ordinance, but it would be constitutional because the reason for it would be the legitimate aim of preventing unnecessary suffering. By contrast, the Hialeah councilmen's reason for their ordinance was theocratic and discriminated against a religious group. This example shows that the reasons for a law can be determinative in assessing its

77. For a related series of examples and an excellent analysis of establishment limits on government expression, see Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013).

constitutionality apart from the harmful effects that it might or might not have. Theocratic reasons, like those used by the Hialeah councilmen, are invalid reasons for laws. But if the difference in whether a law is valid is based in the reasoning for a law rather than its effect, this suggests that the expressive aspect of the law must be considered in determining its constitutionality.

The relevance of the reasons for a law in evaluating its constitutionality under the Establishment Clause can also be seen in James Madison's *Memorial and Remonstrance against Religious Assessments*.[78] In this writing, Madison criticized a tax to support religious teaching in the state of Virginia.[79] Today, under modern free exercise jurisprudence, it would be clearly unconstitutional to levy a selective tax for the specific purpose of supporting religious teaching. But a number of precedents also show that it would be unconstitutional to fund religious education using part of the proceeds from a more general tax because the funding would have no "secular purpose."[80] What makes this state funding unconstitutional is not the coercion involved, but that the reason for the law is to give government support for a particular religion.[81]

If there are constitutional limits on legitimate reasons for law, it follows that there also should be limits on government expression because government sponsored speech makes

78. James Madison, *Memorial and Remonstrance against Religious Assessments*, *in* SELECTED WRITINGS OF JAMES MADISON (Ralph Ketcham ed., 2006).

79. *Id.*

80. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); McGowan v. Maryland, 366 U.S. 420, 436 (1961).

81. In contrast to the limits I want to defend on state speech, Michael McConnell argues that a general tax, which is only partly used to fund a religion, would be constitutional. However, this position is inconsistent with McConnell's acknowledgement that it would be unconstitutional for the state to impose a specific tax for the sole purpose of funding a religion. Both the specific and general tax involves a similar state action. They are capable of collecting equivalent funds for the purpose of supporting a religion. More fundamentally, the general tax is similar to the specific tax in inflicting an expressive harm on citizens of other religions. The state sends the message that it treats citizens unequally based on their religion. In both cases, the state singles out a religion to fund. The general and specific taxes are unconstitutional because of the state's theocratic reason for them and the message it sends in violation of the equal status requirement. The Court is therefore right to conclude that there can be an expressive harm from the state spending money on religion, regardless of whether that revenue was raised in a general or specific tax. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).

transparent its purposes and rationales. If government is prohibited from relying on certain religious reasons for law, it follows that it should also be prohibited from directly endorsing through its own speech these constitutionally prohibited reasons. The anti-theocracy and equal status principles therefore should be understood as limiting not only state coercive action but also state expressive action, including state speech and its reasons for law.

Applying the anti-theocracy and equal status principles gives us reason to rethink Justice Kennedy's "coercion test." In *Lee v. Weisman,* Justice Kennedy's majority decision struck down graduation prayers because they violate the First Amendment restriction on the state establishment of religion.[82] *Lee* concerned a prayer given by an invited Rabbi at a public middle school graduation ceremony.[83] Although the prayer was not sectarian, a Jewish student objected to the public-school prayer on Establishment grounds.[84]

The Court's opinion did not focus on the religious content of the prayer, but on the circumstances surrounding student attendance. Even though attendance was technically optional, the Court reasoned students felt compelled to attend.[85] Justice Kennedy argued that state actions could be coercive if people subjectively felt they were being coerced.[86] The case has come to be known for its coercion test that religious state speech violates the Establishment Clause if people believe they are forced to listen to the speech or adopt its viewpoint, regardless of its content.[87]

I do not object to this principle as an aspect of the Establishment Clause. But it would be a mistake to see the "coercion test" as the exclusive meaning of the Establishment Clause. Such an approach would read the clause as restricting coercion but as placing no restrictions on the content of religious state speech. One problem with this approach is that the Court has implausibly stretched the meaning of coercion in trying to maintain a content-free test. But defining coercion as the feeling of being coercive would be too broad and subjective. When people claim to feel coerced it

82. Lee v. Weisman, 505 U.S. 577, 587 (1992).
83. *Id.* at 581.
84. *Id.* at 581, 584.
85. *Id.* at 586.
86. *See id.* at 594.
87. *Id.*

might simply reflect their disagreement with a viewpoint. But disagreement does not make speech coercive.

