

THE DEAD END OF ANIMUS DOCTRINE

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INTRODUCTION

For animus doctrine, the decade since the Supreme Court decided *United States v. Windsor*¹ has been the best of times and the worst of times. Federal courts have decided at least thirty-five cases involving substantial claims of unconstitutional animus—governmental decision making driven by malice against a group.² The Supreme Court itself explicitly addressed the doctrine in two major decisions—*Trump v. Hawaii* (2018)³ and *Department of Homeland Security v. Regents of the University of California* (2020)⁴—and indirectly addressed it

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1. *United States v. Windsor*, 570 U.S. 744 (2013) (striking down a federal law defining marriage as the union of one man and one woman).

2. *See* *Suber v. Guinta*, 927 F. Supp. 2d 184 (E.D. Pa. 2013), *aff'd sub nom.* *Suber v. Wright*, 574 F. App'x 207 (3d Cir. 2014); *Faith Action for Cmty. Equity v. Hawaii*, No. 13–00450, 2014 WL 1691622 (D. Haw. Apr. 28, 2014); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), *rev'd* 791 F.3d 616 (5th Cir. 2015), *and recalled*, No. 13–5090 C/W, 14–97, 14–327, 2015 WL 4090353 (E.D. La. July 2, 2015), *and abrogated by* *Obergefell v. Hodges*, 576 U.S. 644 (2015); *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Borum v. Swisher Cnty.*, No. 2:14–CV–127–J, 2015 WL 327508 (N.D. Tex. Jan. 26, 2015); *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493 (9th Cir. 2016); *Barber v. Bryant*, 193 F. Supp. 3d 677 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017); *Terry v. Borough*, 660 F. App'x 160 (3d Cir. 2016); *White v. City of New York*, 206 F. Supp. 3d 920 (S.D.N.Y. 2016); *A.H. ex rel/ Holzmueller v. Ill. High Sch. Ass'n*, 263 F. Supp. 3d 705 (N.D. Ill. 2017), *aff'd*, 881 F.3d 587 (7th Cir. 2018); *Whitehead v. Wetzel*, 720 F. App'x 657 (3d Cir. 2017); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018), *rev'd in part sub nom.* *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Tuscola Wind III, LLC v. Almer Charter Twp.*, 327 F. Supp. 3d 1028 (E.D. Mich. 2018); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393 (D. Mass. 2018); *M.S. v. Brown*, 902 F.3d 1076 (9th Cir. 2018); *Thorpe v. Upper Makefield Twp.*, 758 F. App'x 258 (3d Cir. 2018); *New Hope Fam. Servs., Inc. v. Poole*, 387 F. Supp. 3d 194 (N.D.N.Y. 2019), *rev'd in part, vacated in part*, 966 F.3d 145 (2d Cir. 2020); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 945 F.3d 83 (2d Cir. 2019); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *United States v. Machic-Xiap*, 552 F. Supp. 3d 1055 (D. Or. 2021); *Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Hum. Servs.*, 557 F. Supp. 3d 224 (D. Mass. 2021); *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021); *United States v. Hernandez-Lopez*, 583 F. Supp. 3d 815 (S.D. Tex. 2022); *United States v. Muñoz-De La O*, 586 F. Supp. 3d 1032 (E.D. Wash. 2022); *Mitchell v. Kirchmeier*, 28 F.4th 888 (8th Cir. 2022); *625 Fusion, LLC v. City of Fort Lauderdale*, 595 F. Supp. 3d 1228 (S.D. Fla. 2022); *Green Genie, Inc. v. City of Detroit*, 599 F. Supp. 3d 544 (E.D. Mich. 2022); *United States v. Rodriguez-Arevalo*, 603 F. Supp. 3d 142 (M.D. Pa. 2022); *United States v. Barrera-Vasquez*, No. 2:21cr98, 2022 WL 3006773 (E.D. Va. July 28, 2022); *United States v. Paredes-Medina*, No. 2:21–cr–00323, 2022 WL 7683738 (D. Nev. Oct. 13, 2022); *Allentown Victory Church v. City of Allentown*, No. 5:21–cv–03021, 2022 WL 4071851 (E.D. Pa. Sept. 1, 2022).

3. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

4. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

in one more, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.⁵ Scholarship on the issue is flourishing, addressing the application of animus principles in a wide range of contexts from immigration to election law to prison litigation reform.⁶ An important book tracing the development and features of animus doctrine has been published.⁷

“Across four decades,” I wrote in 2013 after *Windsor*, “the concept of animus has emerged from equal protection doctrine as an independent constitutional force.”⁸ Yet animus as a truly *independent* constitutional force—that is, divorced from the usual grounds of invalidating government action under substantive constitutional doctrines like fundamental-rights or suspect-

5. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018).

6. See Walker Moller, *Common Sense Preemption or Preempting Common Sense? A Call to Abandon Obstacle Preemption and Adopt Elevated Scrutiny of Local Legislation Targeting Undocumented Immigrants*, 33 MISS. COLL. L. REV. 119 (2014); Lee Pinzow, *Is It Really All About Race?: Section 1985(3) Political Conspiracies in the Second Circuit and Beyond*, 83 FORDHAM L. REV. 1031 (2014); Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1 (2015); Stacey L. Sobel, *When Windsor Isn’t Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL’Y 493 (2015); John M. A. DiPippa, *Bias in Disguise: The Constitutional Problems of Arkansas’s Intrastate Commerce Improvement Act*, 37 U. ARK. LITTLE ROCK L. REV. 469 (2015); Alamea Deedee Bitran, Comment, *Equal Opportunity, Not Equal Results: Benign Racial Favoritism To Remedy Mere Statistical Disparate Impact Is Never Constitutionally Permissible*, 11 FIU L. REV. 427 (2016); Robert C. Farrell, *Equal Protection Rational Basis Cases in the Supreme Court Since Romer v. Evans*, 14 GEO. J.L. & PUB. POL’Y 441 (2016); A. Reid Monroe-Sheridan, *“Frankly Unthinkable”: The Constitutional Failings of President Trump’s Proposed Muslim Registry*, 70 ME. L. REV. 1 (2017); Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211 (2018); Rishita Apsani, Note, *Are Women’s Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause*, 106 CALIF. L. REV. 1689 (2018); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018); Eric Merriam, *Fire, Aim, Ready! Militarizing Animus: “Unit Cohesion” and the Transgender Ban*, 123 DICK. L. REV. 57 (2018); Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors?*, 2017-18 CATO SUP. CT. REV. 139; Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257; William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155 (2019) [hereinafter *Animus and Its Discontents*]; Govind Persad, *Evaluating the Legality of Age-Based Criteria in Health Care: From Nondiscrimination and Discretion to Distributive Justice*, 60 B.C. L. REV. 889 (2019); Cameron Sheldon, Note, *Using 42 U.S.C. § 1985(2) to Challenge Dragnet Immigration Enforcement at State Courthouses*, 9 U.C. IRVINE L. REV. 1003 (2019); Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147 (2019); William D. Araiza, *Response: Animus, Its Critics, and Its Potential*, 48 STETSON L. REV. 275 (2019) [hereinafter *Animus, Its Critics, and Its Potential*]; Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215 (2019); Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195 (2019); Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185 (2020); Jamila Garmo, Note, *The Rejection of Equal Protection: A Case for Inadvertent Discrimination*, 65 WAYNE L. REV. 437 (2020); Note, *The Support or Advocacy Clause of § 1985(3)*, 133 HARV. L. REV. 1382 (2020); Avidan Y. Cover, *Quieting the Court: Lessons from The Muslim Ban Case*, 23 J. GENDER, RACE & JUST. 1 (2020); Chan Tov McNamarah, Note, *Striking Out Animus: A Framework to Remedy Batson’s Blind Spots*, 29 CORNELL J.L. & PUB. POL’Y 945 (2020); Hannah M. Hamley, Note, *The Weaponization of the “Alien Harboring” Statute in a New-Era of Racial Animus Towards Immigrants*, 44 SEATTLE U. L. REV. 171 (2020); Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, 89 FORDHAM L. REV. 145 (2020); Regs Comment, *Fifth Amendment—Due Process Clause—Equal Protection—Department of Homeland Security v. Regents of the University of California*, 134 HARV. L. REV. 510 (2020); Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45 (2021); Jeremiah A. Ho, *Queering Bostock*, 29 AM. U. J. GENDER, SOC. POL’Y & L. 283 (2021); William D. Araiza, *Regents: Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983 (2021) [hereinafter *Resurrecting Animus*]; Andrew T. Hayashi, *The Law and Economics of Animus*, 89 U. CHI. L. REV. 581 (2022).

7. WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* (2017).

8. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 183.

class analysis—has all but disappeared in the decade since I wrote that sentence. This absence is especially surprising because the presidency of Donald Trump should have inaugurated a golden age for animus doctrine. After all, animus can be detected in part by statements made by governmental authorities and in part by departures from usual procedures and substantive norms.⁹ What was the Trump Presidency but a feast of malevolent statements and departures from the norms of decision making? What administration marinated more in a cauldron of grievance and spite? What presidency could offer more fertile ground for new shoots of growth?

It did not happen. Both aforementioned immigration decisions, *Trump* and *Regents*, were losses for animus claimants. In most of the lower court decisions, too, animus claims lost or added nothing new to the doctrine.

In this Article, I explore the major developments in animus doctrine over the past decade. The first Part reviews the origins, justification, and key characteristics of animus analysis.

The second Part deals with cases analyzing animus-based claims from the Supreme Court and decisions from circuit and district courts that were either decided squarely on animus grounds or involved substantive discussions of animus doctrine. Those decisions have not usefully elaborated the doctrine, although they have also not completely abandoned it. Federal courts have still not developed a systematic approach to animus.

The third Part presents several scholarly treatments of animus on both the conservative and progressive sides.

Conservative scholars predicted polarization in politics and law arising from the judicial use of animus analysis to strike down marriage laws.¹⁰ They were wrong on two counts. Most same-sex marriage decisions, including *Obergefell v. Hodges*, refrained from using animus doctrine to strike down state marriage laws.¹¹ In fact, they bent over backwards to praise the good faith and holy intentions of same-sex marriage opponents.¹² And judicial commands that states recognize same-sex marriages have not been polarizing; gay unions have been one of the few areas of growing political harmony over the past few years.¹³

Progressive scholars often misconceived animus as a substance- rather than process-focused doctrine. They asked it to do the work of other constitutional doctrines to disrupt the status quo or to reinvigorate egalitarian principles, which it was not designed to do. And, not surprisingly, they were disappointed.

9. *Id.* at 186, 244.

10. *See, e.g.*, Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 677 (2014).

11. *See* *Obergefell v. Hodges*, 576 U.S. 644 (2015); *see also* *DeBoer v. Snyder*, 772 F.3d 388, 408 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

12. *See* *Obergefell*, 576 U.S. at 670–71.

13. *See* *Attitudes on Same-Sex Marriage*, PEW RSCH. CTR. (May 14, 2019), <https://www.pewresearch.org/religion/fact-sheet/changing-attitudes-on-gay-marriage/>.

After its promising rise, is animus doctrine dead? I doubt that. It is so deeply rooted in our legal history and in the very foundations of political morality that it may emerge again. But for now, if it is not dead, it is at a dead end.

I. A PRIMER ON ANIMUS DOCTRINE¹⁴

Consider the simple principle that it is wrong for one person to treat another person malevolently. This sentiment so suffuses our moral and legal tradition that hardly anybody denies it.¹⁵ “Of course it is our moral heritage that one should not hate any human being or class of human beings,” wrote Justice Antonin Scalia in his dissent in *Romer v. Evans*.¹⁶ Animus doctrine pluralizes and constitutionalizes this fundamental precept. It asserts that just as *individuals* have a moral and sometimes legal duty to consider the interests and respect the dignity of other *individuals*, the *group* of people elected as democratic representatives has a moral and sometimes constitutional duty to consider the interests and respect the dignity of a *group* of persons. “To disadvantage a group essentially out of dislike is surely to deny its members equal concern and respect, specifically by valuing their welfare negatively.”¹⁷

Under the anti-animus principle, the Constitution’s equal protection guarantee is understood to ‘guard one part of the society against the injustice of the other part’ by checking the tendency of legislative majorities to be vindictive.¹⁸ Animus doctrine addresses this problem in two ways. First, it *a governmental purpose to disparage a group* is illegitimate. That is malice. Second, *the government may not act with a total disregard for the interests of a group of people*. That is malign neglect. Both malice and malign neglect are animus. The doctrine does not specify, as would formal heightened scrutiny, certain classes of people that are entitled to special judicial protection from malicious or utterly uncaring majorities. All citizens are protected from animus-based government action.¹⁹ This includes groups and people viewed as subordinate and those viewed as dominant.

