

## Animus and its Discontents

William D. Araiza

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## ANIMUS AND ITS DISCONTENTS

*William D. Araiza\**

### Abstract

The concept of “animus” has taken center stage in high-stakes constitutional rights adjudication. Both in major equal protection cases and, more recently, in litigation over President Trump’s immigration bans and religion-based denials of commercial services to lesbians and gays, animus has emerged as a favored doctrinal tool of courts committed to protecting individual rights against majoritarian oppression. Despite—or perhaps because of—its prominence, the animus concept has remained controversial. Scholars have remarked on the difficulty of uncovering animus, its tendency to inflame the culture wars, and its potential to distract attention from other doctrinal paths that might be viewed as more promising for emerging social groups. At the same time, other scholars have attempted to create a workable animus doctrine from the Supreme Court’s under-theorized applications of the concept in well-known cases such as *Romer v. Evans* and *City of Cleburne v. Cleburne Living Center*.

This Article considers the arguments made by both the critics and defenders of the animus concept. After recounting the concept’s rise to prominence and scholars’ responses to that rise, it presents an approach to animus that both fits the Court’s analyses of the issue and harmonizes it with its approach to a closely related doctrine: discriminatory intent. This proffered approach answers the critics by explaining how courts can competently detect animus while mitigating the worst effects of an animus finding on public discourse on deeply contested concepts, and by suggesting how animus doctrine can benefit equal protection law more generally. That approach also fills in holes left by other scholars’ constructions of animus doctrine and refocuses animus away from mistaken directions implied by some of those constructions.

This Article then proceeds to contextualize animus within the broader sweep of American constitutional law by exploring the parallels between the animus concept and the nineteenth-century idea of class legislation. For over a century, the class legislation idea provided the prime organizing principle for state, and later, federal, courts’ enforcement of equality rights under both state constitutions and the U.S. Constitution.

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By connecting that older idea with modern animus doctrine, this Article aspires both to provide a stable doctrinal grounding for the animus concept, and, in turn, to secure modern equal protection law on a firmer, more historically legitimate, foundation.

This Article concludes by speculating more generally about the nature of constitutional rights adjudication. In particular, it considers whether such adjudication can ever hope to fully avoid the critique, leveled against the animus concept, that it necessarily involves name-calling that embitters the losing side and makes long-term social accommodation more difficult. This Article suggests that this unfortunate dynamic may often be inevitable, rather than simply a result of courts' use of animus-based reasoning.

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## INTRODUCTION

These should be halcyon days for the concept of animus in equal protection law and constitutional law more generally. The concept, grounded doctrinally in the Court’s famous statement that “a bare . . . desire to harm a politically unpopular group”<sup>1</sup> can never constitute a legitimate government interest, and more foundationally in the requirement that government be allowed only to pursue public-regarding interests,<sup>2</sup> has played a key role in significant court decisions in recent decades.<sup>3</sup> It served as the foundation for the Supreme Court’s 1985 decision striking down the government’s exclusionary zoning decision in *City of Cleburne v. Cleburne Living Center*.<sup>4</sup> Coming as it did at the end of an opinion that effectively ended the Court’s experimentation with political process-based suspect class analysis, *Cleburne*’s animus rationale can be understood (at least in retrospect)<sup>5</sup> as having pointed the way toward a new approach to equal protection, at least for groups who had not already won suspect or quasi-suspect class status by then.

Since *Cleburne*, the animus idea has continued to be generative. Most notably, it has been largely responsible for the impressive string of equal protection victories won by gay and lesbian rights advocates at the Court,

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1. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

2. See, e.g., H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 275 (2011) (“The baseline of the American constitutional order is a government that acts rationally, but not merely in the sense that it has reasons for what it does; rationality in traditional thought has also meant that government’s actions are undertaken in good faith and for reasons that are generally seen to be appropriate.”).

3. See, e.g., Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 183 (“Across four decades, the concept of animus has emerged from equal protection doctrine as an independent constitutional force.”).

4. 473 U.S. 432, 446–48 (1985).

5. It should be noted that the conjoining of the Court’s de facto rejection of suspect class analysis and embrace of the animus concept was not something the justices intended. See William D. Araiza, *Was Cleburne an Accident?*, 19 U. PA. J. CONST. L. 621, 622 (2017) (explaining, based on a study of the justices’ publicly available records, that the *Cleburne* Court’s animus analysis was an afterthought that was not consciously understood as the logical follow-up to its rejection of suspect class status for the intellectually disabled plaintiffs in that case).

in particular, *Romer v. Evans*<sup>6</sup> and *United States v. Windsor*.<sup>7</sup> It also provided the foundation for Justice O'Connor's equal protection-based concurrence in *Lawrence v. Texas*,<sup>8</sup> and it arguably percolated under the surface of Justice Kennedy's 2015 majority opinion in *Obergefell v. Hodges*.<sup>9</sup> The Court's embrace of this idea has been noticed by lower courts, which over the last one and a half decades have shown themselves more and more willing to decide cases on this ground.<sup>10</sup> Most recently, animus played an important role in several of the lower court opinions invalidating the executive orders issued by President Trump to limit immigration from majority-Muslim nations.<sup>11</sup> The Supreme Court also engaged the animus allegation, even if the majority in *Trump v. Hawaii*<sup>12</sup> concluded that animus did not motivate the final iteration of the Trump immigration orders.<sup>13</sup> By contrast, the Court did embrace an animus rationale in its much-anticipated Free Exercise Clause case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.<sup>14</sup>

The fact that the travel ban opinions and *Masterpiece* spoke, respectively, of animus against religions and against religious believers, and thus grounded their opinions on one or both of the First Amendment's

6. 517 U.S. 620, 635 (1996) (striking down a Colorado constitutional amendment as a status-based "classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit").

7. 133 S. Ct. 2675, 2694 (2013) (holding that the Defense of Marriage Act's "principal effect [was] to identify a subset of state-sanctioned marriages and make them unequal").

8. 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the judgment) ("I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.").

9. 135 S. Ct. 2584 (2015). Indeed, such percolation should not be surprising, given that Justice Kennedy wrote the majority opinions in *Romer* and *Windsor*. The dignity focus that permeated Justice Kennedy's opinion in *Obergefell*, and which provides at least some indirect connection to the animus idea, was also prominently featured in Justice Kennedy's majority opinion in *Lawrence v. Texas*. See 539 U.S. at 567 ("[A]dults may choose to enter upon [a] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

10. See, e.g., *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1210–11 (D. Idaho 2015) (striking down Idaho's "ag-gag" law as based on unconstitutional animus), *aff'd in part and rev'd in part sub nom.*; *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200–01 (9th Cir. 2018); *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1163–64 (S.D. Ind. 2014) (striking down state same-sex marriage ban as based in animus); *De Leon v. Perry*, 975 F. Supp. 2d 632, 655 (W.D. Tex. 2014) (same); *Henry v. Himes*, 14 F. Supp. 3d 1036, 1044 (S.D. Ohio 2014) (striking down state refusal to recognize out-of-state same-sex marriages as based in animus); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 995–96 (S.D. Ohio 2013) (same).

11. See *infra* Section I.B (discussing the travel ban litigation).

12. 138 S. Ct. 2392 (2018).

13. See *id.* at 2421 (explaining that the President's issuance of the challenged order came only after the completion of "a worldwide review process undertaken by multiple Cabinet officials and their agencies" and thus was not motivated by animus, despite the various anti-Muslim statements the President made both as a candidate and as president).

14. 138 S. Ct. 1719, 1737 (2018).

religion clauses, rather than the Equal Protection Clause,<sup>15</sup> suggests the flexibility and portability of the animus concept. These characteristics will presumably make that concept all the more useful as the nation confronts the prospect of renewed xenophobia and deep cultural conflict on matters including but extending beyond religion.<sup>16</sup>

And yet, prominent scholars raise troubling questions about the wisdom, coherence, or staying power of the animus concept. Steven Smith and others have criticized the idea for its potential to inflame political and cultural disagreement, given the allegedly disparaging connotation of “animus.” Indeed, Professor Smith has gone so far as to label such a doctrinal approach “the jurisprudence of denigration.”<sup>17</sup> Other scholars have made similar arguments to courts. Indeed, in an amicus brief in a pre-*Obergefell* same-sex marriage case, a group of prominent legal scholars took the unusual position of urging the Court to grant certiorari in one of the marriage cases without taking a position on the proper outcome.<sup>18</sup> Instead, they urged the Court simply to reject the idea that laws prohibiting same-sex marriage were enacted out of animus.<sup>19</sup> Echoing Professor Smith, these scholars warned that finding that those laws were motivated by animus would “unnecessarily vilify” those who oppose same-sex marriage and thereby “chill public debate.”<sup>20</sup> They also argued that such motivations were fundamentally unknowable, suggesting that voters who supported initiatives banning same-sex

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15. See, e.g., *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 557 (4th Cir. 2017) (affirming an injunction based on plaintiff’s likely success on showing that President Trump’s travel ban violated the Establishment Clause).

16. See, e.g., Andrew Keshner, *Trump’s ‘Anti-Latino Commentary’ Could Play into Brooklyn Judge’s Decision in DACA Case*, N.Y. DAILY NEWS (Jan. 30, 2018, 4:27 PM), <http://www.nydailynews.com/new-york/brooklyn/judge-trump-anti-latino-speech-daca-case-article-1.3788610> [<https://perma.cc/2UNU-9EZH>] (explaining that President Trump’s previous demonstrations of anti-Latino sentiment “could be used against [him]” when courts consider the legality of his proposed ending of the Dreamer program).

17. See, e.g., Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 677–78 (2014) [hereafter Smith, *Denigration*] (“[B]y maintaining and contributing to . . . destructive discourse, [animus jurisprudence] aggravates the conflict that is often described, with increasing accuracy, as the ‘culture wars.’”).

18. See, e.g., Brief of *Amici Curiae* Steven G. Calabresi, Daniel O. Conkle, Michael J. Perry, and Brett G. Scharffs in Support of Certiorari and Opposing a Ruling Based on Voters’ Motivations at 2, *Herbert v. Kitchen*, 135 S. Ct. 265 (2014) (No. 14-124) [hereinafter Calabresi Brief] (urging the Court to grant review in a same-sex marriage case, but, without arguing for a particular result, simply arguing that the Court should reject an animus justification for striking down state same-sex marriage bans).

19. *Id.* at 3.

20. *Id.* at 9.

marriage “without doubt acted from a number of motivations, many entirely unrelated to animus.”<sup>21</sup>

Other scholars critique animus from other perspectives. Most notably, Katie Eyer has characterized the animus concept as “descriptively misleading and substantively problematic,” as part of her call for more robust rational basis review across the board, rather than only in particular cases where a court suspects animus.<sup>22</sup> Writing both from a pedagogical standpoint, but also out of concern for shaping judges’ and lawyers’ perceptions of the plausibility of rational basis argumentation, she urges that those cases not be excised, as *sui generis* “animus cases,” from what she calls “the rational basis canon.”<sup>23</sup>

Even scholars more sympathetic to the animus project have sometimes laid bare problems and challenges the doctrine poses. Most notably, Susannah Pollvogt and Dale Carpenter have defended the usefulness of the animus idea and laid out approaches for a judicially workable animus doctrine.<sup>24</sup> Their approaches, however, leave unanswered important questions about how courts should identify animus and what the consequences should be of a decision that animus at least partially infected a government action.

Writing in a related but distinct vein, Carlos Ball has attempted to distinguish between different instances of anti-gay discrimination for purposes of identifying animus.<sup>25</sup> He endorsed the Court’s conclusion in *Windsor* that the Defense of Marriage Act was motivated by animus.<sup>26</sup> But he also defended Justice Kennedy’s opinion in *Obergefell* against the charge, leveled by Chief Justice Roberts’s dissent, that the majority opinion unfairly characterized same-sex marriage opponents as bigots.<sup>27</sup> Professor Ball’s careful distinction between Kennedy’s analysis in these two cases, and his description of *Obergefell* as based in something other than a dismissal of same-sex opponents as bigots, requires a nuanced understanding of how different types of discrimination relate differently to animus. In particular, it requires an understanding of how animus relates both to the concept of bigotry and to the dignitary harms Justice

21. *Id.*

22. Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1322 (2018).

23. *Id.* at 1320, 1336.

24. See Carpenter, *supra* note 3, at 184 (“[T]he constitutional anti-animus principle remains an unappreciated one.”); Susannah Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 888 (2012) (advancing a “comprehensive understanding of unconstitutional animus”).

25. Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 646–48, 661 (2016).

26. *Id.* at 639.

27. *Id.* at 640.

Kennedy sought to remedy by rejecting the constitutionality of same-sex marriage bans in *Obergefell*.<sup>28</sup>

The critiques noted above are serious, and the holes and ambiguities they identify in animus doctrine are real. If animus doctrine is to have a future—particularly in equal protection but also in constitutional law more generally—it will have to develop responses, or, perhaps more accurately, it will need to be adapted to blunt the strongest versions of these critiques. This Article considers these objections—and, in the case of sympathetic scholars, their insights—as part of a larger project of constructing a theory and doctrine of animus that can lay legitimate claim to a place in the Court’s constitutional law jurisprudence. It does so by constructing a workable animus doctrine, answering critics of the animus idea, and, finally, contextualizing the animus idea within the broader sweep of American constitutional law. It performs this work in the hope that courts—including, but not only, the Supreme Court—will find themselves willing to deploy animus reasoning when appropriate, confident that they are applying a doctrinally coherent concept that is firmly grounded in the aspirations of those who drafted and ratified the Fourteenth Amendment.

Part I of this Article lays the necessary groundwork by briefly recounting the recent history of the animus concept in constitutional law, focusing mainly, but not exclusively, on Supreme Court equal protection decisions employing that concept. Part I presents the current state of play of equal protection animus before the rest of this Article presents and considers the objections to and glosses on the idea that scholars have proffered.

Part II presents those objections and glosses. It begins with the objections. As noted above, the critiques of animus fall into two main categories. First, some critics object to animus based on concerns about the effects on legal and political discourse of courts accusing some participants in democratic debate of acting at the behest of something as distasteful as “animus.”<sup>29</sup> Some of those same critics also raise a more practical objection, arguing that it is simply impossible to confidently

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28. See *id.* at 649 (“Kennedy’s opinion [in *Obergefell*] . . . focuses on the *effects* that excluding same-sex couples from the opportunity to marry had on sexual minorities and their children.”).

29. See, e.g., Smith, *Denigration*, *supra* note 17, at 677 (“[T]he Supreme Court aggravates the conflict that is often described . . . as the ‘culture wars.’”); see also Calabresi Brief, *supra* note 18 (“The accusation of animus . . . violates the integrity and aspirations of our shared political discourse.”); Dan O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 40 (2014) (“[A] finding of legislative ‘animus’ is insulting and disrespectful . . .”); *infra* Section II.A (presenting this critique).



determine whether a given law was enacted out of animus.<sup>30</sup> Second, critics such as Katie Eyer worry that focusing on animus, or identifying animus as the *ratio decendi* for the cases Part I identifies, throws equal protection doctrine onto the wrong track. Professor Eyer worries that the “animus” label misdescribes those cases and implicitly submerges the usefulness of standard rational basis review as a tool for emerging social groups to gain legal vindication for their equality claims.<sup>31</sup>

Part II then turns to those scholars who have embraced the animus idea, either normatively or as an accurate description for what the Court has in fact done. It focuses on Susannah Pollvogt and Dale Carpenter, scholars who have written thoughtfully about equal protection animus,<sup>32</sup> and on Carlos Ball, who has carefully distinguished animus from other phenomena that might similarly support decisions rejecting particular instances of discrimination.<sup>33</sup> This Part sketches out Professors Pollvogt and Carpenter’s theories of animus—what it is, how one finds it, and the significance of a court determination that it exists in a given situation. But it also notes where Professors Carpenter and Pollvogt’s analysis potentially fall short.

Part III answers both the critics and the adherents of the animus doctrine. It begins by presenting a reconstructed animus doctrine that addresses both how a court should find animus and what an animus finding should mean.<sup>34</sup> This reconstructed doctrine fills in gaps left by Professor Pollvogt’s evocative but incomplete analysis. Part III then considers the denigration critique identified in Part II.<sup>35</sup> In turn, Part III explains how this reconstructed picture of animus doctrine relates both to rational basis review and heightened scrutiny under the equal protection clause.<sup>36</sup> In so doing, it respectively responds to Professor Eyer’s concerns about animus’s impact on the understood meaning of rational

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30. See, e.g., Calabresi Brief, *supra* note 18, at 10 (“[T]here is no analogue for attributing shared, common intent to millions of citizens across the nation who have voted on a myriad of proposals regarding same-sex marriage.”); see also *infra* Section II.B (presenting this critique).

31. See Eyer, *supra* note 22, at 1356 (arguing that, so far, the canon of rational basis review has “fail[ed] to provide an accurate accounting of the scope and significance of meaningful rational basis review”); see also *infra* Section II.C (presenting this critique).

32. See Carpenter, *supra* note 3, at 184 (arguing that animus doctrine is “unappreciated” and has continuing utility); Pollvogt, *supra* note 24 (advancing a “comprehensive understanding of unconstitutional animus”).

33. See Ball, *supra* note 25, at 641 (examining the role of bigotry arguments and findings of animus).

34. See *infra* Section III.A.

35. See *infra* Section III.B.

36. See *infra* Section III.C.

basis review<sup>37</sup> and refocuses Professor Carpenter's explanation of the mechanics of animus doctrine.<sup>38</sup>

Part IV concludes this Article by contextualizing the animus principle in the broader sweep of American constitutional law.<sup>39</sup> In particular, it highlights the similarity between that principle and the nineteenth-century prohibition on class legislation.<sup>40</sup> To be sure, these two ideas arose in very different historical circumstances. But they aimed at a similar constitutional wrong: the imposition of burdens on groups—often disliked groups—for no legitimate public purpose. Understanding the animus principle as the modern descendant of the class legislation prohibition helps legitimize the Court's emerging animus doctrine as an important part of the Court's overall Fourteenth Amendment jurisprudence. Part IV then considers how *Obergefell v. Hodges*' intertwining of due process and equality<sup>41</sup> provides an additional point of comparison between modern Fourteenth Amendment cases and class legislation cases.<sup>42</sup>

Part IV ends by returning, for a final time, to the denigration critique.<sup>43</sup> This final consideration takes a broader view, and speculates about whether the entire project of constitutional rights adjudication necessarily requires some form of the name-calling Professor Smith and others have found so troubling in animus cases. It considers whether doctrinal paths are open to the Court that would allow it to decide individual rights cases without necessarily casting aspersions on those who oppose the rights claim at issue. It closes by expressing doubt as to whether this is possible.

## I. ANIMUS TRIUMPHANT

As the Introduction stated, animus—and equal protection animus in particular—has emerged as a central concept in American constitutional jurisprudence. In the equal protection context, animus has stepped into the void left by the Supreme Court's abandonment of suspect class analysis and furnished an alternative approach to analyzing at least some important equal protection issues. More recently, it has migrated into other constitutional rights areas.