The major problem with the coercion test, however, is that it fails to incorporate the lessons of the anti-theocracy and equal status principles. Instead of straining the meaning of coercion in the establishment context, it would be more transparent and consistent with the jurisprudence in other clauses to say that religious state speech can be problematic because of its content.[88] A content-based analysis would prohibit the government from employing theocratic state speech or speech that violates the equal status of citizens.

To be clear, the anti-theocracy principle and the equal status principles rightly restrict *state* speech by the government. Ordinary citizens have the free speech right to express any viewpoint without legal restriction, but public officials are entrusted with government power and have a constitutional duty to refrain from theocratic state speech or speech that violates the equal status principle in their official capacity.

B. The Endorsement Test

My attempt to define a content-based limit to state expression is consistent with Justice O'Connor's broad ambition in her "endorsement test." O'Connor's test prohibits the government from engaging in speech that a reasonable observer would interpret as "endorsing" religion. She proposed the test in her concurring opinion in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, a case that concerned a city's display of a menorah next to a

88. McConnell has defended the notion that the original understanding of the Constitution is incompatible with the Court's ruling in *Lemon v. Kurtzman.* He would abandon the first prong of *Lemon,* which requires that legislation have a secular purpose. McConnell instead endorses the coercion test, under which government religious speech is valid as long as it does not coerce citizens into listening or agreeing with the speech. *See* Michael W. McConnell, *Stuck with a Lemon*, 83 A.B.A. J. 46 (1997). However, McConnell's argument is at odds with James Madison's argument from his *Memorial and Remonstrance Against Religious Assessments*, which inspired the Constitution's religious clauses and the Virginia Statute for Religious Freedom. Madison argued that a tax to fund religious schooling violated the religious liberty of citizens. For Madison, it was not the coercive aspect of the tax that was problematic since taxes for other purposes could be legitimate. Instead, he objected to the theocratic reason for the tax. The legitimacy of the tax could not be determined solely on coercive grounds, but only by examining the content of the state's reason for the tax. *See* Madison, *supra* note 78.

Christmas tree on public property.[89] O'Connor argued that while displaying a menorah alone might be seen by a reasonable observer as endorsing Judaism, the menorah did not constitute an endorsement of Christianity when it was included in a larger holiday display next to a Christmas tree.[90] The city's display was not specific to any one religion but celebrated pluralism more generally.[91] In the same case, the Court considered the constitutionality of a city's display of a crèche or Christian Nativity scene with the statement "Glory to God in the highest" written in Latin.[92] Justice Blackmun wrote in a majority opinion joined by Justice O'Connor that the city was endorsing religion by displaying the crèche:

> There is no doubt, of course, that the crèche itself is capable of communicating a religious message. Indeed, the crèche in this lawsuit uses words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear . . . . This praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service.[93]

O'Connor's endorsement test has been widely criticized for being too vague. The concern is that she rests the test on the idea of a "reasonable observer."[94] What matters for O'Connor is not the religious intent of the state's expression, but whether an observer would recognize the expression as having religious content.[95] Despite its ambiguity, O'Connor is right in developing an objective test for establishment that focuses on the *content* of the expression. This objective test resembles the proper understanding of the animus doctrine. The animus doctrine has shifted away from a subjective test that examines whether legislators were motivated by a hateful intent in passing a law. A subjective test of animus would mistakenly invalidate state expression that might reasonably

89. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 627–37 (1989) (O'Connor, J., concurring), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

90. *Id.* at 634–35.

91. *See id.* at 635.

92. *Id.* at 579–80 (majority opinion).

93. *Id.* at 598 (internal citations omitted).

94. *Id.* at 630 (O'Connor, J., concurring).