14. This Part draws upon my earlier work. Carpenter, *supra* note 8.

15. *Id.* at 185.

16. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting)). Justice Scalia went on to suggest a distinction between hatred of a person and disapproval of his conduct: “But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct. Surely that is the only sort of ‘animus’ at issue here: moral disapproval of homosexual conduct . . .” *Romer*, 517 U.S. at 644.

17. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 157 (1980).

18. *THE FEDERALIST* NO. 51, at 161 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966).

19. Dan Farber and Suzanna Sherry identify a similar idea under what they call the “pariah principle”: “This principle, in a nutshell, forbids the government from designating any societal group as untouchable, regardless of whether the group in question is generally entitled to some special degree of judicial protection, like blacks, or to no special protection, like left-handers (or, under current doctrine, homosexuals).” Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 *CONST. COMMENT.* 257, 258 (1996).

A. Animus in Democratic Theory

Animus is inconsistent with the premises of a well-functioning representative democracy and violates the basic constitutional precept that every person is entitled to the equal protection of the laws. It undermines the liberal and democratic values that undergird our constitutional system.

The Constitution presumes that “even improvident decisions” will eventually be corrected by the democratic processes. But that is only a presumption.²⁰ As I explained in 2013:

There are decisions arrived at democratically for which the opposite presumption should be indulged: [T]he political process is not self-correcting in some kinds of cases[] or at least should not be expected to be self-correcting. The mechanisms of democracy do not always work in a way that accounts for all relevant interests.²¹

This phenomenon is most clearly seen in cases involving race. Legislative classifications based on race (or on alienage or national origin) are presumptively unconstitutional because they are rarely truly relevant to legitimate public interests. They reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. Such discrimination is “unlikely to be soon rectified by legislative means” precisely because the prejudice behind the classification blocks any self-correction. The very antipathy that gave birth to the classification helps to sustain it and to inhibit meaningful reexamination. The legislature is unlikely to revisit the issue because its members do not see a problem in the classification or perhaps regard its vices as virtues.

It is central to equal protection jurisprudence that the government cannot create castes of citizens. This is not simply because to do so would deny them specific tax advantages or other benefits but because creating a second-class status is itself a harm to their dignitary interests.²² It would have been no answer in *Loving v. Virginia* to say that the state was required to recognize a separate civil-union status for interracial couples with all the rights, but not the status, of marriage.²³ That is because, at least in the racial context, the separate recognition itself would be an unconstitutional affront to them. At the very least, the insult to their dignity more completely described what harm they suffered in being denied equality. That harm itself cannot be a material purpose

20. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

21. *Carpenter*, *supra* note 8, at 222 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)).

22. Andrew Koppelman has addressed the important connections between dignity and democracy. See ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 13–56 (1998); Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997); Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923 (2010).

23. *Loving v. Virginia*, 388 U.S. 1 (1967).

of the government (animus as malice). Nor can it be the heedless byproduct of a government unconcerned about the equal dignity and interests of its citizens (animus as malign neglect).

B. *Animus in Constitutional History*

Animus doctrine has roots in the views of the Framers, as well as in the Fourteenth Amendment's guarantee of the 'equal protection of the laws.'²⁴ In *Federalist No. 10*, James Madison warned against measures that limit the ability to bring about change through the political process.²⁵ Madison worried about the development of "factions" aroused by passions. Consider his comments in *Federalist No. 10*:²⁶

By a faction, I understand a number of citizens, whether amounting to a majority or [a] minority of the whole, who are united [or] actuated by some common *impulse of passion*, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.²⁷

The Constitution was intended to correct an intolerable situation that had arisen under the Articles of Confederation, Madison contended.²⁸ "Measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."²⁹ In Madison's view, the majority should be "unable to concert and carry into effect schemes of oppression."³⁰

By the middle of the nineteenth century, it was clear that the original constitutional design did not prevent the majority from effecting "schemes of oppression" against minorities, especially the enslaved Black population in the southern states. The post-Civil War constitutional amendments arose partly from a desire to correct this abuse of power.