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37. See *infra* Section III.C.1.

38. See *infra* Section III.C.2.

39. See *infra* Section IV.

40. See *infra* Sections IV.A–B.

41. Cf. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (“*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity* . . .”).

42. See *infra* Section IV.C.

43. See *infra* Section IV.D.

### A. *The Rise of Animus*

At the modern Court, animus can trace its foundations to the 1973 case *Department of Agriculture v. Moreno*.<sup>44</sup> In that case, Justice Brennan, writing for the Court, famously stated that “a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>45</sup> Of all of what were to become the canonical animus cases, *Moreno* was in many ways the easiest to decide, given the explicit (if sparse) legislative history reflecting a straightforward desire among at least some congresspersons to harm a disliked group (“hippies” and their “communes”).<sup>46</sup>

*Moreno*’s seeds eventually bore fruit. A dozen years later,<sup>47</sup> in *City of Cleburne v. Cleburne Living Center*, the Court held that a city’s decision to prohibit the establishment of a group home for intellectually disabled persons in a residential neighborhood violated the Equal Protection Clause, because it was based on “irrational prejudice.”<sup>48</sup> The Court’s sequencing of its analysis—its preliminary decision denying suspect class status to the intellectually disabled and its subsequent conclusion that the city’s decision was tainted by “prejudice”—has led to speculation that its suspect class analysis somehow set up or provided the foundation for its animus conclusion.<sup>49</sup> Recent scholarship calls that causal relationship into serious question.<sup>50</sup> Nevertheless, even if the connection was unintended, those two aspects of the decision have been understood, at least in retrospect, to mark both the end of the Court’s decade-and-a-half long experimentation with political process-based suspect class

44. 413 U.S. 528 (1973).

45. *Id.* (emphasis added).

46. *See id.*

47. To be sure, cases before that date repeated *Moreno*’s warning about the lack of constitutional justification provided by “a bare . . . desire to harm a politically unpopular group.” *Id.* But in those cases, the Court found the requisite bad intent missing. *See* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 593 n.40 (1979) (finding that the challenged rule was “[q]uite plainly . . . [not motivated] by any special animus against a specific group of persons”); Johnson v. Robison, 415 U.S. 361, 383 n.18 (1974) (finding that no “single reference in the legislative history” of the Veteran Readjustment Benefits Act of 1960 supported appellee’s claim that the Act was intended to punish conscientious objectors). *But see* Beazer, 440 U.S. at 609 n.15 (White, J., dissenting) (taking issue with the majority’s finding of no animus, since the heroin addiction governed by the challenged rule “is a special problem of the poor, and the addict population is composed largely of racial minorities” and because “[p]ersons on methadone maintenance have few interests in common with members of the majority”).

48. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

49. *See, e.g.*, Phan v. Virginia, 806 F.2d 516, 521 n.6 (4th Cir. 1986) (characterizing Justice Marshall’s dissent in *Cleburne* as describing the majority’s “second order rational basis” analysis as “occur[ring] in cases in which the law in question approaches, but falls short of, the . . . suspect classifications usually triggering strict scrutiny” (quoting *Cleburne*, 473 U.S. at 458)).

50. *See* Araiza, *supra* note 5, at 624.

analysis<sup>51</sup> and the rise of a new approach to equal protection, which features a more granular approach to equality issues and a willingness to discredit at least some decisions as being tainted with unconstitutional animus.

A decade after *Cleburne*, the Court in *Romer v. Evans*<sup>52</sup> employed this new approach to strike down, for the first time in the Court's history, an instance of sexual orientation discrimination as violating equal protection. *Romer* concerned Colorado's Amendment 2, a voter-enacted initiative that sought to prohibit any person from stating a claim of protected legal status because of that person's gay, lesbian, or bisexual orientation.<sup>53</sup> The Court struck down Amendment 2.<sup>54</sup> Taking the next logical step after *Cleburne*, the Court concluded that, because it could not find any rational relationship between a legitimate government interest and the broad legal disabilities Amendment 2 imposed, animus remained as the only possible explanation for Amendment 2.<sup>55</sup> This step—inferring animus rather than, as in *Moreno*, finding direct evidence of it or, as in *Cleburne*, finding it as legislators' endorsement of their constituents' dislike of the group<sup>56</sup>—may have been necessary to the *Romer* Court, given that otherwise it would face the unpleasant task of explicitly accusing the citizenry of Colorado of acting out of bad motives,<sup>57</sup> based on a highly speculative inquiry into voters' motivations.<sup>58</sup>

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51. To be sure, the Court continues to apply the results of previous suspect class analyses. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (noting and applying the previously determined scrutiny level appropriate for sex classifications). Moreover, lower federal courts, as well as state supreme courts applying their own state constitutional equal protection provisions, have also continued to apply suspect class analysis to determine the scrutiny level appropriate for discrimination where suspectness has not previously been determined. *See, e.g.*, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 489 (9th Cir. 2014) (concluding that sexual orientation discrimination merited heightened scrutiny); *Varnum v. Brien*, 763 N.W.2d 862, 889, 907 (Iowa 2009) (concluding that, under the Iowa Constitution's equal protection provision, sexual orientation constitutes a quasi-suspect class).

52. 517 U.S. 620, 635–36 (1996).

53. As the text indicates, Amendment 2 did not speak to sexual orientation more generally, but instead focused on these particular orientations. *See id.* at 624 (quoting Amendment 2).

54. *Id.* at 635–36.

55. *Id.* at 632.

56. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (noting the trial court's finding that the City Council rested its decision in part on constituents' negative reactions to the would-be residents of the group home).

57. This concern might have been particularly salient in 1996, when an earlier round of the gay rights culture wars was in full bloom and when attitudes about homosexuality, while evolving, could not be fairly described as presumptively welcoming.

58. *See WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* 50–52 (2017); *see also, e.g.*, *Jones v. Bates*, 127 F.3d 839, 863 (9th Cir. 1997), *rev'd en banc*, 131 F.3d 843 (9th Cir. 1997) (striking down a voter-enacted referendum on the theory that the voters were not adequately informed about the effect of the issue on which they were asked to vote).

The next step in the progression of animus was expounded only by a single justice, Justice O'Connor, in her concurring opinion in *Lawrence v. Texas*.<sup>59</sup> In *Lawrence*, a five-justice majority voted to strike down Texas's sodomy law as violating the due process rights of gays and lesbians to engage in intimate conduct and, in the process, to overrule the Court's contrary decision in *Bowers v. Hardwick*.<sup>60</sup> Justice O'Connor, who had voted with the majority in *Hardwick*, relied instead on the Equal Protection Clause as authority for striking down the Texas law.<sup>61</sup> Her opinion surveyed the cases this Part has discussed up to now, and concluded that they stood for the proposition that "[w]hen a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."<sup>62</sup> Her synthesis of the *Moreno-Cleburne-Romer* trilogy confirmed, first, that those cases were indeed connected, and second, that their common characteristic—laws exhibiting a bare "desire to harm a politically unpopular group"—triggered "a more searching form of rational basis review."<sup>63</sup> Importantly, though, her brief analysis left open the question of whether such "searching" review would inevitably lead the law to be struck down or whether, instead, a law could feature such a problematic motivation and nevertheless survive judicial scrutiny.

The next case, and the final one to explicitly reference animus, was *United States v. Windsor*,<sup>64</sup> decided precisely one decade after *Lawrence*.<sup>65</sup> In *Windsor*, a five-justice majority held that Section 3 of the federal Defense of Marriage Act (DOMA) violated the equal protection component of the Fifth Amendment's Due Process Clause.<sup>66</sup> Section 3 defined marriage for federal law purposes as consisting only of a man and a woman, with the result that persons in same-sex marriages recognized

59. 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring in the judgment).

60. *See id.* at 578 (majority opinion) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

61. *Id.* at 579 (O'Connor, J., concurring in the judgment). Justice Antonin Scalia, joined by Chief Justice William H. Rehnquist and Justice Clarence Thomas, dissented. *See id.* at 586 (Scalia, J., dissenting).

62. *Id.* at 580 (O'Connor, J., concurring in the judgment). She also observed that strike-downs under that standard were "most likely . . . where . . . the challenged legislation inhibits personal relationships." *Id.*

63. *Id.* at 579, 580. To be sure, the five-justice majority also used language that suggested the same concern about the use of law to demean or harm. *See, e.g., id.* at 575 (majority opinion) (stating that *Bowers v. Hardwick's* "continuance as precedent demeans the lives of homosexual persons").

64. 133 S. Ct. 2675, 2693 (2013).

65. *Compare id.* at 2675 (date *Windsor* was decided), with *Lawrence*, 539 U.S. at 558 (date *Lawrence* was decided).

66. *See id.* at 2693.

by their home states<sup>67</sup> would not enjoy marital status for purposes of federal rights and responsibilities.<sup>68</sup> Writing for the Court, Justice Kennedy began by expressing concern that Section 3 contravened the normal deference the federal government showed to state-law definitions of marriage.<sup>69</sup> He acknowledged instances where the federal government had in fact rejected such state-law definitions, but he insisted that Section 3's omnibus approach, which altered "over 1,000 statutes and numerous federal regulations," "depart[ed] from [the] history and tradition of [federal] reliance on state law to define marriage."<sup>70</sup> As such, it constituted "[d]iscrimination[] of an unusual character" that merited "careful consideration" to determine its constitutionality.<sup>71</sup>

Applying such "careful consideration,"<sup>72</sup> Justice Kennedy concluded that Section 3 did in fact violate the Constitution.<sup>73</sup> Citing the legislative history and even DOMA's title, he concluded that the law "seeks to injure the very class New York [the same-sex marriage-recognizing state in question] seeks to protect" by granting same-sex couples the right to marry.<sup>74</sup> After citing *Moreno*'s now famous language about "a bare congressional desire to harm a politically unpopular group," he concluded that Section 3's refusal of federal marital status to same-sex couples validly married under their state's law "is strong evidence of a law having the purpose and effect of disapproval of that class."<sup>75</sup> With regard to purpose, he cited congressional debates, the statute's title, and even Congress's brief as an intervenor as support for his conclusion that that "interference with the equal dignity of same-sex marriages" was the statute's "essence."<sup>76</sup> With regard to DOMA's effect, he stated that the law "demeans" same-sex couples and "humiliates" their children.<sup>77</sup> Only in the last paragraph of his opinion did he conclude that the law lacked a legitimate government interest.<sup>78</sup>

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67. When *Windsor* was being written, eleven states and the District of Columbia recognized same-sex marriage. *See id.* at 2689.

68. *Id.* at 2694.

69. *Id.* at 2683.

70. *Id.* at 2692, 2694.

71. *Id.* at 2692 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

72. *Id.*

73. *Id.* at 2693.

74. *Id.*

75. *Id.*

76. *Id.* at 2681, 2693.

77. *Id.* at 2694.

78. *Id.* at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

The last case in this sequence, *Obergefell v. Hodges*,<sup>79</sup> has a more ambiguous relationship to animus. Unlike his earlier opinions in *Romer* and *Windsor*, Justice Kennedy's opinion in *Obergefell* did not explicitly condemn, as grounded in animus, the same-sex marriage bans the Court struck down; indeed, he described opposition to same-sex marriage as at least partly grounded in deep-seated religious and philosophical beliefs he characterized as "based on decent and honorable religious or philosophical premises."<sup>80</sup> Rather, as Professor Ball explained, Justice Kennedy focused on the deleterious *effects* of those bans on the couples that wanted to get married.<sup>81</sup> When combined with his earlier conclusion that same-sex marriage serves the same legitimate government purposes as does its opposite-sex counterpart,<sup>82</sup> these harms to the plaintiffs' dignity sufficed to condemn the bans, even though they were supported by religious and philosophical views that could not be condemned as illegitimate.

Together, these cases have created the raw materials for a meaningful equal protection animus doctrine. To be sure, they do not precisely and explicitly delineate the contours of such a doctrine; indeed, their analyses of the animus idea are seriously under-theorized. But the Court's recourse to animus reasoning in its key equal protection cases involving social groups that lack suspect or quasi-suspect status establishes the idea's importance in modern thinking about equality. As the next two sections explain, that idea has begun to influence other constitutional rights doctrines as well.

### B. *Animus in the Travel Ban Litigation*

Since *Obergefell*, and especially since the inauguration of President Trump, judicial reliance on the animus concept has continued to expand, particularly in litigation over the Establishment Clause.<sup>83</sup> Specifically, challenges to the three executive orders issued by the president imposing temporary immigration bans from several majority-Muslim countries

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79. 135 S. Ct. 2584 (2015).

80. *Id.* at 2602.

81. See Ball, *supra* note 25, at 649 ("Kennedy's opinion [in *Obergefell*] does not focus on questions of intent or animus; instead, it focuses on *the effects* that excluding same-sex couples from the opportunity to marry had on sexual minorities and their children.")

82. See *Obergefell*, 135 S. Ct. at 2599–602 (identifying four social purposes served by the institution of marriage and concluding that same-sex couples seeking to marry sought to serve those purposes as much as opposite-sex couples).

83. This is not to say that recent lower court decisions have not applied the animus concept to equal protection challenges beyond claims of sexual orientation discrimination. They have. See, e.g., *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1210–11 (D. Idaho 2015) (striking down Idaho's "ag-gag" law as based on unconstitutional animus), *aff'd in part and rev'd in part sub nom.* *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200–01 (9th Cir. 2018).

featured claims that those orders violated the Establishment Clause because they reflected anti-Muslim animus.<sup>84</sup> Those challenges enjoyed a fair degree of success,<sup>85</sup> until the Supreme Court rejected them in June 2018.<sup>86</sup>

While the ultimate fate of animus-based Establishment Clause challenges to these orders is now known, their successes in the lower courts—and, indeed, in gaining four votes at the Supreme Court—remains striking. Those orders rested on normally powerful arguments for judicial deference, given the national security foundation for the Administration’s argument<sup>87</sup> and the President’s broad power under immigration law.<sup>88</sup> Nevertheless, courts probed those orders’ national security *bona fides*<sup>89</sup> and statutory foundation, and in the course of those investigations they credited as probative of such animus statements made not just by President Trump after his inauguration, but also by candidate Trump (and his campaign aides, advisors, and spokespersons) during 2015 and 2016.<sup>90</sup> Courts’ willingness to pierce these various veils suggests the depth of their commitment to a vigorous judicial response to

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84. See, e.g., *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 557–59 (D. Md.) (finding such animus, and concluding that it amounted to a violation of the Establishment Clause’s requirement that government action impacting religion have a primarily secular motivation), *aff’d in part and vacated in part*, 857 F.3d 554 (4th Cir.), *vacated*, 138 S. Ct. 353 (2017). See generally *McCreary Cnty v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005) (stating that a secular purpose must not be “merely secondary to a religious objective”).

85. See, e.g., *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 256–57 (4th Cir.) (striking down one of these executive orders as motivated by anti-Muslim animus), *vacated*, 138 S. Ct. 2710 (2018); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 591, 601 (4th Cir.) (same), *vacated*, 138 S. Ct. 353 (2017); *Hawai’i v. Trump*, 245 F. Supp. 3d 1227, 1236 (D. Haw.), *vacated*, 859 F.3d 741 (9th Cir.) (same), *vacated*, 138 S. Ct. 377 (2017); *Int’l Refugee Assistance Project*, 241 F. Supp. 3d at 557–59 (same); *Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1136–39 (D. Haw. 2017) (same); *Aziz v. Trump*, 234 F. Supp. 3d 724, 737 (E.D. Va. 2017) (same); see also *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 627 (D. Md. 2017) (finding the third executive order not to have expunged the anti-Muslim animus of the previous order, and striking it down on that ground), *vacated*, 138 S. Ct. 2710 (2018). But see *Sarsour v. Trump*, 245 F. Supp. 3d 719, 739–40 (E.D. Va. 2017) (rejecting the anti-Muslim animus argument).

86. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

87. But see *Int’l Refugee Assistance Project*, 241 F. Supp. 3d at 562–63 (rejecting the national security rationale as secondary to the anti-Muslim animus rationale, despite the deference owed to the President’s judgments about national security).

88. But see *Hawaii v. Trump*, 859 F.3d 741, 769–82 (9th Cir.) (concluding that challengers to the second executive order had a high degree of probable success on their argument that the executive order exceeded the power Congress delegated to the President under the Immigration and Nationality Act), *vacated*, 138 S. Ct. 377 (2017).

89. See *Trump v. Hawaii*, 138 S. Ct. at 2404–23 (setting forth the national security vetting process and noting the nuances the challenged order eventually included).

90. See, e.g., *Hawai’i v. Trump*, 241 F. Supp. 3d at 1136–37.



plausible claims of animus-based government action.<sup>91</sup> Challengers to those orders looking for a silver lining in their Supreme Court loss can thus at least take heart from the judiciary's willingness to probe the government's motivations to some appreciable degree.

### C. *Animus in the Free Exercise Clause*

The Court's 2017–2018 term also witnessed the deployment of the animus idea in the context of a Free Exercise Clause challenge to the application of a state public accommodations law. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a seven-justice majority vindicated the claim of a baker who challenged, on free exercise grounds, the application of Colorado's public accommodations law to his refusal to provide a same-sex couple with a wedding cake.<sup>92</sup> As presented, the case posed a foundational conflict between the government's interest in ensuring equality for LGBT people, via their statutory protection under many states' public accommodations laws, and the rights of some people of faith to refuse to associate with same-sex marriage on religious grounds—an association that such persons often view as complicity in sin.<sup>93</sup>

Despite these weighty stakes—or perhaps because of them—the Court issued a very narrow ruling in *Masterpiece*. The Court, speaking through Justice Kennedy, found for the baker on the ground that the baker's religiously motivated claim for an exemption from the state law was not treated with the same respect that other such exemption claims received.<sup>94</sup> Instead, Justice Kennedy concluded that “[t]he Civil Rights Commission’s treatment of [the baker’s] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.”<sup>95</sup> In particular, he cited comments made by state agency adjudicators tasked with hearing the couple's discrimination claim that, according to Justice Kennedy, expressed their disdain for religiously motivated discrimination of the type in which the baker was engaging.<sup>96</sup> Justice Kennedy also found fault in the commission's

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91. See, e.g., *Int'l Refugee Assistance Project*, 857 F.3d at 572 (stating that the challenged executive order “drips with religious intolerance, animus, and discrimination”).

92. 138 S. Ct. 1719, 1723–24 (2018). For a detailed analysis of *Masterpiece* animus analysis, see Leslie Kendrick and Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018).

93. See *id.* at 1732.

94. See *id.* at 1730.

95. *Id.* at 1729.