95. *Id.*

interpreted as having a legitimate secular basis, even if its motivation were explicitly religious. Acknowledging this problem, the animus doctrine now considers whether a law could have a possible reason for it that is compatible with equal status. Like the modern animus doctrine, O'Connor's test shifts the focus away from the subjective intent to the objective content of a law or state action. Her endorsement test recognizes that regardless of whether there is a partly religious intent, state expression might be acceptable if its content can be understood on secular terms.

Although the endorsement test has the advantage of being objective, O'Connor is unclear about whether it rules out all religious expression by the state as unconstitutional, or whether it would allow state religious expression that avoids animus or theocratic state expression. O'Connor sums up the endorsement test in *Allegheny* as follows:

> If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.[96]

Part of her description of the endorsement test suggests an interpretation that would make it consistent with the anti-theocracy and equal status principles. According to this reading, the endorsement test evaluates the constitutionality of religious state speech based on its respect for citizens' equal status. O'Connor seems to support this interpretation, writing that the question is whether the state's message conveys that some citizens are "less than full members of the political community."[97] On such a view, there would be nothing inherently constitutionally problematic about the government giving a religious reason that supports independent secular values and that respects equal status.

At times, O'Connor appears, however, to have a different understanding of the endorsement test, one that would be inconsistent with the anti-theocracy and equal status principles. She seems to claim that when the government approves of a religious argument, it inherently sends a message of disrespect

96. *Id.* at 627.

97. *See id.*

to non-religious citizens. As O'Connor writes, the "government cannot endorse the religious practices and beliefs of some citizens" without sending a disrespectful message.[98] Unlike the anti-theocracy principle, this second reading of O'Connor's endorsement test would rule out all religious state speech, even if the speech supports the constitutional value of equality.

The second version of the endorsement test would be too restrictive. It would fail to recognize that religious state speech could serve independent secular principles. Consider the recently constructed Martin Luther King Memorial, which is run by the National Park Service on government land. The King Memorial is a paradigmatic example of state speech, endorsing both King's secular and sectarian arguments for racial equality.[99] The Memorial quotes his *Letter from a Birmingham Jail*, which invoked the Christian doctrine of natural law along with secular arguments to oppose segregation.[100] It recognizes how King, as a religious leader, invoked the gospel for the secular purpose of ending discrimination.[101] Its very structure alludes to Moses and the idea that "[w]ith this faith, we will be able to hew out of a mountain of despair."[102] By building the memorial, the state is endorsing King's religious message to support a non-sectarian conception of equal rights.

The Jefferson Memorial similarly draws on religious arguments for the secular purpose of strengthening equal rights. The Memorial is inscribed with Jefferson's preamble to the Declaration of Independence that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights[.]"[103] Jefferson's statement is religious, invoking the "Creator," but it is in the service of the constitutional aim of equal rights. In the northwest wall, the Memorial quotes another religious argument from Jefferson:

> Almighty God hath created the mind free . . . . [A]ll attempts to influence it by temporal punishments, or burthens . . . are a

98. *Id.*

99. KING, *supra* note 65.

100. *See id.*

101. *See id.* at 84–85.

102. *See Martin Luther King, Jr. Memorial*, TR. NAT'L MALL, https://nationalmall.org/monuments-memorials/mlk (last visited Jan. 14, 2022).

103. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

> departure from the plan of the [H]oly [A]uthor of our religion . . . . [N]o man shall be compelled to frequent or support any religious worship . . . or ministry . . . [or] shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion.[104]

The Memorial inscription is an example of state religious speech that would be permissible under the anti-theocracy principle. The Jefferson Memorial quotation makes the religious argument that God created the conscience to be free. But the inscribed passage is not limited to having a purely sectarian purpose. Jefferson's statement more broadly supports the legitimate constitutional purpose of protecting religious freedom.

The anti-theocracy principle allows the state to cite religion in bolstering independent freestanding principles of equality, as in the official memorials to Martin Luther King and Thomas Jefferson. According to the anti-theocracy principle, the problem with the display of the crèche in *Alleghany* is that it seems only to further the aims of one religion. It does not use religion or religious language to endorse an independent secular ideal that could be shared by citizens who are not Christians. When the state displays the crèche, it does not clarify how its religious expression is consistent with the equality of non-Christians. Absent any clarification, a reasonable observer can interpret the display as the state endorsing Christianity as the exclusive government understanding of God. The absence of a secular purpose for the display would violate the anti-theocracy principle, while the state expression of inequality towards citizens would violate the equal status requirement. The principles would rule out the display of a crèche because it reflects the state endorsement of Christianity, instead of the inclusive message of supporting constitutional rights.

In sum, O'Connor's restriction on the government endorsement of religion is often thought to be too vague. It relies on a notion of a reasonable observer without clarifying what kinds of endorsement would bepermissible in the eyes of that observer. By contrast, the anti-theocracy and equal status principles makes secular equivalence and respect for equal citizenship the explicit

104. Thomas Jefferson, *Bill for Establishing Religious Freedom* (1779), *in* A DOCUMENTARY HISTORY OF RELIGION IN AMERICA 229, 229–32 (Edwin S. Gaustad & Mark A. Noll eds., 2003).

standards for whether state religious speech is constitutionally permissible or impermissible.

C. The First Prong of Lemon: Secular Purpose

The anti-theocracy principle also improves upon and clarifies the Court's "secular purpose" analysis. According to the first prong of the *Lemon* test from *Lemon v. Kurtzman*, a law must have a "secular legislative purpose."[105] I argue that "secular purpose" is too subjective and that the test for respecting the Establishment Clause should be understood in terms of the anti-theocracy principle. Namely, the question should not be about whether the intent of law was secular but rather whether the reasons for it can be translated into secular reasons. Furthermore, that prong should require reasons consistent with the equal status principle.

In *Edwards v. Aguillard*, the Court invoked the first prong of the *Lemon* test to strike down a law that required the teaching of "creation science" alongside evolution in biology classes.[106] Justice Brennan argued in his majority opinion that the creation science requirement had only a religious purpose, as there was no scientific evidence to support creationism.[107] In Brennan's words,

> The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose.[108]

In Brennan's view, the government had no secular purpose in passing the Louisiana Creationism Act.

There is a clear overlap between Brennan's application of the secular purpose prong and the anti-theocracy principle. Brennan rightly strikes down a policy that is based exclusively on a religious ideal and cannot be translated or explained to

105. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

106. Edwards v. Aguillard, 482 U.S. 578 (1987) (directing that the law did not mandate the teaching of Christian Science unless evolution was also taught; the legislation thus sought equal time for the two theories of the start of life).

107. *See id.* at 594–96.

108. *Id.* at 596–97.

non-religious citizens. But despite this point of agreement, there is a question as to whether he would rule out all school policies that would teach approvingly about religion. Consider whether the Establishment Clause ever allows public school students to think about whether theirreligion might lead them to endorse certain constitutional values, such as the idea of equal protection. Such an assignment might give Martin Luther King's *Letter from a Birmingham Jail* as an example of how religious beliefs might inform or motivate constitutional ideals. If we asked students to engage in such a debate, would such an assignment be a form of unconstitutional religious endorsement? Brennan's opinion is unclear here. The Court might view such a lesson as purposeful encouragement of religion that constitutes endorsement under *Lemon*'s first prong. However, I would view the assignment as being consistent with the anti-theocracy principle. It asks students to consider their own views about the ways religion might reinforce secular constitutional values. Such an assignment would contrast with a school lesson that promotes religious racist views that undermine equality and are theocratic. The anti-theocracy principle thus clarifies why the exclusion of theocratic public-school lessons that aim to undermine secular purposes should not be confused with an exclusion of religion from public life.