96. See *id.* at 1729–30.

allegedly more favorable treatment of other bakers' secular-based claims for exemptions from the law.<sup>97</sup>

For Justice Kennedy, these features of the record of the administrative adjudication of the baker's liability under the state's public accommodations law reflected a "hostility to a religion or religious viewpoint."<sup>98</sup> Importantly, in scrutinizing that record for that "hostility," Justice Kennedy relied on his earlier opinion in *Church of Lukumi Babalu-Aye v. Hialeah*,<sup>99</sup> which itself borrowed from equal protection jurisprudence that provided guidance for courts seeking to determine whether a facially neutral law was in fact motivated by discriminatory intent.<sup>100</sup> While Justice Kennedy wrote the Court's opinion in *Lukumi*, his borrowing from equal protection jurisprudence gained the assent of only one other justice.<sup>101</sup> Thus, when in *Masterpiece* he cited and applied his earlier analysis from *Lukumi*, Justice Kennedy elevated that borrowing to the status of an opinion for the Court.<sup>102</sup> As this Article explores, the equal protection/discriminatory intent analysis that Justice Kennedy deployed in search of animus in *Masterpiece* will play a significant role in this Article's construction of a coherent animus doctrine more generally.

## II. ANIMUS ATTACKED AND EXPLAINED

The success of the animus argument in the gay rights cases since *Romer*, and its potential for broader applicability, both in equal protection law<sup>103</sup> and beyond,<sup>104</sup> has placed animus at the center of an intense scholarly debate. Critics of that concept have attacked it from several different perspectives, while scholars more sympathetic to the idea have attempted to flesh out its undertheorized components. This Part of the Article lays out these various arguments and notes their points of commonality and contention.

### A. Animus as "Denigration"

A foundational critique of the animus idea maintains that it reflects accusations of ill will and subjective prejudice. Expressed most colorfully

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97. See *id.* at 1730–31.

98. *Id.* at 1731.

99. 508 U.S. 520 (1993).

100. See *id.* at 540–42.

101. See *id.* at 522, 540–42.

102. See *Masterpiece*, 138 S. Ct. at 1731.

103. See *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1210–11 (D. Idaho 2015) (striking down Idaho's "ag-gag" law as based in unconstitutional animus), *rev'd sub nom.* *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200–01 (9th Cir. 2018).

104. See *supra* Section I.B.

by Professor Smith as “the jurisprudence of denigration,”<sup>105</sup> this critique explains such accusations as the natural result of the extreme lack of social consensus on fundamental questions of liberty and equality in modern American society. Professor Smith argues that, given such dissensus, accusations of this sort become the only potential point of social consensus left—namely, that acting out of “prejudice” or “animus” is unquestionably wrong.<sup>106</sup> Relatedly, he suggests that a jurisprudence founded on a search for such bad motives reflects courts’ limited competence, and, in particular, their inability to employ other types of reasoning methods, such as straightforward moral reasoning.<sup>107</sup> The problem, he argues, is that labelling conduct as animus-based does nothing to establish that, as a matter of such consensus, the conduct is indeed generally considered to be wrong.<sup>108</sup>

The results of such a jurisprudence are, to Smith and others of like mind, predictably bad.<sup>109</sup> Given that the subjects animus doctrine addresses often reflect deep-seated cultural anxieties—for example, about sexuality and gender identity—but also situations, such as that in *Cleburne*, where citizens feel other types of deep-seated unease with the group they are trying to segregate, it is easy for one side of the battle to lob accusations that the other side is acting out of “prejudice,”<sup>110</sup> “animus,” or “a bare . . . desire to harm . . . .”<sup>111</sup> According to Professor Smith, those accusations, combined with the nature of the underlying issues, simply poison the dialogue and compromise that he views as necessary exactly because of the deep-seated and incompatible nature of the views held by each side.<sup>112</sup>

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105. See Smith, *Denigration*, *supra* note 17.

106. See Steven D. Smith, *Against “Civil Rights” Simplism: How Not to Accommodate Competing Legal Commitments*, in UNIV. OF SAN DIEGO SCH. OF LAW LEGAL STUDIES RESEARCH PAPER SERIES 3, 4 (Research Paper No. 17-294, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2991883](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991883) [<https://perma.cc/QXD8-KZXX>] [hereinafter Smith, *Simplism*]; Smith, *Denigration*, *supra* note 17, at 690–96; see also *Romer v. Evans*, 517 U.S. 620, 636, 644 (1996) (Scalia, J., dissenting) (“Of course it is our moral heritage that one should not hate any human being or class of human beings.”).

107. See Smith, *Denigration*, *supra* note 17, at 696–97.

108. See *id.* at 691 (“No citations should be needed for the proposition that on many concrete moral questions—particularly but surely not exclusively in the realm of sexual morality—Americans disagree radically; what some Americans view as profoundly wrong, other Americans regard as wholly acceptable and sometimes even virtuous.”).

109. See, e.g., Smith, *Denigration*, *supra* note 17, at 700 (“It is hard to imagine a jurisprudence better calculated to undermine inclusiveness, destroy mutual respect, and promote cultural division.”).

110. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (“The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice . . . .”).

111. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

112. See Smith, *Denigration*, *supra* note 17, at 700.

Professor Smith is not alone in his bleak assessment of the consequences of court decisions grounded on an animus theory. For example, in 2014, an ideologically diverse group of legal scholars took the unusual step of submitting, in a pre-*Obergefell* same-sex marriage case, an *amicus* brief urging the Court to grant certiorari but arguing only that the Court should “correct” lower courts’ alleged over-emphasis on the animus aspect of its decision in *Windsor*.<sup>113</sup> These scholars’ negative focus—that is, their desire simply to have the Court retreat from the animus aspect of *Windsor* (or to “correct”<sup>114</sup> lower courts’ alleged over-emphasis on it)—appears to have flowed from their concerns about the implications of a conclusion that the same-sex marriage bans then at issue were grounded in animus. According to the scholars, such a conclusion “impugn[ed] the motives”<sup>115</sup> of the voters who enacted voter initiatives banning same-sex marriage.

Such “impugning,” these scholars argued, would generate negative social effects.<sup>116</sup> They argued that it would widen social strife on a deeply contested cultural issue, which in turn would make it more difficult for the anti-same-sex marriage side to accommodate itself to an adverse result.<sup>117</sup> The scholars also implied that the bitterness of such a defeat—and, conversely, the unambiguous moral high ground that the marriage rights forces would hold in the aftermath of an animus-grounded judicial triumph—would make it difficult to forge a post-marriage war compromise between public marriage rights and private conscience rights.<sup>118</sup>

These arguments also imply a deeper critique. Made most explicitly by Professor Smith,<sup>119</sup> this critique suggests that the animus idea reflects a type of “Manichean”<sup>120</sup> thinking that divides the world into saints (who reject views labelled as animus-driven) and sinners (who embrace such views). The critique maintains that such binary thinking not only renders

113. See Calabresi Brief, *supra* note 18, at 2–3.

114. See *id.* at 2.

115. *Id.* at 4–5.

116. *Id.* at 5.

117. See *id.* at 13–16; see also Smith, *Simplism*, *supra* note 106, at 8 (“The targets of such accusations—namely, those who are denigrated by distant outsiders as disingenuous and hateful even though they themselves know otherwise—are of course likely to feel resentful, abused, and alienated. Justified or not, these perceptions do not contribute to a healthy, positively engaged civic character.”).

118. See Calabresi Brief, *supra* note 18, at 13–16. For a statement that arguably illustrated their concerns, see Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/EH7D-RLCX>].

119. See Smith, *Simplism*, *supra* note 106, at 8–9.

120. See *id.* at 8.

impossible both compromise and post-war peace on the particular issue in question, but also undermines the foundations of democratic deliberation more generally by failing to recognize that fellow citizens have worldviews and motivations that merit respect, even if that respect takes the form of respectful disagreement.<sup>121</sup> Indeed, even the “saints”’ own self-image undermines the possibility of deliberation, given how such a distorted self-image makes self-knowledge impossible, or at least much harder to achieve.<sup>122</sup> Such “self-delusions”<sup>123</sup> render similarly unlikely the possibility of empathy with others’ views—not just on a given issue, but as a general matter. Regardless of their origin, the results of such polarized absolutism are obvious to anyone who follows political discourse in America today.

### B. *Animus as Unknowable*

On a far more prosaic note, scholars have also remarked on the difficulty of discerning when animus exists. This concern manifests itself most clearly in cases where the challenged action in question takes the form of a voter initiative, such as Amendment 2 in *Romer* or the same-sex marriage prohibitions that were enacted in the late 1990s and the 2000s.<sup>124</sup> In such cases, scholars insist on the fundamental unknowability of the motivations of a large and diverse group of voters passing judgment on a morally-fraught issue that might be rife with implications from a variety of perspectives, both practical and purely expressive, some obvious, some suspected, and others unpredictable.<sup>125</sup>

But concerns about legislative motivation extend beyond the context of voter-enacted initiatives. The question of legislatures’ motivations—whether they can be uncovered and if so, how and with what doctrinal effect—has occupied scholars and courts for over a generation.<sup>126</sup> Nor have courts been consistent on this question. Indeed, from remarking on

121. *But see* ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 31 (1996) (arguing that certain preferences should not be accounted for and respected in government decision-making because they reflect desires to oppress other groups).

122. *See* Smith, *Simplism*, *supra* note 106, at 9.

123. *Id.*

124. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 620 (1996).

125. *See* Calabresi Brief, *supra* note 18, at 9–13; *see also* Smith, *Simplism*, *supra* note 106, at 7 (“[A]rguments that centrally turn on ascriptions of animus to large classes of people are likely at best to vastly oversimplify a complex set of beliefs, perspectives, and motivations . . .”).

126. *See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971); *United States v. O’Brien*, 391 U.S. 367, 383–84 (1968); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1207 (1970); *see also* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 100–01 (1980) (arguing legislators may be susceptible to making decisions that benefit their own interest, but the Constitution is meant to prohibit that bias).

the difficulty of determining such intent in 1968<sup>127</sup> and flatly declaring the impossibility of that task three years later,<sup>128</sup> the Court enshrined a closely related concept, “discriminatory intent,” as a threshold equal protection requirement in 1976.<sup>129</sup> When combined with what is alleged to be the high-stakes nature of a finding of a particular type of intent—that is, “animus”<sup>130</sup>—this epistemological difficulty would seem to send a strong cautionary signal about widespread use of the animus idea.<sup>131</sup>

### C. *Animus as Incomplete and Misleading*

Katie Eyer criticizes the animus idea from a very different perspective. Critiquing what she describes as “the canon of rational basis review,”<sup>132</sup> she argues that animus “fail[s] to provide an accurate accounting of the scope and significance of meaningful rational basis review.”<sup>133</sup> Professor Eyer’s project seeks to unearth and display the phenomenon of rational basis review that is—to use her term—“meaningful,” with the goal of demonstrating the utility of garden-variety rational basis arguments to emerging social movements seeking recognition of their equality claims.<sup>134</sup>

Eyer does not deny that rational basis review often takes the ultra-deferential form reflected in well-known cases<sup>135</sup> such as *Railway Express v. New York*<sup>136</sup> and *Williamson v. Lee Optical*.<sup>137</sup> But she argues that such review can also be more searching; indeed, she claims that courts have often employed a more searching variety at the behest of social movements.<sup>138</sup> Professor Eyer’s project aims at revealing this additional facet of rational basis review in order to ensure that future litigators learn the potential usefulness of making rational basis claims, both to win victories *simpliciter* and to help encourage a judicial and extra-judicial conversation about that particular type of equality claim,

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127. See *O’Brien*, 391 U.S. at 383–84.

128. See *Palmer*, 403 U.S. at 224–25.

129. *Washington v. Davis*, 426 U.S. 229, 240 (1976).

130. See *supra* Section II.A.

131. See, e.g., Kendrick and Schwartzman, *supra* note 92, at 148 (noting this epistemological problem).

132. Eyer, *supra* note 22, at 1320. Eyer also critiques descriptions of some instances of rational basis review as distinct from, and explicitly sharper than, its traditional version. See *id.* at 1356–58.

133. *Id.* at 1356.

134. *Id.* at 1321.

135. *Id.* at 1367.

136. 336 U.S. 106 (1949).

137. 348 U.S. 483 (1955).

138. See Eyer, *supra* note 22, at 1320.

with the goal of achieving more explicit judicial and political protection.<sup>139</sup>

Eyer argues that a focus on animus impairs this archeological project by segregating cases described as animus cases, distinguishing them from “normal” rational basis cases, and thus reducing their usefulness as models for rational basis review.<sup>140</sup> She also expresses concern that the animus category tells a misleading story of constitutional change, since, as she observes, emerging social movements rarely find early success in having discrimination against them struck down as animus-based.<sup>141</sup> Rather, Professor Eyer argues that just as with the denomination of a group as a suspect class, the denomination of a particular type of discrimination as animus-based at best describes a more advanced stage of the group’s campaign for recognition.<sup>142</sup> Neither suspect class status nor rejection of such discrimination as animus-based springs fully formed at the start of that group’s constitutional litigation saga.<sup>143</sup> Her project, therefore, seeks to fill in that early gap, which almost necessarily implies a critique of the entire idea of an “animus doctrine.”

#### D. *Animus Distinguished and Explained*

A different group of scholars view the animus concept more favorably. While they differ in the details, these scholars agree that the animus concept merits a place in the Court’s equal protection doctrine. However, they suggest, in one way or another, cabining the doctrine or structuring it in a way that provides it with the soundest foundation possible.

##### 1. Animus Distinguished

One approach to animus cautions that it should not be appealed to as an all-purpose tool to challenge any particular type of discrimination. A leading example of this approach is Carlos Ball’s attempt to explain that *Obergefell* did not accuse same-sex marriage opponents of bigotry or animus.<sup>144</sup> Professor Ball notes that Justice Kennedy’s majority opinion focused on the demeaning *effects* of same-sex marriage bans on the same-sex couples who wished to marry, and on their children.<sup>145</sup> Since, according to Justice Kennedy, same-sex couples wished to marry for the reasons that society generally valued marriage, a state’s decision to “lock

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139. *Id.*

140. *Id.* at 1364.

141. *Id.*

142. *Id.* at 1358–59.

143. *Id.* at 1358.

144. Ball, *supra* note 25, at 648.

145. *Id.* at 649.

[gays and lesbians] out of a central institution of the Nation's society" "has the effect of teaching that gays and lesbians are unequal in important respects" and "demeans" them.<sup>146</sup> But Professor Ball notes that Justice Kennedy went out of his way to acknowledge the honorable foundations for much religious and philosophical opposition to same-sex marriage.<sup>147</sup> From analysis such as this, Professor Ball concludes that *Obergefell* did not accuse same-sex marriage opponents of bigotry.<sup>148</sup>

Much of the impetus for Professor Ball's careful analysis seems to have stemmed from the *Obergefell* dissents, which accused Justice Kennedy of leveling exactly this charge against same-sex marriage opponents.<sup>149</sup> But the import of his analysis extends beyond *Obergefell* and, indeed, beyond gay rights. Professor Ball's analysis warns us that a doctrinal tool such as animus cannot be applied uncritically to any instance of discrimination against a given group, even when a particular prior instance has in fact been condemned as grounded in animus. In other words, he cautions that animus cases such as *Windsor* (which he applauds) must sometimes be distinguished—even when, as in *Obergefell*, the same type of discrimination is challenged in a later case.<sup>150</sup>

This lesson is an important one. Within the ambit of gay rights, and indeed even same-sex marital rights, cases have already arisen that consider the limits of same-sex marriage opponents' rights to refuse to associate with or endorse such ceremonies (and potentially such statuses), either in their public or private capacities.<sup>151</sup> Most notably, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, discussed earlier,<sup>152</sup> considered the extent of a baker's free speech and free religious exercise rights to decline to provide a wedding cake for a same-sex marriage celebration. The Court's narrow resolution of that case makes it highly likely that further litigation will arise to flesh out the meaning of the Court's decision and, more generally, the balance between statutory equality rights and statutory or constitutional religious exercise rights.

146. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

147. See Ball, *supra* note 25, at 650.

148. *Id.* at 651.

149. See *Obergefell*, 135 S. Ct. at 2611, 2626 (Roberts, C.J., dissenting); *id.* at 2630 (Scalia, J., dissenting).

150. See Ball, *supra* note 25, at 642–46.

151. In their public capacities, such refusals might take the form of government officials refusing to assist in the solemnizing of a wedding. See, e.g., Sarah Pulliam Bailey, *Can LGBT Rights and Religious Rights Co-Exist? Kim Davis-like Case Tests the Waters*, WASH. POST (Feb. 7, 2018), [https://www.washingtonpost.com/news/acts-of-faith/wp/2018/02/07/can-lgbt-rights-and-religious-rights-coexist-kim-davis-like-case-tests-the-waters/?utm\\_term=.689306465a2b](https://www.washingtonpost.com/news/acts-of-faith/wp/2018/02/07/can-lgbt-rights-and-religious-rights-coexist-kim-davis-like-case-tests-the-waters/?utm_term=.689306465a2b) [<https://perma.cc/5H45-ANGN>].

152. See *supra* Section I.C.



Professor Ball’s caution about uncritical application of the animus principle tells us that such follow-up litigation—as well as other types of discrimination claims that will likely be made in the future<sup>153</sup>—must be analyzed carefully so that animus can only be applied when that principle truly applies to the facts of the given case.<sup>154</sup>

## 2. Animus Explained

A final set of scholars explicitly defend the anti-animus principle as a legitimate component of the Court’s equal protection jurisprudence. Most notably, Dale Carpenter and Susannah Pollvogt have each carefully analyzed the canonical animus cases and erected doctrinal structures that seek to define animus and guide courts presented with animus claims. Their analyses and resulting structures have done a great deal to advance our understanding of the concept of unconstitutional animus. But each leaves important questions unanswered.

Professor Carpenter’s analysis of animus comes in defense of the Court’s decision in *United States v. Windsor*, the case in which the Court struck down Section 3 of the Defense of Marriage Act.<sup>155</sup> Revealingly titled “*Windsor* Products: Equal Protection from Animus,” his analysis attempts to connect the Court’s canonical animus cases with its *Carolene Products*-based theory justifying more careful judicial review as an appropriate response to political process breakdown.<sup>156</sup> Moving from such high theory to practicalities, Professor Carpenter concludes his analysis by articulating a set of factors that help determine when animus exists and by applying those factors to DOMA.<sup>157</sup>

Carpenter’s analysis is important at both the level of theory and doctrinal practicality. His analysis connecting the anti-animus principle to concerns about political dysfunction reinforces a further linkage between that principle and the framing generation’s concern with faction.<sup>158</sup> This latter linkage is important because it contextualizes animus within the broader sweep of American constitutional law. In turn,

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153. See, e.g., *Doe v. Trump*, 275 F. Supp. 3d 167, 176–77 (D.D.C. 2017) (issuing preliminary injunction against application of President Trump’s order denying transgendered persons the right to serve in the military), *appeal dismissed*, No. 17-5267, 2018 WL 411236 (D.C. Cir. Jan. 4, 2018); see also *supra* note 151 and accompanying text.