The anti-theocracy principle also offers a way to rethink the Court's cases about displays of the Ten Commandments under the Establishment Clause. In *McCreary County v. ACLU of Kentucky*, the Court considered whether it was constitutional for a county courthouse to display the Ten Commandments.[109] The Court ruled that the government display was unconstitutional because it endorsed a sectarian set of religious beliefs and did not serve a secular purpose.[110] But in *Van Orden v. Perry*, the Court heard a challenge to a display of the Ten Commandments outside the Texas state capitol, which also contained seventeen other monuments and twenty-one historical markers.[111] A divided Court held that this latter display of the Ten Commandments was constitutional.[112] The Court's reasoning emphasized that there was secular intent in the display about lawgiving because the Ten Commandments were

109. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005).

110. *Id.* at 870, 881.

111. Van Orden v. Perry, 545 U.S. 677, 702 (2005) (Breyer, J., concurring).

112. *Id.* at 691–92.

placed in a context intended to convey a message about history and the law.[113] The opinion seems to reflect the logic of the anti-theocracy principle. It suggests that the Ten Commandments are being used as a religiousendorsement of secular ideals in law.

The opinion, however, is overly deferential to the subjective intent of those who created the display. Regardless of the intent in displaying the Ten Commandments, part of the text would seem to lack a secular equivalent to a reasonable observer. Although five of the commandments address principles of ethical relationships, the second five are concerned to tell citizens how to address God. These commandments endorse the principle of monotheism and explicitly declare polytheistic religions to be false. There seems to be a presumptive reason to think a display of the commandments lacks a secular equivalent or consistency with the ideal that polytheistic believers remain equal under the law. The anti-theocracy principle regards the display of the Ten Commandments in both *Van Orden* and *McCreary* as an unconstitutional endorsement, because the government does not explain to the viewing public how the commandments, which declare polytheism to be false, are consistent with the ideal that all citizens are equal under law.

While cases like *Van Orden* and *McCreary* should be resolved by appeal to the anti-theocracy principle, other Ten Commandment cases implicate the equal status principle. Consider *Pleasant Grove City v. Summum,* which was discussed in the introduction to this Part.[114] The case considered whether the city sent a discriminatory message when it decided to display the Ten Commandments while rejecting a monument from another religious group, the Summum.[115] The Court sought to avoid the Establishment issue in this case because no litigant challenged the placement of the Ten Commandments.[116] But the rejection of the monument raises the concern that the Summum might be the subject of illegitimate state expression. The city could be sending a message that lowers the Summum's status before the law. If the city rejected the monument out of a desire to lower the status of the Summum Church, it would

113. *Id.*

114. Pleasant Grove City v. Summum, 555 U.S. 460 (2008).

115. *Id.* at 464–65.

116. *Id.* at 482 (Scalia, J., concurring) ("But it is also obvious that from the start, the case has been litigated in the shadow of the First Amendment's *Establishment Clause* . . . .").

violate the anti-theocracy principle's two prongs. If the city is rejecting the monument because it believes the views of the Summum are false, then the city would be sending a message that denigrates the Summum's religious belief, just as the Hialeah ordinance denigrated the religious belief of the Santeria. It would also be incompatible with the equal status requirement for the government to send a message about the inferiority of a religious group, even if it does so for secular reasons.

IV. GOVERNMENT SPONSORED PRAYER

Now that I have extended the anti-theocracy principle to religious state expression, I will apply it to the Court's decisions on the Establishment Clause jurisprudence concerning government sponsored prayer. In *Town of Greece v. Galloway*, the Court ruled that opening a legislative session with a sectarian prayer did not violate the Establishment Clause.[117] *Town of Greece* seemed to abandon Justice O'Connor's endorsement test for religious state speech, replacing it with Justice Kennedy's more permissive coercion test.[118] As Justice Kennedy wrote in his majority opinion stating the coercion test, "[t]he town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents."[119]

In my view, however, the Court did not abandon the endorsement test. Rather, it left open the possibility of a test, like the anti-theocracy principle and equal status principles for ruling out the constitutionality of some government sponsored prayer. The Court should clarify in future cases the content-based restrictions on religious state speech. These restrictions should require that religious state speech serve a secular purposeand avoid animus. This approach is suggested in the following language by the Court in *Town of Greece*:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,many present may consider the prayer to fall short of the desire to elevate the purpose of

117. Town of Greece v. Galloway, 572 U.S. 565 (2014).

118. *Id.* at 589.