154. See, e.g., Kendrick and Schwartzman, *supra* note 92, at 148 (observing that the Court in *Masterpiece* “adopt[ed] a totality-of-the-circumstances approach to determining whether officials have acted with animus” and expressing their agreement with that approach).

155. Carpenter, *supra* note 3, at 191.

156. See, e.g., *id.* at 226 (“Animus doctrine addresses the deeply problematic potential of a democratic republic to consistently oppress a politically unpopular minority, a concern articulated in *Carolene Products*.”).

157. *Id.* at 221.

158. See *id.* at 226–30.

such linkage helps make the case for animus as a legitimate component of modern equal protection law. In addition, his identification of practical criteria for determining the existence of animus in a given case helps provide a set of workable guideposts for courts considering claims of unconstitutional animus. Given the critique of animus as little more than pejorative name-calling,<sup>159</sup> the creation of a workable and objective doctrinal structure to assist in unmasking animus promises to aid courts when they consider whether animus constitutes a suitable judicial tool rather than simply a political cudgel.

Nevertheless, Carpenter's analysis is incomplete and in some ways flawed. It is incomplete in that it does not attempt to explicitly connect the animus principle with the nineteenth-century concept of class legislation,<sup>160</sup> which itself was a direct descendant of the framers' concerns with faction, which Carpenter does mention.<sup>161</sup> It is also flawed—or at least slightly misfocused—in its equation of purposeful discrimination in more traditional equal protection contexts (such as race) with the purposeful discrimination that constitutes animus. These more problematic aspects of Professor Carpenter's construction of an animus doctrine require a doctrinal structure that is more fully fleshed-out and sharply focused.

Susannah Pollvogt has also written thoughtfully about both the general concept of animus<sup>162</sup> and, more specifically, on some of the canonical animus cases.<sup>163</sup> In particular, she has concluded—correctly—that animus can be evidenced both by explicit legislative statements and as “an inference . . . based on the structure of a law.”<sup>164</sup> She also concludes—again correctly—that animus must be understood as a per se constitutional wrong rather than, say, as a trigger for heightened scrutiny

159. See Smith, *Denigration*, *supra* note 17, at 696.

160. Carpenter does make one brief reference to the anti-class legislation impetus for the Fourteenth Amendment. See Carpenter, *supra* note 3, at 229–30. But he does not provide an in-depth analysis of class legislation doctrine or its connection with the animus principle.

161. See, e.g., HOWARD GILMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 19–60* (1993) (drawing the connection between the framers' concern about faction and the subsequent generation's concern about class legislation).

162. See generally Pollvogt, *supra* note 24 (arguing animus analysis is a good alternative to tiered scrutiny analysis for Equal Protection claims).

163. See generally Susannah Pollvogt, *Forgetting Romer*, 65 STAN. L. REV. ONLINE 86, 89 (2013) (critiquing the Court's analysis in *Romer* as “incomplete and ultimately incoherent”).

164. Pollvogt, *supra* note 24, at 926.

of some sort.<sup>165</sup> As she colorfully puts it, animus “functions as a doctrinal silver bullet.”<sup>166</sup>

Nevertheless, Pollvogt’s analysis, like Carpenter’s, is incomplete. She reads several of the important animus cases as requiring an “affirmative connection” between the trait at issue and the government interest.<sup>167</sup> Similarly, she reads those cases as reflecting “skepticism of class-based legislation.”<sup>168</sup> But her justification for such skepticism and for the judicial demand for such an “affirmative connection” remains hazy. At times, she suggests that such scrutiny is triggered by the status-based nature of the discrimination.<sup>169</sup> But this surely proves too much, as Justice Brennan acknowledged at the outset of the suspect class era when he conceded that the immutability of the characteristic at issue in a discrimination claim, while relevant to determining the suspectness of that characteristic, could not serve as an infallible guide to that determination.<sup>170</sup>

At other times, Professor Pollvogt uses the language of “caste” and suggests that laws that create permanent classes are inherently problematic under the Equal Protection Clause.<sup>171</sup> Caste is surely an important part of the animus idea, as this Article will argue.<sup>172</sup> But without a theory of what constitutes caste-creating legislation, such language simply rephrases her identification of status-based discrimination as especially problematic. Indeed, it suggests that cases such as *Zobel v. Williams*,<sup>173</sup> in which the Court condemned state laws because they created permanent classes, should be understood cases about animus.<sup>174</sup> This suggestion is troubling, not because such cases<sup>175</sup>

165. *See id.* at 929–30. To be sure, the animus that’s at issue in the cases and in this Article is animus that furnishes the basis for government action. In other words, this Article—like the law itself—does not address situations in which a legislature may have animus toward a group but fails to legislate based on that animus. Thanks to Steven Smith for pointing out this distinction.

166. *See id.* at 889.

167. *Id.* at 911, 927; *see also id.* at 910 (describing the government action in *Cleburne* as being struck down “because the trait that characterized [the plaintiff] group had no special relevance to the government’s purported interests”).

168. *Id.* at 927.

169. *See, e.g., id.* (identifying in these cases “a general skepticism of class-based legislation”).

170. *See* *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973).

171. Pollvogt, *supra* note 24, at 926.

172. *See infra* Section IV.B.

173. 457 U.S. 55 (1982).

174. *See* Pollvogt, *supra* note 24, at 920–21 (suggesting that *Zobel* should thus be understood as an animus case).

175. *See Zobel*, 457 U.S. at 55; *see also, Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 624 (1985) (striking down, as violating equal protection, a property tax exemption limited to veterans who established residence in the state before a certain date).

are necessarily wrong, but because characterizing them as cases about animus expands the concept of animus far beyond its appropriate boundaries.<sup>176</sup> Thus, while her analysis is, like Carpenter's, thoughtful and helpful, it leaves important questions unanswered.

### III. ANIMUS IDENTIFIED AND PROPERLY UNDERSTOOD

The challenges posed to the animus principle, described in Part II, require that the doctrine be placed on a firmer doctrinal footing. This Part seeks to do that work. It begins by offering a practical, workable doctrinal pathway for courts charged with determining whether animus exists in a given case.<sup>177</sup> This work builds on the foundation provided by Professors Ball, Carpenter, and Pollvogt, and answers the critique that animus is unknowable.<sup>178</sup> This Part of the Article then expands its scope, first by considering the doctrinal significance,<sup>179</sup> and, in turn, the moral salience of an animus finding.<sup>180</sup> Thus, it responds to the "denigration" critique set forth in Part II.<sup>181</sup> Part III then situates animus within the traditions of both rational basis<sup>182</sup> and heightened<sup>183</sup> scrutiny equal protection review. In so doing, it respectively responds to Professor Eyer's critique<sup>184</sup> and refocuses Professor Carpenter's animus analysis.<sup>185</sup> With the animus idea thus properly explained, Part IV considers how it fits within the broader sweep of American constitutional law.

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176. In addition, and intriguingly, Professor Pollvogt identifies *Brown v. Board of Education* and *Loving v. Virginia* as cases that reflect animus, given that the laws in those cases express a governmental view that some groups are inferior and thus not fit for social interaction. See Pollvogt, *supra* note 24, at 915–17. Such laws may indeed reflect such views; indeed, even the *Plessy* Court seemed to be willing to strike down the Jim Crow railway law in that case if it had been convinced that the law sent a message of African-American inferiority. See *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (recognizing this possibility but then concluding that any such imputation of inferiority was one blacks cast on themselves by reading the law in that way), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); cf. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 422 (1960) (arguing that *Plessy* did not disagree with earlier cases' more forceful statements about the Constitution's incompatibility with laws that stamped one group as inferior, but instead merely concluded, mistakenly, that Louisiana's Jim Crow railroad law did not stamp African-Americans as inferior). Evaluating this argument and considering its relationship to other animus-based claims requires analysis that is beyond the scope of this Article.

177. See *infra* Section III.A.1.

178. See *supra* Section II.B.

179. See *infra* Section III.A.2.

180. See *infra* Section III.B.

181. See *supra* Section II.A.

182. See *infra* Section III.C.1.

183. See *infra* Section III.C.2.

184. See *supra* Section II.C.

185. See *supra* Section II.D.2.

## A. *Reconstructing Animus*

### 1. How to Find Animus

The search for animus in any given case challenges courts with problems that implicate both practicality and theory. At the most practical level, animus claims confront courts with the threshold question of whether animus necessarily reflects subjective ill will on the part of the decision-maker. A requirement that courts identify such ill will would bode poorly for the doctrine's future usefulness, for reasons that have been well-known for decades.<sup>186</sup> The institutional nature of most government action means that the very concept of discrimination motivated by subjective dislike is of questionable coherence,<sup>187</sup> even if the Supreme Court insists that equal protection plaintiffs show some level of "discriminatory intent" when challenging facially neutral laws.<sup>188</sup> Even more foundationally, the well-known critique that the Court's intent jurisprudence has retarded progress toward race and sex equality<sup>189</sup>

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186. See, e.g., Kendrick and Schwartzman, *supra* note 92, at 146-154 (discussing the problem of subjective intent).

187. See, e.g., Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284, 284 (1992) ("[T]he concept of 'an' intent for . . . an institution [is] hilarious."). To be sure, some government actions might in fact reflect an individual official's choice and thus could avoid this critique. For example, many, though certainly not all, class-of-one equal protection cases feature allegations of mean-spirited action taken against the plaintiff by one or more government officials motivated by vendettas against the plaintiff. See, e.g., *Geinosky v. Chicago*, 675 F.3d 743, 745 (7th Cir. 2012) (involving a class-of-one plaintiff alleging orchestrated harassment by city parking officers who conspired to ticket his car so continuously that he received tickets for illegally parking his car in different parts of Chicago at exactly the same time). See generally William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 ECOLOGY L.Q. 493, 498-500 (2007) (discussing lower courts' resistance to the Supreme Court's conclusion, in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), that subjective ill will was not a necessary part of a plaintiff's class-of-one claim). Similarly, litigation over President Trump's immigration executive orders involves allegations that those orders were motivated by the President's own personal anti-Muslim animus. See *supra* Section I.B (discussing this litigation); see also Kendrick and Schwartzman, *supra* note 92, at 146 ("Where a single person has legal authority—for example, the President of the United States issuing a travel ban—courts can proceed on the plausible assumption that the person exercises that authority on the basis of some intention (or set of intentions).").

188. See *Washington v. Davis*, 426 U.S. 229, 239-40 (1976); see also *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 281 (1979) (determining that law favoring hiring of veterans does not demonstrate animus or violate the Equal Protection Clause because "[t]he appellee . . . has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex").

189. In particular, many scholars have criticized the intent requirement in light of subsequent decisions that have allegedly made it increasingly difficult for plaintiffs to prove the required discriminatory intent when challenging actions that burden minority groups without explicitly classifying on the basis of race. See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080-83 (2011) (critiquing both the intent

constitutes a warning against an unreflective expansion of that jurisprudence into the nascent animus concept. As explained below,<sup>190</sup> however, equal protection ought to be understood as flexible and nuanced enough to require some type of bad intent in some contexts (such as animus itself) while dispensing with that requirement in others.

Relatedly, even assuming that such inquiries are conceptually coherent, the proof problems that arise when courts attempt to divine such an intent present formidable problems. Whose statements during the legislative debate count? How much weight should they carry when a judge evaluates the entire legislature's aggregate intent? Can judges legitimately pierce the veil of ostensibly neutral-sounding justifications to conclude that some subjective invidious intent lurked below? In particular, if animus is correctly considered a particularly intense, subjective frame of mind,<sup>191</sup> what is a judge to make of equally idiosyncratic countervailing evidence? For example, consider the fact that one of the three Cleburne, Texas city council members who voted against the permit for the group home for intellectually disabled persons had sat on the board of a school for intellectually disabled persons, while another had an intellectually disabled grandchild.<sup>192</sup> How, if at all, should a judge evaluate those facts when determining whether those council members (let alone the council as a whole) "disliked" or harbored "irrational prejudice"<sup>193</sup> toward the intellectually disabled?

These problems plague equal protection law in general, even if they may be especially acute in animus doctrine.<sup>194</sup> It should not be surprising then, that the best-known doctrinal phenomenon implicating bad intent—the "discriminatory intent" requirement most closely associated with *Washington v. Davis*<sup>195</sup>—acknowledges the fundamentally objective nature of the inquiry.<sup>196</sup> Even while using language suggesting human

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requirement and what the authors describe as the limited number of evidentiary factors that can be cited in support of a finding of discriminatory intent); Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1784 (2012) ("In declaring that malice is the only form of intent that counts, discriminatory intent doctrine excludes evidence of continued discrimination against non-Whites rooted in history, contemporary practices, and social science.").

190. See *infra* text accompanying notes 318–20.

191. Cf. Smith, *Denigration*, *supra* note 17, at 697 (suggesting that even the inquiry into discriminatory purpose required by *Washington v. Davis* implies some level of subjective ill will, by pairing "discriminatory" with "hateful" purposes); see also KOPPELMAN, *supra* note 121, at 63 (using similar language to describe a finding that the defendant engaged in intentional discrimination).

192. See ARAIZA, *supra* note 58, at 39.

193. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

194. See *supra* text accompanying notes 191–93 (suggesting this acuteness).

195. 426 U.S. 229 (1976).

196. *Id.* at 241 (discussing the requirement of a discriminatory purpose).

motivation,<sup>197</sup> the Court's explanation of the discriminatory purpose requirement establishes that a court can find the requisite discriminatory purpose by reference to objective factors, including, but not limited to, the historical background of the decision, the deviation from normal decisional procedures, and the extent of the disparate impact itself.<sup>198</sup>

The Court's explanation of how judges can find discriminatory purpose can play a useful role in the related area of animus. As I explain in more detail in other writing,<sup>199</sup> the Court's canonical animus cases, carefully read, reveal reliance on the factors the Court has identified as relevant to a contextual<sup>200</sup> discriminatory purpose inquiry that turns on both subjective and objective factors. *Moreno* featured troubling legislative history.<sup>201</sup> *Cleburne* featured a decisional process that one observer described as an emotional and strongly negative constituent reaction that triggered an after-the-fact legislative search for legitimate justifications,<sup>202</sup> impacting a group the Court acknowledged as at least somewhat politically powerless.<sup>203</sup> Both *Romer* and *Windsor* featured government actions that deviated from the normal substance of the decision-maker's conduct in the course of imposing both wide and deep burdens on a precisely targeted group.<sup>204</sup> All of these factors, in addition to appearing in one or more of the animus cases, were recognized in some way by the Court as relevant to the more standard discriminatory intent inquiry in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>205</sup> the 1977 case that provided lower courts with guidance on the intent inquiry one year after the Court announced the

197. See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (requiring that a challenged law have been enacted “‘because of,’ not merely ‘in spite of’” its disparate impact on a given classification tool).

198. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (discussing these and other factors as relevant to the discriminatory purpose inquiry).

199. See generally ARAIZA, *supra* note 58 (discussing the Court's animus cases in more detail).

200. See Haney-Lopez, *supra* note 189, at 1806–09 (interpreting the Court's explanation of its requirement of discriminatory intent in *Davis* and its explanation of the process of finding such intent in *Arlington Heights* as reflecting a “contextual” approach).

201. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); cf. *Arlington Heights*, 429 U.S. at 268 (identifying legislative history as a factor in the intent analysis).

202. See ARAIZA, *supra* note 58, at 38–39.

203. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985).

204. See ARAIZA, *supra* note 58, at 53–56 (discussing *Romer*); *id.* at 67–69 (discussing *Windsor*). The second of these characteristics thus echoes, albeit imprecisely, the Court's acknowledgement in *Arlington Heights* that the extent of a law's disparate impact is relevant to the discriminatory intent inquiry. See *id.* at 56–58 (explaining how this “disparate impact” helped the Court explain why Amendment 2 was unconstitutional in *Romer*); *id.* at 67–69 (similarly explaining how this factor influenced the Court's analysis in *Windsor*).

205. 429 U.S. 252 (1977).

intent requirement in *Washington v. Davis*.<sup>206</sup> Perhaps one can fairly dispute the precise correspondence between any of these observations and its corresponding *Arlington Heights* factor. Nevertheless, the sheer number of these phenomena lurking in animus cases, and their conceptual closeness to corresponding *Arlington Heights* factors, strongly suggests that at least as a descriptive matter, the Court's animus jurisprudence has built upon the foundational statements of its discriminatory intent jurisprudence.<sup>207</sup>

In addition to the parallels one can find between the *Arlington Heights* factors and the factors the Court has used in the animus cases, one can also find a doctrinal parallel in the burden-shifting structure of the two inquiries. Just as with discriminatory intent analysis, the animus cases, carefully read, reveal a sequence of shifting burdens.<sup>208</sup> Those cases reveal that, once the *Arlington Heights*-related factors combine to identify a plausible claim of animus, the burden shifts to the government-defendant to justify its decision.<sup>209</sup> For example, after the *Moreno* Court identified troubling legislative history expressing a desire to punish "hippies" and "hippy communes," it proceeded to consider the government's proffered interests but rejected them after employing scrutiny more stringent than is normally associated with rational basis review.<sup>210</sup> Similarly, in *Cleburne*, the Court began its rationality review of the city's decision by identifying, and condemning, the city's reliance on its constituents' fear and discomfort regarding the would-be residents of the group home.<sup>211</sup> It then proceeded to consider the city's more legitimate justifications, again subjecting them to scrutiny that has been rightly characterized as stricter than normal.<sup>212</sup> The Court's other animus cases feature similar sequences.<sup>213</sup>

These similarities between discriminatory intent jurisprudence and the animus cases are not coincidental. As students learn in an introductory

206. See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

207. By contrast, scholars have understood the Court's later statements about the intent requirement as enforcing a more stringent, malice-like understanding of discriminatory intent, which necessarily focused more on subjective motivations. See Haney-Lopez, *supra* note 189, at 1826 (restating this scholarly view and partially endorsing it).

208. See *infra* notes 190–92 and accompanying text.

209. See *infra* notes 190–92 and accompanying text. Compare Kendrick and Schwartzman, *supra* note 92, at 151–54 (criticizing the Court in *Masterpiece* for failing to perform an analogous burden-shifting exercise after finding preliminary evidence of animus).

210. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–38 (1973); see also *id.* at 545–47 (Rehnquist, J., dissenting) (commenting on the unusual stringency of the Court's scrutiny).

211. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

212. *Id.* at 449–50 (scrutiny); *id.* at 458–60 (Marshall, J., concurring in the judgment in part and dissenting in part) (commenting on the unusual strictness of the Court's review).