119. *Id.* at 591–92.

> the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.[120]

This passage from Justice Kennedy points to the need for the Court to begin to outline a content-based test of what state prayers would be consistent with the Establishment Clause. Kennedy recognizes that some theocratic or animus-based prayers can violate the First Amendment. I propose the anti-theocracy principle and equal status principles as tests for the constitutionality of sectarian prayer, state speech, and the reasons for law.

One threshold question in *Town of Greece* is whether the legislative session was engaging in state-sponsored speech or opening a limited public forum that invited citizens to give their private views. In accordance with the Court's doctrine, when the government opens a limited public forum, it is bound to accept all viewpoints regardless of their content. I believe that the Court was right to reject a limited public forum analysis. Such a holding would have required that prayers meet a requirement of viewpoint neutrality. This would have meant that all speakers would have a right to participate regardless of the content or viewpoint of what they said. For example, if a Ku Klux Klan minister wanted to open a legislative session with a racist prayer, he would have to be permitted to do so if the town's legislative session were considered a limited public forum open to any private view. Such a holding would deny the town the ability to frame its own message about the purpose of its legislative session. It would also make it more difficult for the state to use the legislative session to endorse constitutional values instead of theocratic, discriminatory, or animus-based values. The Court's finding that the state is speaking in this instance rightly allows the town to use the legislative session to craft its own message as it debates and passes laws.

The fact that the state is speaking, however, should not mean that everything it wishes to say is permissible. While Justice Kennedy suggested that theocratic or animus-based state prayers would raise a new case different from *Town of Greece*,[121] the Court should stipulate clear content- and viewpoint-based limits on what state speakers can say in the context of legislative prayer. In

120. *Id.* at 583.

121. *Id.*

outlining these standards, the Court should apply the anti-theocracy principle to its prayer decisions. It should require town guidelines that allow sectarian prayer as long as it does not disparage the equal status of religious or non-religious citizens. Such an approach would recognize that protecting religious freedom also means limiting the kind of religious reasons that count as public reasons in state expression. Specifically, there should be a two-pronged analysis of the constitutionality of state sponsored prayer that reflects the requirements of the anti-theocracy and equal status principles.

First, the Court should ask whether the content of a state-sponsored prayer aims at a secular purpose that non-religious citizens can share. In contrast to Justice O'Connor's endorsement test from *Allegheny*,[122] the fact that the state prayer is sectarian should not automatically rule it out. Martin Luther King's speeches, quoted in the government's King Memorial, often drew on his own religious background and sectarian references in order to endorse the secular purpose of equal protection of the law.[123] If prayers in the spirit of King's approach to public speech, combining religious and secular reasoning, were offered at beginning of a legislative session, they would be compatible with the anti-theocracy principle. Far from making one religion the exclusive domain of the state, they would express the compatibility of religions and a plurality of viewpoints beyond those of co-religionists.

A second requirement of the anti-theocracy principle is respect for the equal status of citizens, including citizens who are non-Christian or non- religious. Some legislative prayers clearly fail this standard. A recent prayer in the Minnesota state legislature purported to invoke Jesus Christ as the fundamental and exclusive authority as ruler of the United States.[124] This prayer criticized President Obama's administration for failing to recognize Jesus as the highest leader of the United States.[125] Opening a legislative session with such a prayer fails the first

122. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 623–637 (1989), *abrogated by Galloway*, 572 U.S. 565.

123. KING, *supra* note 65.

124. Jay Weiner, *LegislativeFirestormErupts OverBradleeDean's Prayer*, MINN. POST (May 20, 2011), http://www.minnpost.com/politics-policy/2011/05/legislative-firestorm-erupts-over-bradlee-deans-prayer.

125. *Id.*

secular independence prong of the anti-theocracy principle because it attempts to use the government as a vehicle for solely sectarian ends. The Minnesota state prayer also violates the equal status prong of the anti-theocracy principle because it expresses hostility to non-Christian citizens.