213. See ARAIZA *supra* note 58, at 54–58 (discussing *Romer*); *id.* at 69–73 (discussing *Windsor*).



Constitutional Law class, discriminatory intent is the gateway to the heightened scrutiny that courts perform when legislation classifies on a suspect ground, either explicitly or (more relevantly here) intentionally. In turn, that heightened scrutiny seeks to uncover situations where the challenged law is found to be so tenuously related to a government interest of the requisite importance that it is held to be invidious. Justice O'Connor's opinion in *City of Richmond v. J.A. Croson Co.*,<sup>214</sup> illustrates this dynamic: As she famously explained, applying heightened scrutiny to each and every racial classification "smokes out" those uses of race that are motivated by what she described as illegitimate notions of racial inferiority or "simple racial politics."<sup>215</sup> To be sure, scholars ever since *Croson* have criticized the Court's insistence that racial classifications defended as benign run the gauntlet of strict scrutiny.<sup>216</sup> But for our more descriptive purposes, the point is simply that the Court believed that such scrutiny, preceded by a discriminatory purpose inquiry if required by the law's facial neutrality, was necessary in order to reach the ultimate conclusion about whether the law was invidious.

Animus shortcuts the process of identifying invidiousness. Recall that the Court has applied the animus idea in cases where, for whatever reason, it was not willing to apply explicitly heightened scrutiny to the law in question.<sup>217</sup> Thus, in animus cases the tool of heightened scrutiny is, by hypothesis, unavailable. But the end point of the Court's review is the same: In both animus and heightened scrutiny cases, the court ultimately seeks to determine whether the challenged law reflects discrimination that can fairly be described as invidious.<sup>218</sup> Given that a similar goal animates both inquiries, it should not be surprising that courts use similar tools to perform those inquiries.

For the same reason, the parallels in these doctrines' burden-shifting structures are also more than coincidental. In the discriminatory intent context, the burden-shifting occurs when determining whether the law in question "really" discriminates on the suspect or quasi-suspect ground, thus opening up the prospect of explicitly heightened review. By contrast,

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214. 488 U.S. 469 (1989) (plurality opinion).

215. *Id.* at 493.

216. *See, e.g.*, Darren Lenard Hutchinson, "Unexplainable on Grounds Other than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 646–47 (criticizing this insistence).

217. *See supra* Part I.

218. *Compare, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."), *with Croson*, 488 U.S. at 493 ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

animus becomes a useful doctrinal path for a court exactly when such heightened review is, for whatever reason, unavailable. Thus, in animus cases, the burden shifting must, by definition, occur within the domain of rational basis review. As illustrated by the examples discussed above,<sup>219</sup> the animus cases reveal a structure in which judicial suspicion that animus may be lurking triggers more careful scrutiny of the legitimate justifications the government offers in defense of the law. In other words, that suspicion triggers judicial scrutiny that puts the onus on the government to justify itself. Importantly, though, that more searching scrutiny occurs under the aegis of the rational basis standard, rather than either an intermediate inquiry into intent or the ultimate application of explicitly heightened scrutiny.<sup>220</sup>

Thus, both the discriminatory intent factors from *Arlington Heights* and that case's burden-shifting structure can do additional duty as doctrinal components to assist courts in uncovering animus. To repeat, that's not a coincidence. The intent-heightened scrutiny sequence and the animus inquiry both seek to answer the same question about invidiousness, but the animus inquiry (by definition) avoids heightened scrutiny. Therefore, it stands to reason that, without explicitly saying so, the Court has latched on to those same factors—and, indeed, the same structure for using them—when asking, in the animus context, a distinct, but closely related question. Use of these factors within the burden-shifting framework that incorporates them helps provide the doctrinal framework that Pollvogt's evocative but incomplete explanation of analysis omits.<sup>221</sup>

## 2. The Doctrinal Significance of an Animus Finding

Despite these parallels in the process by which animus and discriminatory intent are uncovered, the results of these inquiries diverge in a conceptually significant way. As law students learn, a finding of discriminatory intent is a pathway to the heightened scrutiny—whether styled “intermediate” or “strict”—appropriate for the type of discrimination the intent inquiry has uncovered. But such scrutiny—even strict scrutiny—is not automatically fatal, as the Court has recognized when upholding even racial classifications that it concludes are

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219. See *supra* notes 210–13 and accompanying text.

220. See ARAIZA, *supra* note 58, at 139–43 (explaining that more careful review is performed in animus cases, and stressing that that review, while seeking the *actual* reasons for the challenged government action, nevertheless requires only that the fit be reasonable, rather than particularly tight, and only that the interest be legitimate, rather than unusually pressing).

221. See *supra* notes 162–76 and accompanying text (recounting Pollvogt's analysis).

sufficiently narrowly tailored to achieve a sufficiently compelling interest.<sup>222</sup>

Animus is different. Unlike a finding of discriminatory intent, a finding of animus should not trigger further scrutiny; rather, it should end the case, and end it with a defeat for the government. Because animus short-circuits the tiered scrutiny analysis, cutting immediately to the ultimate constitutional question about invidiousness, there is simply nothing left for a court to consider once it concludes that a law is grounded in animus. Such a doctrinal structure reinforces the parallel between animus and nineteenth-century ideas of class legislation, since class legislation, just like this proposed understanding of animus, reflects an ultimate constitutional wrong rather than merely an intermediate point in the analysis, such as a finding of discriminatory intent that then triggers heightened judicial review.<sup>223</sup>

Concededly, at first glance, the Court's animus cases appear inconsistent with this hypothesis. In *Moreno*, the famous language about "a bare . . . desire to harm" appeared early in the opinion, but the Court nevertheless continued on, to consider the government's more legitimate justifications for the law.<sup>224</sup> Similarly, *Cleburne*'s rational basis analysis began with its disapproving references to neighbors' fear and dislike of the would-be residents of the group home but nevertheless continued on to consider the city's traffic and flood evacuation rationales for the zoning permit disapproval.<sup>225</sup> Looking back on these cases in her concurring opinion in *Lawrence v. Texas*, Justice O'Connor wrote that "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."<sup>226</sup> Her phrasing suggests either that such strike downs are the inevitable result of the scrutiny she described, or that a law found to be grounded in animus might nevertheless conceivably survive such scrutiny. The latter possibility would, of course, be inconsistent with the idea of animus as a *per se* constitutional wrong.<sup>227</sup> But it is, at least at first blush, what the Court seems to do.

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222. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding a law school's "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body").

223. See generally *infra* Part IV (explaining the parallels between animus doctrine and class legislation).

224. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

225. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

226. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment).

227. Cf. *Pollvogt*, *supra* note 24, at 889 (describing an animus finding as a "silver bullet" that is necessarily fatal to any law so described).

But this inconsistency is more apparent than real. As I have explained in more detail elsewhere,<sup>228</sup> when the Court has pushed forward in its review of a law even after initially observing its grounding in animus, it should be understood as endeavoring to ensure that, in fact, animus was the reason for the law. In a way closely parallel to the standard discriminatory intent inquiry, suspicion about animus—in *Cleburne*, for example, the evidence of the neighbors’ dislike and fear of the would-be group home residents<sup>229</sup>—should trigger a demand for proof from the government that the action was in fact motivated by more legitimate concerns. Hence, in cases such as *Moreno* and *Cleburne*, the Court’s subsequent examination of the more legitimate concerns asserted by the government should be understood as constituting a judicial demand for the government’s actual motivations.

This demand parallels the structure of the intent inquiry, in which a *prima facie* showing by the plaintiff that a “bad” intent (say, an intent to classify on the basis of sex) lurked in the government’s action triggers a shift in the burden of proof, requiring the government to show that it would have taken the challenged action even had such bad intent not existed.<sup>230</sup> In both cases, the plaintiff’s success in raising suspicion about the existence of potentially (or, in the case of animus, conclusively) illegitimate motivations justifies courts in insisting on proof of benign motivations. In the context of the discriminatory intent inquiry, this insistence takes the form of the burden-shifting explained in *Arlington Heights*.<sup>231</sup> In the context of the animus inquiry, it takes the form of the more stringent rational basis review that commentators have consistently noted as a feature of the animus cases.<sup>232</sup>

### B. Responding to the Denigration Critique

The most troubling critique of animus is the one that criticizes the animus idea as attaching an inappropriately pejorative, *ad hominem* label

228. See generally ARAIZA, *supra* note 58, at 120–33.

229. *Cleburne*, 473 U.S. at 448.

230. See *Village of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 270 n.21 (1977) (explaining this burden shifting in the discriminatory intent context).

231. *Id.*

232. See, e.g., Eyer, *supra* note 22, at 1357 & n.178 (arguing that there is “a subintermediate tier of rational basis ‘plus’ . . . which a litigant must make a special showing to access (subordinated group status or animus)”). Indeed, rational basis review is ideally suited for the animus inquiry, since that inquiry’s ultimate concern is not whether the government action satisfies some level of urgency, as expressed in heightened scrutiny formulas, but instead simply seeks to determine the government’s real goal. That goal need not be particularly urgent, nor need the fit be particularly good, as long as the government is acting in good faith to achieve a legitimate, public-regarding, purpose. See ARAIZA, *supra* note 58, at 139–43.

to laws and their proponents.<sup>233</sup> Beyond the fact that an animus conclusion does indeed necessarily sting, this critique also implicates the well-known difficulties already mentioned,<sup>234</sup> complicating courts' search for a legislature's intent.<sup>235</sup> Upon reflection, however, both of these objections can be at least mitigated, if not fully overcome, by adopting the more nuanced understanding of animus offered above.

One way of mitigating the undoubted sting of an animus conclusion is to construct an understanding of the concept that does not rely exclusively on the sort of subjective ill will that scholars such as Professor Smith find so discomfiting.<sup>236</sup> To be sure, this construction process will not remove the ill-will component entirely. Such an erasure would be unfaithful to the facts of too many animus cases, which do in fact feature evidence of simple dislike.<sup>237</sup> Just as importantly, it would drain the concept of animus of its core meaning—in softening the blow, such a move would eliminate the force of the concept altogether.<sup>238</sup>

However, there is a way to understand animus as a meaningful concept that nevertheless eases at least some of the sting. As explained earlier,<sup>239</sup> courts confronting a claim of animus can borrow liberally from the Supreme Court's explanation of how courts should go about uncovering discriminatory intent. That earlier explanation invoked a variety of factors, most of which avoid requiring judges to delve into the subjective motivations of government decision-makers. The result of such an inquiry is thus a conclusion that does not necessarily indict the subjective motivations of any particular person or members of an institution. To be sure, being adjudged to have acted with "animus" still stings, just like being adjudged to have acted, in Professor Smith's words,

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233. See, e.g., Carpenter, *supra* note 3, at 237–38 (explaining that religious groups claimed they felt insulted and attacked in response to the finding of animus in *Windsor*).

234. See *supra* notes 191–94 and accompanying text.

235. See, e.g., Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1386–87 (1990) (acknowledging, in the context of commenting on the difficulties courts encounter when attempting to distinguish between "class prejudice" and "reasonable regulation," that "the inquiry into [legislative] motivation is treacherous").

236. See *supra* notes 17–20 and accompanying text; see also Kendrick and Schwartzman, *supra* note 92, at 148 (approving of the "totality-of-the-circumstances" approach to animus the Court took in *Masterpiece*).

237. See, e.g., U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); Price-Cornelison v. Brooks, 524 F.3d 1103, 1122 (10th Cir. 2008) (involving police selective enforcement explicitly justified on the ground that the victim of that selective enforcement was lesbian, toward whom animus was constitutionally acceptable).

238. Cf. *supra* notes 173–76 and accompanying text (critiquing a theory of animus that includes within its scope laws, such as the one struck down in *Zobel v. Williams*, 457 U.S. 55 (1982), that create permanent classes of persons without any imputation of ill will).

239. See *supra* Section III.A.1.

with “hateful or discriminatory purposes.”<sup>240</sup> But these conclusions can be shorn of their most pejorative connotations by distinguishing them from conclusions about subjective motivations.<sup>241</sup>

At this point the reader may wonder how it is even possible to conclude that a law is tainted with “animus” without also necessarily concluding something about the lawmaker’s ill will. On this theory, the entire idea of animus focuses on ill will, such that it drains the term of any meaning to apply it to situations lacking such subjective feelings. But on reflection, it’s not clear why this has to be, at least not in every case. Institutions, not individuals, enact laws.<sup>242</sup> Even though individuals comprise those institutions (whether a legislature or the public enacting an initiative measure), discriminatory intent determinations must be made at the level of the institution, not the individual member—at least when the challenged action is institutional in nature, for example, the enactment of a law or the decision of a multi-person governmental body.<sup>243</sup> This

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240. Smith, *Denigration*, *supra* note 17, at 697; *see also* KOPPELMAN, *supra* note 121, at 63 (“Stigma is often, and appropriately, inflicted by the law itself—most pertinently, by a legal finding that a defendant has engaged in purposeful discrimination.”); *cf.* Black, *supra* note 176, at 426 (“Can a system which, in all that can be measured, has practiced the grossest inequality, actually have been ‘equal’ in intent, in total social meaning, and impact? ‘Thy speech maketh thee manifest . . .’; segregation, in all visible things, speaks only haltingly any dialect but that of inequality.”).

241. *Cf.* RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (AM. LAW INST. 1965) (“Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.”). To be sure, the Court has rejected this understanding of intent as a matter of the discriminatory purpose inquiry. *See* Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (“‘Discriminatory purpose’ . . . implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”). Despite this seeming rejection of the approach stated in the Torts Restatement provision quoted earlier, the *Feeney* Court appended to the quoted text a footnote that recognized the role of more objective evidence of discriminatory intent. *See id.* at 279 n.25 (“This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the law challenged in that case], a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.”).

242. *But see infra* notes 265–74 and accompanying text (describing class-of-one litigation); *supra* Section I.B (describing litigation against the President’s executive orders on immigration).

243. Of course, individual members’ stated feelings may still be probative of that institutional intent. *See, e.g.,* United States v. Windsor, 570 U.S. 744, 770 (2013) (quoting legislative history as evidence of congressional intent to act based on animus); U.S. Dep’t of

must mean that it is the institution's intent that matters. Even though individuals' own subjective intents remain relevant to that institutional intent question,<sup>244</sup> the institutional nature of that inquiry strongly supports use of objective, institution-focused evidence of the sort the Court has embraced in the discriminatory intent context.

This same logic should apply in the animus context. As with the discriminatory intent inquiry, the animus inquiry can rely on a combination of evidence of lawmakers' subjective intentions and more objective evidence, such as the decision's deviation from normal practice<sup>245</sup> and the extent to which the burden the challenged law places falls predominantly on an identifiable group.<sup>246</sup> But this understanding of animus does more than simply resolve the problem of subjective intentions. This objective understanding makes it more defensible to analogize animus to the Nineteenth century class legislation tradition. Part IV takes up this work, which holds the potential to ground modern equal protection law on a firmer historical footing.<sup>247</sup>

### C. *Animus and Its Relation to the Rest of Equal Protection Law*

So far, Part III has attempted to create a workable animus doctrine<sup>248</sup> and has begun considering the moral significance of an animus finding.<sup>249</sup> This sub-Part contextualizes this newly created animus structure within the broader scope of equal protection law. In so doing, it responds both to Katie Eyer's critique of animus and Dale Carpenter's comparison of animus to intentional race classification. The goal of this sub-Part is to go beyond the structure of animus doctrine and to begin defending it as a valuable component of equal protection law.

#### 1. Animus and Rationality Review

Katie Eyer's critique, discussed above,<sup>250</sup> provides the opportunity to consider the relationship between animus and rational basis review.

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*Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (quoting legislative history as evidence of congressional intent to act based on animus). In addition, applications of law in particular situations may still reflect fundamentally individual action. *See, e.g., infra* notes 265–74 and accompanying text (discussing the equal protection class-of-one doctrine).

244. *See supra* note 243 and accompanying text.

245. *See, e.g., Windsor*, 570 U.S. at 767–69 (noting the unusual nature of a federal definition of marriage).

246. *See, e.g., Romer v. Evans*, 517 U.S. 620, 633 (1996) (remarking on the breadth and targeted nature of the disability Amendment 2 placed on lesbians, gay men, and bisexuals).

247. *See infra* Part IV.

248. *See supra* Section III.A.

249. *See supra* Section III.B; *see also infra* Section IV.D (expanding on this previous analysis).

250. *See supra* Section II.C.

Professor Eyer's main critique of animus is limited, though still important. Her main concern appears to be that identifying the canonical animus cases as, in fact, animus cases tells a misleading story about constitutional change.<sup>251</sup> At one level, this critique sounds only in pedagogy: that is, Eyer worries that today's students, when they become tomorrow's social movement litigators, will be dissuaded from making rational basis claims if they believe (wrongly so, in Eyer's view) that rational basis review is inevitably toothless and thus not worth the effort.<sup>252</sup> Rather, she argues, courts sometimes do find that challenged government action fails rational basis review.<sup>253</sup> Just as importantly, such rational basis victories—and even defeats<sup>254</sup>—can trigger an evolutionary process in which courts and the political system eventually come to accept the equality claims, either by courts ultimately bestowing suspect class status to the claim or legislatures repealing discriminatory legislation. Eyer worries that excising the animus cases (which feature victories for the plaintiffs) from the rational basis canon sends a false signal to future lawyers that rational basis argumentation fails to yield such benefits.<sup>255</sup>

On a deeper level, though, Eyer's concerns go beyond the straightforward, though important, question of what we teach our students.<sup>256</sup> Identifying a given case, for example *Cleburne*, as a rational basis case, or alternatively, as an animus case matters for the stories scholars, litigators, and judges tell each other about the development of the law.<sup>257</sup> In turn, those stories matter for the width and shape of the path lawyers and judges feel is open to them as they move the law.<sup>258</sup> Thus, they matter when a lawyer or a judge decides which arguments can be

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251. See *supra* Section II.C.

252. Eyer, *supra* note 22, at 1320.

253. *Id.* at 1319.

254. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969 (2011) (considering how litigation losses suffered by social movements can ultimately redound to their benefit, either by mobilizing the movement's members, triggering more favorable political action, or even persuading future courts to rule in their favor).

255. *Id.* at 1320.

256. See generally, e.g., Katie R. Eyer, *A Casebook Section Companion to the Canon of Rational Basis Review* (Dec. 12, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3086830](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086830) [<https://perma.cc/QJ2K-FLDX>] (providing teaching materials structured to avoid many of the common problems with the canon of rational basis review identified in Eyer, *supra* note 22.)

257. Cf. Araiza, *supra* note 5, at 665–69 (noting a similar dynamic in the context of the narrative scholars and judges derive from the text of a case, without regard to the underlying court dynamics that produced that text).