An objection to the limits on religious speech mandated by the anti-theocracy and equal status principles might emphasize that I am ignoring problematic secular state speech. The critic might claim that I focus only on cases where religious state speech fails the test of the anti-theocracy principle. I have argued, however, that secular government speech must also avoid denigrating religious minorities. For example, my analysis of *Summum* suggests that the anti-theocracy principle is violated when a religion is denigrated, regardless of whether the reason for denigration is secular or religious. I also have recognized that secular state speech might lack legitimate purpose in cases outside of religion. The display of the Dixie flag, given its association with the slave-owning Confederacy, is an example of secular state speech that would violate the animus doctrine.[126] These restrictions on secular state speech show that the limits on religious state speech are not unique. Just as some secular reasons for law can violate the equal status principle, so too can some secular state speech.

Some might object that it would violate free speech to evaluate different kinds of state prayer based on their content under the anti-theocracy and equal status principles. I have argued, however, that when the state speaks, it has distinct obligations under the Constitution. Private individuals have the right of free expression to say what they wish. But the state has additional responsibilities since it speaks on behalf of all citizens and has the power to impose laws. For that power to be legitimate, the state, when it speaks and acts, must respect the equal status of all the citizens it rules. The reasons that the state can express or enact binding laws raise a separate set of issues from the right of free speech held by private individuals. The anti-theocracy and equal status principles limit the kinds of reasons that the state can express or act on as the government. It would be unconstitutional for the state to send

126. Corey Brettschneider, *Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies*, 79 BROOK. L. REV. 1059, 1063 (2014).

messages about the inferiority of some religions or to speak in a way that implies the inequality of non-religious persons.

Another objection might be that by allowing some religious government sponsored speech, including prayer, instead of banning all of it risks crossing the boundary of "excessive entanglement" prohibited by the third prong of *Lemon*.[127] In addition to *Lemon*'s requirement that government policies have a secular legislative purpose, the third prong of *Lemon* prohibits policies that overly involve the government in religious matters.[128] But once some prayer is constitutionally allowable, as the *Town of Greece* decision made clear, the question is no longer how to separate religion from state speech. The issue is instead how to ensure that the state does not engage in types of theocratic speech that violate the fundamental values of the Constitution. I have argued that can be done through an appeal to the anti-theocracy and equal status principles.

V. THE COURTS EMBRACE OF LAW-MAKING AT ODDS WITH THE ANTI-THEOCRACY AND EQUAL STATUS PRINCIPLES

I have offered a normative defense of the anti-theocracy and equal status principles under the Equal Protection, Free Exercise, and Establishment Clauses. But my argument that these two principles offer the best account of the Constitution and my examination of how this normative view is located in past Supreme Court cases by no means implies a prediction about the Supreme Court's future path in these areas of law. Recently, the Supreme Court has strayed from these principles. Indeed, it has charted a collision course with them. My normative argument so far about how the Court should interpret these three clauses is also a basis for a critique of its most recent opinions, particularly when it comes to issues that pit religious freedom against LGBTQ rights.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court considered whether a Colorado Civil Rights Commission's denial of an exemption to a baker who refused to bake a cake for a

127. Lemon v. Kurtzman, 403 U.S. 602, 603, 624–25 ("As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.").

128. *See id.* at 612–14.

same-sex wedding violated the Free Exercise Clause.[129] The Court, relying on *Lukumi*, ruled that several of the statements by a commissioner at the meeting were evidence of animus toward the baker, rendering the Commission's denial of the exemption unconstitutional.[130] Specifically, Justice Kennedy pointed to two statements made by the Colorado commissioners as evidence of an animus-based motive for the Commission's denial of the exemption.[131] The first, Kennedy admitted, was ambiguous as to the question of animus.[132] The first commissioner said that "if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."[133] The second, Scalia argued, was clearly based in unconstitutional animus.[134] Here the other commissioner said,

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[135]

In his opinion, Kennedy said it was specifically the claim that "one of the most despicable pieces of rhetoric that people can use" is to invoke religious beliefs to discriminate that amounted to animus because it amounted to calling the baker's beliefs "despicable" and "merely rhetorical."[136] But in the ruling, Justice Kennedy misstates and wrongly applies the doctrine he had developed in cases like *Lukumi*, *Romer*, and *Town of Greece*. As I have argued, those decisions amount to the proposition that when religious reasons that violate the anti-theocracy or equal status principles are used to create laws or as the basis for government

129. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1720 (2018).
130. *Id.* at 1731–32.
131. *Id.* at 1729.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*

speech, that government acts unconstitutionally when it discriminates against or disparages gays. In other words, the doctrine itself in these cases affirms the councilman's contention that some religious reasoning aimed at discrimination has no place in public policy. Of course, the councilman calls that kind of reason "despicable" and "merely rhetorical,"[137] but understood as an explication of the Court's own jurisprudence, those terms can be understood not as disparagements of religion but statements about the inappropriateness of discriminatory religious beliefs as a basis for lawmaking. Far from conflicting with the Court's own idea of "animus," the councilman can be understood as merely stating what the Court held in *Romer* and *Lukumi*, ruling that some religious reasons were illegitimate bases for law.[138]

Like *Masterpiece*, the Court's decision in *Fulton v. City of Philadelphia* misstates the logic of *Lukumi* in a decision ruling that Catholic Social Services (CSS) was denied its free exercise rights when the city denied it an exemption to a non-discrimination requirement for providing adoption service.[139] The Court in *Fulton* drew an analogy between the Hialeah city council's granting of exemptions for Muslim and Jewish slaughter but not for the Santeria practice of animal slaughter and the city's creation of a system of exemptions that it refused to apply to CSS's application for an exemption.[140]

But that analogy is confused and strained. In *Lukumi*, the Court criticized exemptions that were gerrymandered solely on the basis of religion.[141] In *Fulton*, the city was refusing to grant exemptions to those who were discriminating against gays for religious reasons.[142] Far from being at odds with the Court's ruling in *Lukumi*, Philadelphia's policy actually reflects the *Lukumi* Court's logic in seeking to avoid religious justifications inappropriately influencing government policy. In *Lukumi*, the Court rebuked those city councilmen who refused to bracket their religious beliefs about the

137. *Id.*

138. *See* Romer v. Evans, 517 U.S. 620, 634–35 (1996); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993).

139. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021).

140. *Id.* at 1876–77.

141. *Lukumi*, 508 U.S. at 535.

142. *Fulton*, 141 S. Ct. at 1874–76.

truth or falsity of the Santería religion.[143] The City of Philadelphia was trying to avoid that fate by asking CSS, as a conduit of its own adoption policy, to bracket its religious beliefs about the suitability of gays for parenthood when facilitating adoptions. Philadelphia's policy was a rightful way of seeking to avoid violating the anti-theocracy and equal status principals at the core of the Court's free exercise doctrine—not a violation of it.

CONCLUSION

The Establishment Clause is sometimes thought to be an outlier among constitutional protections. Whereas many constitutional protections focus on the rights of the claimant, Establishment Clause jurisprudence is often focused on the legitimate purposes of the state. In particular, the Establishment Clause constitutionally bars the state from expressing theocratic views. I have argued, however, that the constitutional principles operating to limit religious expression by government is no anomaly. The principles at the core of the Establishment Clause are also fundamental to the logic of the Free Exercise and Equal Protection Clauses in that those clauses limit theocratic reasoning as the basis for law as well as religious reasons that do not comport with the equal status of persons regardless of race, gender, or LGBTQ identity. That limit on religious reasons is found in the animus and secular purpose doctrines that are relevant to the Free Exercise, Equal Protection, and Establishment Clauses.

But because of the Court's rulings in *Masterpiece* and *Fulton*, it appears that something quite different from those principles will guide the Court in the future. The more the Court strays from these principles, the more it risks affirming exactly the kind of thinking that Madison, with Locke's influence, crafted the First Amendment to avoid. The risk is that, far from protecting religious freedom in the future, the Court will begin to protect theocratic reasoning within lawmaking. This would be a constitutional tragedy of the highest order, undermining the philosophy behind the protections of religious freedom at the heart of the First Amendment.

143. *See Lukumi*, 508 U.S. at 540–42.