258. *Id.* at 666.



respectably made or vindicated, and which are, to use Jack Balkin's term, "off the wall."<sup>259</sup>

Professor Eyer's questioning of how to understand "the animus cases"—that is, as about animus or about conventional rational basis review—can never receive a conclusive answer. Those cases can be framed either way.<sup>260</sup> Indeed, Eyer's larger point—that characterizing them as "animus" cases harms some larger value beyond simple doctrinal categorization—is consistent with this conclusion.<sup>261</sup> Eyer argues that characterizing the cases in that way causes such a larger harm by removing them as exemplars of meaningful rational basis review, and thus as precedents for future cases where an animus argument might be difficult to make.<sup>262</sup>

The dynamic Eyer fears likely exists. But characterizing the *Moreno* line of cases as cases about animus generates positive as well as negative externalities. Most notably, creating a category of "animus cases" helps rationalize equal protection law by connecting modern doctrine to equal protection's anti-class-legislation and anti-caste origins. A full exposition of this idea must await Part IV, which explains how, properly understood, animus doctrine hearkens back to the Fourteenth Amendment's anti-caste aspirations and the ante-bellum class legislation idea on which those aspirations rested. For now, though, suffice it to say that a properly understood—and properly limited—animus doctrine helps rescue equal protection law from a relentless, single-minded focus on the degree of a challenged law's fit with a legitimate government interest. To be sure, that focus has its place—but only as a mediating concept, or heuristic, that helps judges determine when the equal protection's core anti-class legislation goal is satisfied.<sup>263</sup>

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259. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. L. REV. 549, 577 (2009) ("Constitutional revolutions are changes in expectations about what constitutional provisions mean and how they are likely to be applied; changes in what kinds of positions are thought reasonable and unreasonable, 'off-the-wall' and 'on-the-wall.'").

260. To be sure, it cannot be the case that cases can be framed in any way a commentator desires. Rather, that framing must respect and comply with the norms of legal reasoning, including categorization, that obtain at a given point. Cf. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1074 (1980) (recognizing, in the context of analyzing the standard criteria for suspect class status, that features like immutability and even identity as a particular group exist only as a matter of social construction rather than objective reality). But current norms of legal reasoning clearly allow the *Moreno* line of cases to be categorized either as "animus cases" or "rational basis cases."

261. Eyer, *supra* note 22, at 1321.

262. *Id.* at 1364.

263. Cf. *United States v. Windsor*, 570 U.S. 744, 811 (2013) (Alito, J., dissenting) ("The modern tiers of scrutiny . . . are a heuristic to help judges determine when classifications have that 'fair and substantial relation to the object of the legislation' [required by equal protection]." (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971))). In turn, the idea of reasonable classification,

One fascinating but barely known equal protection doctrine helps clarify this claim. The “class of one” doctrine, endorsed by the Court in *Village of Willowbrook v. Olech*,<sup>264</sup> holds that a person may be the victim of an equal protection violation when she is discriminated against, not on the basis of a shared characteristic such as race or sex, but simply on the basis of her own identity.<sup>265</sup> In *Olech*, the Court unanimously held that the plaintiffs—homeowners who were required to provide a larger easement in exchange for city water service than other residents receiving the same service—had stated a valid equal protection claim.<sup>266</sup> However, Justice Breyer concurred only in the judgment, to express his disagreement with the per curiam opinion’s conclusion that “ill will” or “illegitimate animus” was not a necessary part of a valid class-of-one claim.<sup>267</sup> Justice Breyer worried that, without that requirement, “many ordinary violations of city or state law” would be transformed into constitutional violations if they lacked a rational basis.<sup>268</sup>

The class-of-one doctrine, and its relation to core equal protection commitments, presents a fascinating but intricate issue, the full presentation of which extends far beyond the scope of this Article.<sup>269</sup> For our purposes, the important point is that, shorn of the animus or ill will requirement Justice Breyer (and many lower court judges)<sup>270</sup> insisted on, class-of-one litigation devolves into unhelpful and unprincipled discussions of how irrational a challenged government action has to be in

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which finds expression in the “fair and substantial relation” formula Justice Alito recited, can be traced to courts’ deference to legislative judgments toward the end of the class legislation period. See V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 981–82 (2009).

264. 528 U.S. 562 (2000).

265. *Id.* at 562.

266. *Id.* at 565.

267. See *id.* at 566 (Breyer, J., concurring in the result).

268. *Id.* In a rational basis case, *Nordlinger v. Hahn*, 505 U.S. 1 (1992), Justice Thomas criticized the majority opinion for seeming to read an earlier rational basis case as standing for the same proposition that concerned Justice Breyer in *Olech*: namely, that unequal state treatment of an individual based in the state’s misapplication of state law converts that state law violation into an equal protection violation as well. See *Nordlinger*, 505 U.S. at 25–28 (Thomas, J., concurring in the judgment).

269. For discussions of this doctrine, see generally William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 WM. & MARY L. REV. 435 (2013) (analyzing the history and current state of the class-of-one doctrine and its relationship to the core principles of equal protection); Timothy Zick, *Angry White Males: The Equal Protection Clause and “Classes of One,”* 89 KY. L.J. 69, 76 (2000) (arguing the original understanding, theoretical underpinnings, and Supreme Court analysis of the “equal protection guarantee do not support extending the Equal Protection Clause” to a class of one).

270. See, e.g., William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means for Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27, 48–49, 54 (2009).

order to be held unconstitutional. In turn, those discussions trigger subsidiary, and equally unhelpful, arguments about the extent of courts' latitude to indulge in extravagant speculation in order both to identify a legitimate purpose underlying the discrimination and to find a connection between that purpose and the personalized discrimination.<sup>271</sup> By contrast, requiring that government singling-out of an individual for burdensome treatment not be merely irrational, but grounded in animus or ill will, more firmly plants equal protection law in its anti-class legislation foundation.<sup>272</sup> Indeed, it does so in what is perhaps the conceptually purest equality context imaginable: claims that a single individual was the subject of unconstitutional discrimination, based on her own identity shorn of any constitutionally-significant history of group-based oppression.

To be sure, in some historically-inflected contexts, most obviously racial discrimination, "mere irrationality" may indicate a reflexive lack of concern for the welfare of a group that society has historically subordinated.<sup>273</sup> Such a dynamic can fairly be described as reflecting ill will, at least to the extent the Constitution charges government with an obligation of affirmative concern for all members of society. But class-of-one claims present situations shorn of such historical baggage and of any complicating factors related to the status of a particular group, such as the immutability of its defining characteristic. As such, these claims present in the starkest possible light the question whether simple irrationality is enough to condemn such discrimination, or instead, whether more is required.

By requiring ill will, animus, or at least some level of intentionality in class-of-one cases, courts would honor equal protection's core commitment: that government act in pursuit of a public purpose.<sup>274</sup> Note that the commitment is *not* that government must *succeed* in promoting

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271. For an analysis of this issue, see generally Steve Sanders, *Making it up: Lessons for Equal Protection Doctrine from the Use and Abuse of Hypothesized Purposes in the Marriage Equality Litigation*, 68 HASTINGS L. REV. 657 (2017) (analyzing the proper scope for judicial hypothesizing of a government interest).

272. See *infra* Part IV (explaining this foundation in more detail).

273. See generally Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) (discussing the history of equal protection and racial discrimination).

274. See, e.g., Powell, *supra* note 2, at 275 (noting this commitment). Of course, it must be admitted that the *Olech* Court did not impose this type of requirement on class-of-one claims. See *supra* note 265 and accompanying text. But it is striking that many lower courts after *Olech* continued to insist that plaintiffs plead such bad intent. See Araiza, *supra* note 270, at 53–54 (describing this lower court pushback). While some of this pushback might have been based on a practical desire to cut back on the otherwise-expansive potential of class-of-one claims after *Olech*, some of it may have derived from an instinct that class-of-one claims, to be conceptually coherent, needed to feature some degree of government intent or ill will.

that interest. Government makes mistakes all the time. But if the underlying goal of equal protection is that government not act simply with the goal of burdening any person or group, then in the context of such “pure” discrimination it makes sense to insist on some degree of intentionality with regard to the discrimination.

If all this is true—if one core of equal protection’s aspiration, beyond its goal of uprooting systematic subordination of particular groups, is to condemn action taken with an intent to burden a group not in the course of pursuing a legitimate interest but simply in order to accomplish that burdening<sup>275</sup>—then a properly understood and properly cabined animus doctrine can play an important role in bridging the gap between that core commitment and the fit analysis that characterizes modern equal protection review and, in particular, rational basis review. Animus doctrine should not be understood as a replacement for equal protection’s other, more historically grounded, goals. Most notably, it should not be understood as a replacement for the Amendment’s historical goal of ensuring racial equality, however that goal might be understood.<sup>276</sup> But once the focus moves beyond those goals, animus doctrine can play an important role, both in providing a path forward for considering other types of discrimination and as connective tissue linking contemporary jurisprudence to its historical antecedents.

## 2. Animus and Heightened Scrutiny

As noted in Part II, Dale Carpenter’s inquiry into how courts should search for animus relies heavily on the Court’s discriminatory intent jurisprudence that serves as the gateway to heightened scrutiny.<sup>277</sup> While exceedingly helpful, Professor Carpenter’s discussion of animus is

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275. See, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) (describing Amendment 2 as “a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit”). Tellingly, in the next sentence Justice Kennedy quoted a nineteenth-century case’s statement that “[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . .” *Id.* (alteration in original) (quoting *The Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

276. For an example of a scholar arguing that the constitutional uniqueness of racial discrimination justifies a different balancing of constitutional free exercise and statutory non-discrimination rights in areas other than race, see Douglas Laycock, *The Campaign Against Religious Liberty*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 231, 252–53 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

To be sure, animus doctrine might have some logical connection with an anti-subordination understanding of the Amendment’s racial equality goal, in the sense that both animus and anti-subordination focus not on classification *simpliciter* but rather the types of classifications that reflect problematic government decision-making—respectively, decision-making infected by animus and (racial) decision-making that fails to account for historical racial oppression. The scope and details of this parallel present issues that lie beyond the scope of this Article.

277. See *supra* Part II.D.

incomplete. His analysis relies on the familiar *Arlington Heights* discriminatory intent factors as tools for uncovering animus.<sup>278</sup> That reliance is unsurprising, and appropriate; as explained above,<sup>279</sup> the concept of discriminatory intent bears close logical and doctrinal parallels to the animus principle.<sup>280</sup>

But those factors, and the burden-shifting framework that employs them, aim at a slightly different goal in the animus inquiry, one Carpenter does not acknowledge. He writes that, in the race context, “[t]he impermissible purpose [that is exposed by the *Arlington Heights* factors] is the purpose to discriminate on the basis of race,” while “[i]n animus cases, the impermissible purpose is the purpose to inflict injury or indignity.”<sup>281</sup> His equation of the two relevant “purposes” is off by a slight, but meaningful, degree. In the race context, the intent inquiry seeks to establish whether the government was indeed classifying (or “discriminating”) on the basis of race.<sup>282</sup> But establishing that the government indeed classified based on race (or any other status that merits heightened scrutiny) does not by itself end the case. Instead, it merely triggers the heightened scrutiny that the Court has described as “smok[ing] out” invidious—and thus unconstitutional—uses of race.<sup>283</sup> Thus, the intent inquiry plays an intermediate, not a final, step in the constitutional analysis.

By contrast, use of those same *Arlington Heights* factors as part of the animus inquiry leads to a more direct conclusion about the constitutionality of the challenged action. As Carpenter correctly acknowledges, animus is itself a constitutional wrong.<sup>284</sup> Thus, if application of the *Arlington Heights* factors leads a court to conclude that animus is present, that conclusion—unlike an analogous conclusion that a purposeful racial classification exists—ends the case.

This may seem like a trivial distinction with little practical bite. Nevertheless, this distinction matters for two related reasons. First, it explains the seemingly heightened rationality review that scholars observe in animus cases. As this Article has explained,<sup>285</sup> the conclusive nature of an animus determination<sup>286</sup> means that the burden-shifting that

278. See Carpenter, *supra* note 3, at 243–48.

279. See *supra* Section III.A.1.

280. See ARAIZA, *supra* note 58, at 89–133 (expanding on this point).

281. Carpenter, *supra* note 3, at 243.

282. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

283. Justice O’Connor (using the “smok[ing] out” language quoted in the text) made this most clear in *J.A. Croson. Id.* at 493.

284. Carpenter, *supra* note 3, at 221.

285. See *supra* notes 219–20 and accompanying text.

286. As Susannah Pollvogt puts it, animus “functions as a doctrinal silver bullet.” Pollvogt, *supra* note 24, at 889. See also Carpenter, *supra* note 3, at 221.

normally occurs at the second stage of the discriminatory intent inquiry must occur within the domain of rational basis scrutiny when that scrutiny is focused on a search for animus. That imperative in turn requires that such scrutiny be unusually stringent.

Second, and in turn, this understanding of animus as a “doctrinal silver bullet”<sup>287</sup> reveals that animus is qualitatively different from other strands of equal protection doctrine. In particular, it reveals the animus inquiry as a doctrinal shortcut, cutting through presumptions and heuristics such as heightened scrutiny analysis to home in directly on the ultimate conclusion that other doctrinal paths reach only indirectly. This understanding of animus therefore reveals the nature of animus as a core concern of equal protection.

To be sure, this conclusion does not mean that animus properly supplants those other paths. Applying the anti-animus principle presents courts with difficult challenges. Indeed, courts apply heuristics such as tiered scrutiny analysis exactly because more direct inquiries into a law’s constitutionality tax their abilities.<sup>288</sup> But heuristics can also fail or be abandoned, just as the Court appears to have abandoned any further evolution of suspect class analysis.<sup>289</sup> At such times, a return to first principles—here, to animus as a modern instantiation of the Fourteenth Amendment’s anti-class legislation idea—can help refocus equal protection law on its deep foundations.

#### IV. ANIMUS CONTEXTUALIZED

Part III’s concluding proposition—that animus doctrine can reflect a reformulated, contemporary expression of equal protection’s historic aspirations—requires careful consideration. If animus doctrine can be made to reflect such venerable principles, then it can claim a legitimate role in American constitutional jurisprudence. Indeed, it can even do more: By presenting a contemporary version of the class legislation idea, animus doctrine can help reconnect contemporary equal protection law to its historical antecedents and thus help place that law on a firmer, more historically legitimate, footing.

The basic argument for this proposition is straightforward: Just like its class legislation ancestor, animus doctrine tasks courts with ferreting out laws that are enacted for no legitimate government purpose, and

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287. Pollvogt, *supra* note 24, at 889.

288. See *supra* note 263 and accompanying text.

289. See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 (2011) (“At least with respect to federal equal protection jurisprudence, [the] canon [of suspect class analysis] has closed.”).

which are thus fundamentally arbitrary.<sup>290</sup> To be sure, “arbitrariness” fails to fully capture the essence of the constitutional problem with either class legislation or legislation infected with animus. For example, nineteenth-century commentators frequently described class legislation using adjectives that suggested defectiveness, impurity, and corruption,<sup>291</sup> words that suggest more than what one might call “arbitrariness,” “innocent irrationality,” or simple bad fit.<sup>292</sup> These more critical descriptions distantly echo this Article’s earlier argument that considerations of fit, while important to equal protection law, should play a secondary role in equal protection analysis—secondary, that is, to considerations of motive that are closer to the core of the equal protection guarantee.<sup>293</sup>

But beyond this straightforward comparison, difficult questions arise when evaluating whether animus-grounded legislation can be understood as the modern equivalent of class legislation. The jurisprudential world

290. For a deep consideration of class legislation and its influence on nineteenth and early twentieth century American constitutional thinking, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 10 (1993).

291. Consider, for example, the definitions of “vicious,” an adjective commonly used to describe class legislation. *See, e.g.*, *Peonage Cases*, 123 F. 671, 688 (M.D. Ala. 1903); *State v. Nashville, C. & St. L. Ry. Co.*, 135 S.W. 773, 774, 776 (Tenn. 1911); *see also* 2 NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 882–83 (1828) (“Vicious, . . . 1. Defective; imperfect; as a system of government *vicious* and unsound . . . 2. Addicted to vice; corrupt in principles or conduct; depraved; wicked; habitually transgressing the moral law; as a *vicious* race of men; *vicious* parents; *vicious* children. 3. Corrupt; contrary to moral principles or to rectitude; as *vicious* examples; *vicious* conduct. 4. Corrupt; in a physical sense; foul; impure; insalubrious; as *vicious* air. 5. Corrupt; not genuine or pure; as *vicious* language; *vicious* idioms. 6. Unruly; refractory; not well tamed or broken; as a *vicious* horse.”); WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 1474 (Chauncey A. Goodrich et al. eds., 1886) (“Vicious . . . 1. Characterized by vice or defects; defective; imperfect. The title of these lords was *vicious* in its origin. . . . 2. Addicted to vice; corrupt in principles or conduct; depraved; wicked; corrupt; as, a *vicious* race of men; *vicious* children; *vicious* examples; *vicious* conduct. 3. Lacking purity; foul; bad; as, *vicious* air, water, weather, and the like. 4. Not genuine or pure; as, *vicious* language; *vicious* idioms. 5. Not well tamed or broken; given to bad tricks; unruly; refractory; as, a *vicious* horse.”).

292. *See* Araiza, *supra* note 187, at 509–11 (discussing the differences between animus and “pure irrationality” in the context of class-of-one equal protection cases); *see also* Powell, *supra* note 2, at 266 (analyzing the applicability of equal protection to “arbitrary or irrational” government decisions made on an individualized basis). This more precise focus of the animus idea also effectively brackets the doctrinal question of hypothesized, rather than actual, government purposes. *See* Sanders, *supra* note 271, at 693–94 (discussing the proper scope of judicial hypothesizing of governmental purposes in constitutional litigation).

293. To repeat a point made earlier, such troubling motivations could also include omissions, such as failures to give conscious consideration to the interests of particular groups whose concerns have historically been ignored. *See* Karst, *supra* note 273, at 52 (offering such an understanding of equal protection as a response and partial rebuttal to the imposition of a generally-applicable discriminatory intent requirement).

of 1866 is vastly different from ours;<sup>294</sup> thus, drawing anything more than a superficial connection between animus and class legislation requires revisiting some basic assumptions about equal protection and constitutional rights in general.<sup>295</sup> Still, some tantalizing, if necessarily speculative and tentative, parallels exist between the class legislation idea and the anti-animus principle.

#### A. *Class Legislation as Legislation Lacking a Public Purpose*

First, consider the core of the class legislation idea. As explained by Melissa Saunders, the class legislation prohibition condemns laws that single out particular groups for burdens or benefits without a corresponding public purpose.<sup>296</sup> Professor Saunders offers a thin but broad definition of class legislation, one that raises the prospect of encompassing within it laws that reflect not just oppressive intent, but also laws that reflect “mere” government irrationality or private party rent-seeking.<sup>297</sup>

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294. *Cf.* Nourse & Maguire, *supra* note 263, at 996 (“[A]nalogizing class legislation to modern political theories poses risks of presentism.”). The same could be said about analogizing class legislation jurisprudence to modern judicial doctrine.

295. *Cf. id.* at 1006 (calling for a reconceptualization of equality law as principles guiding governance so as to ensure that minority interests are accounted for in the legislative process).

296. *See* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247–48 (1997); *see also* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 177 (1988) (explaining how Reconstruction-era theorists would have understood that a law that burdened one group without a corresponding public benefit would be understood as arbitrary). Jack Balkin defines the term to incorporate a subordinating effect on the burdened group. *See* Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843, 852 (2007) (defining class legislation as “legislation that imposes special burdens on a social group and tends to perpetuate their subordinate status”).

297. Saunders disclaims any interest in linking the class legislation idea to any conception of bad government intent. *See* Saunders, *supra* note 296, at 300 (describing the “guidance” of antebellum class legislation doctrine for the meaning of the Equal Protection Clause as a prohibition “aimed at state action that had the effect of singling out certain classes of persons for special benefits or burdens”). Her disinterest in the existence *vel non* of such intent suggests that a class law’s failure to promote any public purpose must either flow from the law’s sheer irrationality or its purpose to promote one group’s private interest without any intent to also promote the public interest. The question of a law’s sheer, but “innocent,” irrationality is an interesting one. *See, e.g.*, Powell, *supra* note 2, at 276 (suggesting that the Constitution does not require rationality where the government exercises “discretion”). The other possibility—that class legislation reflects nothing but rent-seeking by an interest group—should also be excluded from animus’s domain, given that rent-seeking laws generally reflect “mere” personal wealth maximization, rather than aiming at the social subordination of a group. *See, e.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4 n.15 (2011) (describing Saunders’ definition of class legislation as including rent-seeking legislation, even if, according to the authors, such laws do not impose the “social stigmatization” that marks caste-creating legislation); *see also* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and*



This broad definition of class legislation helps secure a handle on the proper meaning and role of animus in constitutional law, but it does not do the entire job. Exactly because this broad definition encompasses laws that cannot fairly be described as grounded in animus,<sup>298</sup> it cannot provide a precise historical parallel for a properly understood animus doctrine. Instead, that broad understanding of class legislation suggests that animus-based laws are best viewed as a subset of class legislation. In particular, while class legislation, as defined by Saunders, refers to legislation that *lacks* a connection to a *public*-regarding purpose, animus should be understood as a subset of such legislation that affirmatively *promotes* a *non-public*-regarding purpose.<sup>299</sup>

### B. *Animus as Caste Enforcement*

The previous sentence offers the prospect of narrowing the understanding of animus to a subset of class legislation that focuses on the establishment or reinforcement of castes.<sup>300</sup> Scholars have shown that the idea of caste resonated with the drafters of the Fourteenth Amendment.<sup>301</sup> In rejecting earlier drafts of the amendment that focused explicitly on racial equality, members of the Thirty-Ninth Congress expressed a broader concern with ensuring equal fundamental rights for all Americans.<sup>302</sup> They thus also expressed a corresponding antipathy to legislation that reduced any group of Americans to a subservient social position, such as the Black Codes that provided the impetus for both the Amendment and the Civil Rights Act of 1866.<sup>303</sup> Members of that

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*the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1024–25 (2013) (defining class legislation as including “legislation that singles out groups, individuals, or classes of people and grants them special privileges”).

298. See *supra* note 297.

299. See Saunders, *supra* note 296; see also Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 284, 337 (2015) (describing the equal protection rational basis test as one that “root[s] out blatant exploitations of power that needlessly abuse the disfavored constituents or pointlessly reward the favored” and describing rational basis equal protection cases as “cases in which animus, political capture, and gross violations of public trust depart from the barest expectations that the government will engage in public-minded pursuits”).

300. Indeed, some scholars define class legislation in this narrower way. See, e.g., Balkin, *supra* note 296 (defining class legislation as “legislation that imposes special burdens on a social group and tends to perpetuate their subordinate status”). See also Pollvogt, *supra* note 24, at 926 (connecting the concepts of animus and caste).

301. See Calabresi & Rickert, *supra* note 297, at 31–36.

302. *Id.* at 32.

303. *Id.* at 31–35. These ideas of equality focused on treating all members of a given class equally, a fact that opened up significant room for discrimination that modern Americans might find unjustifiable, if, at the time, the discriminated-against group was thought to be relevantly different from the favored group. See, e.g., *id.* at 34–35, 52 (recounting members of the 39th

Congress used evocative examples from foreign cultures, suggesting that they understood caste legislation as legislation that imposed status-based burdens creating or reinforcing a rigid social hierarchy.<sup>304</sup> This understanding of what the Reconstruction Congress sought to prohibit makes comprehensible both Justice Harlan’s use of the term “caste” in his *Plessy v. Ferguson* dissent as an apt label for laws, like the Louisiana streetcar segregation law, that were motivated by a belief that blacks were not fit to associate with whites, and his belief that such laws thereby violated the Equal Protection Clause.<sup>305</sup>

The modern animus cases have distinct parallels with the anti-caste idea. First, all of those cases concerned discrimination based on identity. To be sure, in *Moreno*, the identity wasn’t of the type that standard equal protection doctrine would recognize as immutable.<sup>306</sup> Nevertheless, even in that case, the “bare congressional desire to harm” targeted a social group based on its distinctive living choices, rather than on identity attributes society understands as less socially salient, such as occupation or geographic residence.<sup>307</sup>

Other parallels also exist, especially with regard to caste’s focus on creating physical and social distance between groups that in turn reinforces social hierarchy. *Cleburne* involved a decision to prohibit the disfavored group from taking up residence in a particular neighborhood, a context that distinctly, if admittedly distantly, echoes Justice Harlan’s critique of Jim Crow legislation as reflecting the majority’s distaste for associating with the burdened group.<sup>308</sup> In *Romer*, Justice Kennedy described Amendment 2 in ways that suggested a similar social

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Congress stating or assuming that men and women were often different and thus that sex discrimination often did not amount to class legislation).

304. See *id.* at 43 (quoting congressional debates on the Fourteenth Amendment).

305. See *Plessy v. Ferguson*, 163 U.S. 537, 555–59 (1896) (Harlan, J., dissenting) (“[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.”), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Indeed, Jim Crow legislation itself is certainly susceptible to an allegation of animus, to the extent it was justified simply by a view that races should not mix. And, as Justice Harlan recognized via his “[t]here is no caste here” language, it would be even more susceptible to such an allegation to the extent such laws were justified by the desires of white persons not to associate with particular types of other people—that is, black people. See *id.* at 557 (Harlan, J., dissenting) (setting forth his view of the underlying motivation for Jim Crow laws).

306. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

307. *Id.*

308. See *Plessy*, 163 U.S. at 557; Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1243 (2018) (citing *Cleburne* as an example of a majority’s desire to create a physical distance between it and the burdened group). Professor Huq likens this phenomenon to the idea of “taste-based discrimination” pioneered by Gary Becker, which Professor Huq identifies as one manifestation of animus. *Id.* (citing GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 15 (2d ed. 1971)).

distancing.<sup>309</sup> That distancing was more metaphorical than physical, as the Court concluded that Amendment 2 walled off the burdened group from the very status of enjoying the protection of the laws.<sup>310</sup> But such metaphorical distancing still resonates as social or civic exclusion: consider that the last substantive sentence of the *Romer* opinion described Amendment 2 as “deem[ing] a class of persons a stranger to its laws.”<sup>311</sup> Consider also that Justice Kennedy began his opinion with a reference to Justice Harlan’s rejection of caste in *Plessy*.<sup>312</sup>

Admittedly, *Windsor* is a tougher fit with the caste idea. Yet even that case features meaningful allusions to caste. Justice Kennedy noted how Section 3 of DOMA effected an across-the-board denial of a legal status that states, the traditional providers of that status, had chosen to bestow on same-sex couples.<sup>313</sup> More explicitly, repeating his emphasis on dignity in *Lawrence v. Texas*, he stressed the stigma DOMA imposed, describing the law as “undermin[ing] both *the public* and private significance” of their state-sanctioned marriages, and “plac[ing] same sex couples in . . . a second-tier marriage” that “demeans the couple,” and “humiliates” their children.<sup>314</sup> These descriptions all suggest the public subordination of a class of relationships<sup>315</sup> that, in turn, reflects caste-like status.<sup>316</sup>

309. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

310. *See id.* (describing the protections Amendment 2 withdrew as “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society”); *cf.* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1982 (2012)) (guaranteeing that all persons would enjoy the same basic civil rights as enjoyed by white persons). The wording of the statute—not guaranteeing “equal rights” *simpliciter*, but rather, guaranteeing that all persons would be accorded the level of rights protection as that enjoyed by white persons—again suggests, however obliquely, the idea of raising up all Americans to the highest level of rights protections American law provided, thus directly attacking the idea of hierarchy.

311. *Romer*, 517 U.S. at 635; *cf.* Editors of Encyclopaedia Britannica, *Outlawry*, ENCYCLOPAEDIA BRITANNICA (May 4, 2018), <https://www.britannica.com/topic/outlawry> [<https://perma.cc/RJR9-8SMQ>] (describing “outlawry” in terms suggesting social ostracism).

312. *See Romer*, 517 U.S. at 623; *see also* Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 203–04 (1996) (arguing that Amendment 2 was the equivalent of an unconstitutional bill of attainder).

313. *See United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013).

314. *Id.* at 2694 (emphasis added). For an argument that such humiliation and stigmatization constitute the equivalent of an unconstitutional bill of attainder, *see* Amar, *supra* note 312, at 208–09.

315. *See Windsor*, 133 S. Ct. at 2694 (observing that DOMA intentionally created inequality within the class of marriages recognized by states, the institutions that traditionally bestow marital status); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2599–602 (2015) (establishing that same-sex marriages further the same societal goals for which marital status is created to begin with).

316. *Cf.* Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667, 683 (2010) (drawing a connection between majoritarian views that extending marriage rights to same-sex couples will

These cases' focus on identity-based physical or social separation enacted in the service of preserving the purity of the dominant group by segregating disfavored groups<sup>317</sup> suggests an intuitive parallel with the idea of caste. As such, they suggest that animus doctrine may fit neatly within a subset of laws condemned as class legislation—those that create a caste regime.

Of course, animus is not the only equal protection doctrine that features these parallels to caste. Indeed, given that the anti-caste imperative provided at least some of the motivation for the Fourteenth Amendment,<sup>318</sup> it is not surprising that many scholars have insisted that caste-like social subordination should constitute the main focus of equal protection law.<sup>319</sup> The great variety of discrimination that raises colorable equal protection claims, and in particular the historical legacies of certain types of discrimination, suggests that an anti-caste and anti-subordination theory of equal protection should be flexible enough to encompass a variety of doctrinal mechanisms. With regard to race, for example, such a theory should easily be flexible enough to accommodate lesser reliance on an intent requirement in light of the historical embeddedness of racism in American society that risks leaving much of it unremedied if a plaintiff is required to satisfy such a requirement.<sup>320</sup> One could make a similar observation about sex discrimination in light of deeply entrenched and often unacknowledged assumptions about the relative capabilities of, and appropriate social roles for, men and women.<sup>321</sup>

For other types of discrimination, however, broad presumptions about the likely existence of either obvious prejudice or “merely” stereotyped thinking either become less persuasive or, at the very least, encounter obstacles to effective judicial implementation. For example, distinguishing caste-creating discrimination from appropriate differential

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sully traditional marriage and notions of disgust and contamination that are heavily caste-inflected).

317. See *Romer*, 517 U.S. at 635; Nussbaum, *supra* note 316.

318. See, e.g., Calabresi & Rickert, *supra* note 297.

319. See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986); Hutchinson, *supra* note 216, at 692 nn.516–17 (citing several of those scholars); *id.* at 692 (“[A]ntisubordination theory looks toward ending only those governmental practices that reinforce caste.”).

320. See, e.g., Karst, *supra* note 273, at 30.

321. See, e.g., Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 136 (2010) (noting Justice Blackmun’s apparently startled reaction to Justice Brennan’s suggestion in his draft opinion in *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) that the male widower-father in the case might have chosen to stay at home with the couple’s child even if his wife had not died). For statements about the caste-like status of gender relations in the United States at the time of the Fourteenth Amendment’s enactment, see Calabresi & Rickert, *supra* note 297, at 57–60.

treatment may be difficult in the context of disability discrimination.<sup>322</sup> In the context of transgender rights, the still-evolving nature of public opinion may make some judges nervous about issuing blanket condemnations of such discrimination—a phenomenon that some might even continue to ascribe to the context of gay and lesbian rights.<sup>323</sup>

Of course, some axes of discrimination have yet to arise, or yet to command significant public and judicial attention.<sup>324</sup> Indeed, to the extent majorities can impose social subordination based on the lifestyle choices of the burdened group,<sup>325</sup> the constantly evolving nature of such choices means that new axes of subordination will likely arise with the living choices made by each new generation. Even assuming that society eventually condemns such emerging discrimination, the process by which that condemnation develops takes time and proceeds in a series of somewhat regular stages, as scholars have begun to uncover.<sup>326</sup>

In situations like these, animus doctrine can play a useful role in ferreting out, at a more granular level, the kind of socially subordinating discrimination the Reconstruction generation would have characterized and condemned as caste-creating. But this promising possibility requires doing the hard work of uncovering the retail-level analogues to the wholesale legacies of racism and sexism that make anti-subordination an attractive approach to equal protection in those latter contexts.

The outline of an animus doctrine provided earlier in this Article<sup>327</sup> furnishes guideposts for that inquiry. Its focus on legislation that imposes unusually-targeted burdens that deviate from normal governmental practices and procedures, and that does so against a background that suggests that these effects were intended (rather than mere by-products of legislative attempts to pursue other, more legitimate, goals) channels

322. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 444–45 (1985) (observing that some disability differentiation may in fact redound to the benefit of disabled persons and expressing doubt about courts' ability to distinguish between beneficial and detrimental treatment).

323. Cf. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605–07 (2015) (addressing the argument that more public debate was necessary on the question of same-sex marriage).

324. See, e.g., William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. L. REV. 451, 478–80, 524–28 (2010) (discussing the prospect of discrimination based on genetics, and how such discrimination fits within equal protection doctrine); see also *id.* at 529–30 (discussing obesity discrimination). See generally ANA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* (2008) (providing a deeper discussion of obesity discrimination).

325. See *supra* note 46 and accompanying text (discussing legislators' hostility to the lifestyle choices of hippies).

326. Among the large literature in this area, see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2073 (2002).

327. See *supra* 215–67 and accompanying text.

the inquiry toward laws that appear to have been enacted simply to legislate inequality.<sup>328</sup> To be sure, such suspicion does not equate to proof. But, as that outline explains, it justifies reversing the normal presumption of constitutionality accorded government action, and it requires the government to demonstrate that the law was in fact motivated by a legitimate purpose.

Unlike formally heightened scrutiny, this burden shifting does not require the government to demonstrate an unusually good fit between the law and that legitimate purpose. Given that the inquiry's goal is determining the government's ultimate motivation, and given that, by definition, the discrimination in question is not entirely suspicious, it demands only a reasonable fit.<sup>329</sup> But it must be a fit with the government's *actual* goal.<sup>330</sup> This insistence on identifying a challenged law's actual goal reflects animus doctrine's underlying concern with the government's motivation.<sup>331</sup> If the challenged law fails the burden-shifting described above,<sup>332</sup> then the government's true motive becomes apparent. And it isn't good.

### C. *Obergefell: The Doctrinal Promiscuity of the Class Legislation Prohibition and the Future of Animus Doctrine*

*Obergefell v. Hodges*<sup>333</sup> is the most recent gay rights victory at the Court—and, more importantly, the Court's most recent significant individual rights case that cannot be fully explained by conventional equal protection or due process doctrine. As such, it provides clues to animus doctrine's possible evolution and, in particular, its relationship to Fourteenth Amendment equality and liberty.

Consider that relationship: Late nineteenth and early twentieth century-judges and scholars frequently commented on the overlap between the Due Process and Equal Protection Clauses. That overlap

328. Cf. *Romer v. Evans*, 517 U.S. 620, 635 (1996) (“[Amendment 2] is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”).

329. For an expanded discussion of this point, see Araiza, *supra* note 58, at 139–43. Indeed, to the extent a requirement of precise fit is itself a decisional heuristic that flows from the identification of the classification as suspect, *see, e.g.*, *United States v. Windsor*, 570 U.S. 744, 802, 811 (2013) (Alito, J., dissenting) (“The modern tiers of scrutiny . . . are a heuristic to help judges determine when classifications have that fair and substantial relation to the object of the legislation [that equal protection requires].”) (internal quotation omitted), the more direct, unmediated nature of the animus inquiry dispenses with this requirement in favor of a more direct inquiry into the law's constitutionality. *See* Araiza, *supra* note 58, at 139–43.

330. On the question of actual versus hypothesized government purposes, *see* Sanders, *supra* note 271, at 695.

331. *See* ARAIZA, *supra* note 58, at 139–43.

332. *See supra* notes 208–13 and accompanying text.

333. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

manifested in the prohibition on class legislation, which nineteenth-century courts often described as contrary to the Fourteenth Amendment as a general matter, without bothering to further specify its textual basis.<sup>334</sup> In the last decades before 1937, the Court began to specify that the Equal Protection Clause provided the strongest protection against the sort of non-public-regarding discrimination that was condemned as class legislation.<sup>335</sup> Nevertheless, the Court continued to insist that the Due Process Clause, in addition to protecting against deprivations of then-newly-announced rights such as the right to contract and raise a family, also provided at least some protection against generally arbitrary discrimination.<sup>336</sup>

One can find a trace of that latter idea in *Obergefell*'s determination that same-sex couples married for the same reasons as their opposite-sex counterparts.<sup>337</sup> While normally one might expect such a finding to lead a court to decide that same-sex marriage bans simply fit badly with the underlying reasons government recognizes marriages, *Obergefell* drew a different lesson. According to Justice Kennedy, that finding led him to conclude that same-sex marriage bans “teach[] that gays and lesbians are unequal in important respects” and “demean[] gays and lesbians” by “lock[ing] them out of a central institution of the Nation’s society.”<sup>338</sup> This is not the language of misclassification. Rather, it is a conclusion that excluding same-sex couples from access to marital status subordinates—a conclusion that it “teach[es]” inequality, “demeans” its victims, and “lock[s] them out of a central [social] institution.”<sup>339</sup> Regardless of its grounding in due process rather than equal protection, such effects suggest the kind of oppressive discrimination and exclusion from a desirable status that could legitimately be described, not just as class legislation, but more specifically as legislation that creates a caste.<sup>340</sup>

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334. See, e.g., *Barbier v. Connolly*, 113 U.S. 27, 31–32 (1885) (providing a detailed explanation of the constitutional impermissibility of class legislation but failing to specify which Fourteenth Amendment clause condemned such laws).

335. See *Truax v. Corrigan*, 257 U.S. 312, 331–34 (1921) (discussing the respective roles of the Due Process and Equal Protection clauses); see also *Nourse & Maguire*, *supra* note 263, at 987 (discussing *Truax*).

336. See *Truax*, 257 U.S. at 351–52.

337. *Obergefell*, 135 S. Ct. at 2589.

338. *Id.* at 2602.

339. *Id.*

340. Cf. *Windsor*, 570 U.S. at 771 (“[DOMA’s] demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law.”). It should not be surprising, or particularly problematic for this analogy, that *Obergefell*'s neo-class legislation conclusion found its doctrinal home in the Due Process Clause rather than the Equal Protection Clause. As noted earlier in the text, see text accompanying *supra* notes 334–36, judges and scholars from the nineteenth and early twentieth

To be sure, one cannot precisely equate *Obergefell's* interlocking of due process and equal protection<sup>341</sup> to the doctrinal promiscuity of nineteenth-century class legislation jurisprudence. That earlier jurisprudence may have flowed uniquely from that era's more general conception of "rights" as the residual liberty that remains after the legitimate scope of government power—what was called the "police power"—ran out.<sup>342</sup> That understanding of rights implied that the precise identification of the right did not matter as much as it does today, when the law considers rights as trumps, and thus insists on specifying which right is at issue and how far that right extends.

Nevertheless, the nineteenth-century idea that the police power does not extend to government actions that impose arbitrary burdens on persons' residual liberty can be analogized to *Obergefell's* conclusion that same-sex marriage bans impose an analogously arbitrary burden. For purposes of that comparison, note *Obergefell's* apparent conclusion that same-sex marriage bans furthered no legitimate government interest, given the Court's understanding that same-sex marriage furthers the same social goals as its opposite-sex counterpart.<sup>343</sup> So understood, one could understand bans on same-sex marriage as a modern species of the arbitrary burdening of liberty that class legislation doctrine condemned. Indeed, by "lock[ing] out" those relationships from an important status, "demean[ing]" their victims, and "teach[ing]" inequality,<sup>344</sup> those bans could be understood as a particularly odious type of class legislation—a type appropriately describable as imposing caste-like disabilities. To be sure, the analogy is far from precise. But ideas of class legislation and caste can help make an otherwise-inscrutable opinion both more comprehensible and more firmly grounded in constitutional first principles.

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centuries recognized that both of these provisions required some level of equality, and both were offended by laws that were exposed as class legislation. *See, e.g., Truax*, 257 U.S. at 312. Indeed, Nourse and Maguire argue that at some point in the early Twentieth century, courts used the presence of a right as a trigger for more careful class legislation scrutiny. *See* Nourse & Maguire, *supra* note 263, at 983–84. Translating this development into modern doctrine, one could understand *Obergefell's* acknowledgement of the fundamental right to marry, *see* 135 S. Ct. at 2598, as triggering equally careful neo-class legislation scrutiny.

341. *See, e.g.,* Tribe, *supra* note 41, at 20–23.

342. *See, e.g.,* Bambauer & Massaro, *supra* note 299, at 286 n.19 (collecting sources making this point).

343. *See id.* at 2588–602.

344. *Obergefell*, 135 S. Ct. at 2602.



### D. *Animus as Ill Will*

While an earlier part of this Article addressed the criticism that animus jurisprudence constitutes, at base, the “jurisprudence of denigration,”<sup>345</sup> Part IV’s comparison between animus and caste requires returning to the idea that the concept of animus necessarily includes some imputation of ill will. It is unsurprising that the ill will issue should return as the ultimate challenge facing animus doctrine. Questions about intent are central to any coherent concept of animus, but have bedeviled the Court’s constitutional rights jurisprudence, not just in equality law but more generally.<sup>346</sup> As scholars such as Professor Smith have observed, the animus idea exacerbates these difficulties, given both the undeniably freighted nature of the very term “animus,” the reheating of the culture wars of the 1990s, and the Court’s willingness to venture into that battleground.<sup>347</sup> To Professor Smith’s catalog of reasons to worry about animus doctrine, one can add more recent developments reflecting renewed xenophobia in American society, and courts’ seeming willingness to characterize it as animus.<sup>348</sup>

At the most general level, this final consideration of the descriptive accuracy and normative appropriateness of a doctrine called “animus” presents a problem whose full analysis far exceeds the scope of this Article. Indeed, one can plausibly argue that the debate over animus doctrine ultimately implicates the debate over the judiciary’s role in enforcing constitutional rights at all, or at the very least, its enforcement of constitutional rights beyond their thinnest, most textually-incontestable versions. After all, a legal culture that often seems to equate “unconstitutional” with “evil” or “benighted” almost necessarily “denigrates” those associated with conduct that a court—and especially *the* Court—determines to be unconstitutional. The heroic story America tells itself about the Constitution—a story of setbacks and advances, but

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345. Smith, *Denigration*, *supra* note 17, at 275; *see supra* Section III.B.

346. *See, e.g.*, *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 872 (1990) (ruling that judicial review under the Free Exercise Clause is triggered only by laws that target religion); Huq, *supra* note 308, at 1224 (identifying a turn toward requiring intent in Equal Protection, Free Exercise Clause, and Establishment Clause law); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 431 (1996) (doing the same in Free Speech Clause law).

347. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290, 2290 (2017) (mem.) (granting *cert.*); *see, e.g.*, *Obergefell*, 135 S. Ct. at 2605–07 (explaining why it was unnecessary and inappropriate for the Court to wait and let political debate about same-sex marriage mature further).

348. *See supra* Section I.B and accompanying text (describing the travel ban litigation); *see also, e.g.*, Keshner, *supra* note 16 (noting a judge’s possible reliance on anti-Latino comments made by the President when deciding a legal challenge to the President’s rescission of the DACA program).

ultimately a triumphal story of good eventually prevailing over evil<sup>349</sup>—necessarily casts as villains the characters who have ended up on the short side of the Supreme Court vote: the police torturers,<sup>350</sup> the censors,<sup>351</sup> the segregationists,<sup>352</sup> the sexists,<sup>353</sup> the prudes<sup>354</sup>—and now, the homophobes?<sup>355</sup>

If this story resonates even a little,<sup>356</sup> then query whether it is possible to find a doctrinal vocabulary that allows for advances in human freedom without necessarily casting aspersions on those who stand in the way. Indeed, the very language of “advancing human freedom” necessarily calls into question the motives of those who oppose that advance. One can easily sympathize with Justice Kennedy in *Obergefell* when he struggled to use soaring terms to portray marriage rights for same-sex couples without simultaneously denigrating those who opposed granting those rights. Tradition, deeply held and deeply respectable religious belief.<sup>357</sup> How could these concepts be lauded when they blocked access to such admirable concepts, advanced by such admirable people?<sup>358</sup>

349. See generally, e.g., RICHARD D. MOHR, *THE LONG ARC OF JUSTICE: LESBIAN AND GAY MARRIAGE, EQUALITY, AND RIGHTS* (2005) (discussing, prior to *Obergefell*, the hope that same-sex marriage would be legalized by the Court).

350. See *Brown v. Mississippi*, 297 U.S. 278, 278 (1936).

351. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964).

352. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

353. See *United States v. Virginia*, 518 U.S. 515, 558 (1996).

354. See *Jenkins v. Georgia*, 418 U.S. 153, 154–55 (1974).

355. To be sure, some villainous characters have taken the form of *defenders* of constitutional rights—in the stereotypical telling, the *Lochner*-era defenders of a so-called liberty of contract who were, at, base, simply defending the right to exploit. But opponents of that right were ultimately able to cast themselves as the true defenders of constitutional rights, correctly understood. See, e.g., REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 68–69 (2006) (explaining, in quasi-constitutional terms, the rights of labor unions to organize for better pay and working conditions, and for statutory protections). More recently, *Lochner* “revisionists” have sought—with some success—to flip the traditional script, and to cast defenders of economic rights as standing in similar, if not the exact same, shoes as the defenders of more traditionally-celebrated constitutional rights. See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 122–25 (2011) (concluding that *Lochner* and similar, individual-rights jurisprudence have been unfairly maligned).

356. Not every story about constitutional rights will take this form. For example, governments seeking to restrict guns are generally not portrayed as evil, but, at least in mainstream tellings, as (at worst) well-intentioned officials sincerely concerned about gun violence. See ZIETLOW, *supra* note 355, at 76 (suggesting that regulators of the labor market could also be understood as well-intentioned). Thanks to Lee Strang for this insight.

357. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (describing the views of those who oppose same-sex marriage in those terms).

358. See *id.* at 2594–95 (presenting, in very favorable light, the stories of the plaintiffs in the litigation); see also Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 138 & 138 n.9 (2015)

One answer is to employ doctrinal indirection. For example, had the *Obergefell* Court concluded that sexual orientation was a suspect classification, then discrimination implicating that trait would be subject to more stringent proof requirements that it likely could not have satisfied in the case of marriage.<sup>359</sup> But this effacing of the underlying normative judgment is only skin-deep. As Justice Scalia recognized (and protested) in *Romer*, a holding that sexual orientation discrimination requires more than the barest public-regarding justification “places the prestige of [the Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.”<sup>360</sup>

But *Romer* did not even involve explicitly heightened scrutiny.<sup>361</sup> Such heightened scrutiny would have made the normative argument against homophobia (and thus, presumably, homophobes) even clearer, given that traditional suspect class analysis inquires into concepts such as the general relevance of the classification trait and the group’s (unfair<sup>362</sup>) political powerlessness.<sup>363</sup> If such a trait was held to be generally irrelevant and a marker for an unfairly marginalized group, but yet was employed in a given law, it is hard to avoid the conclusion that the enactors of that law—such as the Coloradans who voted for Amendment 2—must simply have disliked that group. The only other explanations would hold that the majority was simply woefully uninformed about that group or indifferent to its well-being (another form of denigration, to be sure).<sup>364</sup>

The fundamental rights route similarly offers little hope of evading the implied moral judgment condemning homophobes. Ultimately, rights are fundamental for those who are deemed potentially proper recipients of that right.<sup>365</sup> The right to vote is fundamental, but nobody thinks strict

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(describing how the plaintiffs in *Obergefell* were chosen for their likely attractiveness to mainstream American society).

359. For one scholar’s argument that this doctrinal path was the preferable path to same-sex marriage rights, see Conkle, *supra* note 29.

360. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). Indeed, Justice Scalia’s quote implicitly criticized the Court’s stand against “disfavoring” homosexuality, thus suggesting that such disfavoring need not even satisfy minimal constitutional standards.

361. *See id.* at 631, 634 (basing the Court’s holding not upon strict scrutiny, but rather, upon a finding of animus, which cannot withstand rational basis review).

362. *See ELY, supra* note 126, at 152 (conceding that the political powerlessness prong of suspect class analysis had to refer to powerlessness that was in some way “discreditable” or unwarranted); *see also* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 740–41 (1985) (making a similar argument, but as part of a critique of standard suspect class criteria).

363. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 689–90 (1973).

364. *See, e.g.,* Karst, *supra* note 273, at 65.

365. Indeed, this observation helps explain at a doctrinal level the practical emphasis in impact litigation such as that challenging same-sex marriage bans on finding what one scholar

scrutiny is required to justify its denial to a precocious fourteen year-old.<sup>366</sup> If the right to marriage extends to same-sex couples because the right is fundamental, it must be because same-sex couples are proper recipients of that right. Of course, this is exactly what Justice Kennedy said in *Obergefell* when he concluded that gays and lesbians marry for the same socially desirable reasons as heterosexuals.<sup>367</sup> Indeed, it's what he *had* to say, lest the fundamental nature of the right to marry therefore mean that it must extend to children and polyamorous groupings. As with the heightened equal protection scrutiny route, the due process fundamental rights route requires validating the claim that sexual orientation is a morally and practically neutral feature, either generally (in the case of a heightened scrutiny approach) or within the context of the right in question (in the case of a fundamental rights approach). Opposition to claims stated through either route thus becomes hard to express in terms that allow that opposition to escape moral taint.

A final approach is to emphasize the distinction between the public and the private realm. Under this approach, the Court purports to withhold judgments about the correctness vel non of moral qualms about homosexuality and simply decrees, as a matter of jurisprudential housekeeping, that such qualms per se have no place in government decision-making. Thus, as Justice Kennedy concluded in both *Lawrence* and *Obergefell*, privately held moral precepts about sexuality, marriage, and family simply have no place in law, at least when they have the oppressive effect Justice Kennedy described in those cases.<sup>368</sup> This approach has the benefit of rendering such qualms legally irrelevant, and thus obviating any need for courts to condemn them. Indeed, it allows even more: As in *Obergefell*, it allows a court to pay homage to the sincerity and goodwill with which those qualms are held and expressed, while nevertheless ruling them jurisprudentially out of bounds.<sup>369</sup>

This approach opens the door, if only a crack, to a thin understanding of rights such as the same-sex marriage right. Under this approach, moral disapproval of the right (or of the equality claim) is disallowed as a factor and drops out of the analysis. This leaves the government to defend the rights deprivation or discrimination on utilitarian grounds—as some

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calls “perfect plaintiffs.” See Godsoe, *supra* note 358, at 155 (describing the process of plaintiff selection in several foundational individual rights litigations).

366. U.S. CONST. amend. XXVI.

367. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

368. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting with approval a previous dissenting opinion arguing that a legislative majority’s view that certain conduct is immoral does not authorize it to criminalize that conduct); *Obergefell*, 135 S. Ct. at 2602; see also *Lawrence*, 539 U.S. at 575 (describing the oppressive effects of Texas’s sodomy laws); *Obergefell*, 135 S. Ct. at 2604 (describing the oppressive effects of same-sex marriage bans).

369. *Obergefell*, 135 S. Ct. at 2602.

states did, unsuccessfully, in the run-up to *Obergefell* when they offered child welfare and so-called “accidental procreation” arguments as justifications for same-sex marriage bans.<sup>370</sup> Under this approach, culture war issues such as same-sex marriage become straightforward questions of a challenged law’s fit with a utilitarian justification.<sup>371</sup> As such, courts are relieved of any need to rule on an animus ground.

The problem is that the private realm is not so easily cabined. Florists, photographers, and bakers may all have private views about same-sex marriage, but when those views affect their conduct in the public sphere, their rights to private belief collide with governmental recognition and protection of the other side’s public status as equal members of the community. This, of course, is the issue today.<sup>372</sup> Whether the Court can find a satisfactory dividing line between the public and the private realms is a matter of much doubt.<sup>373</sup> Perhaps more importantly, any dividing line the Court offers may well be understood as endorsing “animus” on the part of the prevailing side—either the religious objectors whose objections would become constitutionally accommodated, or the beneficiaries of the anti-discrimination law who would gain the right to compel conduct those objectors find deeply offensive.

#### CONCLUSION: ANIMUS AND ITS DISCONTENTS

It should not be surprising that the rise of animus analysis has been controversial. Its aggressively personal tone, when combined with its undertheorized application in Supreme Court cases that have employed it, make criticism understandable, especially when it is used in high

370. See, e.g., *Bostic v. Schaefer*, 760 F.3d 352, 381 (4th Cir. 2014).

371. For one expression of this approach, with a fairly clear motivation to shore up the ability of persons to continue expressing opposition to the claimed right within the private sphere, see Brief of Douglas Laycock, Thomas C. Berg, David Blankenhorn, Marie A. Failinger, and Edward McGlynn Gaffney, as Amici Curiae in Support of Petitioners at 10, 12–13, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) (arguing that government lacks a legitimate interest to deny same-sex marriage rights, but urging the Court to consider expanding rights to religious-based private conduct opposing same-sex marriage).

372. See, e.g., *Masterpiece*, 138 S. Ct. at 1723 (“The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.”).

373. See, e.g., James M. Oleske, Jr., *Doric Columns are Not Falling: Wedding Cakes, the Ministerial Exception, and the Public-Private Distinction*, 75 MD. L. REV. 142, 145 (2015) (discussing the public-private divide in the context of the debate over religious belief-based exemptions from civil rights laws implicating hot-button cultural issues); see also Steve Sanders, *RFRAs and Reasonableness*, 91 IND. L.J. 243, 265–66 (2016) (acknowledging this difficulty and calling for restraint on both sides of this issue).

profile cases that reflect deep-seated cultural dissensus. It is also understandable why it might trigger frustration among those who see it as useful only in a limited number of situations—but nevertheless a potential distraction for courts faced with the important business of meaningfully testing government action that is alleged to discriminate on more prosaic bases, such as an action’s alleged lack of a rational basis.

To repeat, much of this critique should not be a surprise. Name calling really does poison the dialogue that may become necessary after a heated issue is decided and the time comes for post-war negotiations over the details of the final settlement. If animus really does distract courts and litigators from the hard, unglamorous work of proving the irrationality of government action, and thus impedes the progress of social movements which have only rational basis claims available at the start of their litigation sagas, there is reason to be dispirited. The undertheorized nature of the Court’s animus decisions can only add insult to these injuries.

Yet the doctrine persists, and, indeed, seems to be flowering.<sup>374</sup> In part, this may be due to our current circumstances, in which the label “animus” truly seems to describe government action in a way that has not generally been the case in recent American history.<sup>375</sup> But it may also be persisting because of its instinctive resonance. The framers’ concern with faction and nineteenth-century jurists’ concern with class legislation both reflect similar concerns to those underlying the modern animus cases—concerns about private interests and private prejudices motivating government action.<sup>376</sup> These concerns, of course, can be understood quite broadly; thus, they can be understood as supporting a variety of jurisprudential approaches to the Constitution’s guarantee of equality.<sup>377</sup> But surely one way to instantiate those concerns today is to ask directly and explicitly what one might legitimately describe as a foundational question in any equal protection case: Is government acting “not to further a proper legislative end but to make [a burdened group] unequal to everyone else?”<sup>378</sup> The difficulty lies in translating into workable doctrine the “majestic generalit[y]”<sup>379</sup> underlying that question. This Article has aspired to do some of that work.

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374. See *supra* Part I.

375. To be sure, this observation can be overstated; presumably, every generation fights its cultural battles, which may seem to that generation uniquely difficult or mean-spirited. Struggles for racial and sex equality have at times been every bit as bitter as our current conflicts. *But see* Kendrick and Schwartzman, *supra* note 92, at 169 (describing some of President Trump’s statements relating to the immigration bans as “some of the grossest public statements made by any President in recent memory”).

376. See, e.g., Carpenter, *supra* note 3, at 226–30; *supra* Sections IV.A–B.

377. See *supra* text accompanying notes 319–321.

378. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

379. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

Finally, any speculation about the future of animus doctrine would be incomplete without addressing the retirement of Justice Anthony Kennedy in July 2018.<sup>380</sup> Justice Kennedy, the author of *Romer*, *Windsor*, *Obergefell*, and *Masterpiece*, has done more than any other modern justice to promote the animus idea. It would be deeply unfortunate if his departure from the Court caused a halt in the evolution of the animus principle, or even its complete abandonment, just at the moment when a coherent doctrine is starting to appear.

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380. Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html> [<https://perma.cc/7GEZ-NPWH>].