The Fourteenth Amendment explicitly forbade states to "deny to any person . . . the equal protection of the laws."³¹ In a proposed joint resolution for the Fourteenth Amendment, Senator Charles Sumner (D-MA) argued that the Amendment would abolish "oligarchy, aristocracy, caste, or monopoly with particular privileges and powers."³² Senator Jacob Howard (R-MI), floor

24. U.S. CONST. amend. XIV, § 1. For a fuller discussion of this idea, see Dale Carpenter, *A Conservative Defense of Romer v. Evans*, 76 IND. L.J. 403 (2001).

25. FEDERALIST NO. 51, *supra* note 18, at 161–62.

26. FEDERALIST NO. 10, at 16–20 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966).

27. THE FEDERALIST NO. 10 (emphasis added).

28. THE FEDERALIST NO. 10, *supra* note 26.

29. THE FEDERALIST NO. 10, *supra* note 26, at 16.

30. THE FEDERALIST NO. 10, *supra* note 26, at 20.

31. U.S. CONST. amend. XIV, § 1.

32. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2348 (1997) (alteration in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess., 674 (1866)).

manager of the Fourteenth Amendment, argued that it would “abolis[h] all class legislation . . . and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another.”³³ Professor William Araiza argues persuasively that animus doctrine can be traced to these concerns about class legislation,³⁴ which is barred by the Fourteenth Amendment.

C. *Animus Doctrine in the Supreme Court: The Quadrilogy*

The animus doctrine emerged directly from four cases over the space of forty years from 1973 to 2013. I have called these decisions the “animus quadrilogy.”³⁵ In chronological order, these were *U.S. Department of Agriculture v. Moreno*,³⁶ which concerned the federal denial of food stamps to non-traditional family units (“hippie communes”); *City of Cleburne v. Cleburne Living Center*,³⁷ which concerned a city’s denial of housing to a group home for the cognitively disabled; *Romer v. Evans*,³⁸ which concerned a state constitutional amendment denying antidiscrimination protections to homosexuals; and *United States v. Windsor*,³⁹ which involved denial of federal recognition to same-sex marriages. Let us look at each decision in the quadrilogy a little more closely.

1. *U.S. Department of Agriculture v. Moreno*

In *Moreno*, the Court invalidated a federal law denying food stamps to any household containing one or more people unrelated by blood or marriage to others in the household.⁴⁰ In a “declaration of policy” accompanying the Food Stamp Act, Congress asserted two reasons for creating the program: ensuring adequate levels of nutrition among low-income households and strengthening the market for agriculture.⁴¹ But these stated purposes were “irrelevant” to excluding households of unrelated people, concluded the Court, since such people had nutritional needs and food purchases by them would equally benefit domestic agriculture.⁴² Thus, even under rational-basis review, the stated justifications were insufficient.

33. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess., 2766 (1866)). For a more complete discussion of the history of the Fourteenth Amendment, see ANDREW KULL, THE COLOR-BLIND CONSTITUTION 74–75 (1992).

34. ARAIZA, *supra* note 7, at 14–24.

35. Carpenter, *supra* note 8, at 183.

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

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

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

39. *United States v. Windsor*, 570 U.S. 744 (2013).

40. *Moreno*, 413 U.S. at 528.

41. *Id.* at 533.

42. *Id.* at 534.

So, what was the real reason for the exclusion? The Court noted that there was little legislative history to explain the amendment, which was inserted without any committee consideration.⁴³ “The legislative history that does exist,” the Court noted, “indicates that that amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”⁴⁴ Here was the heart of the problem:

The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.⁴⁵

The “purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest,” justify the exclusion.⁴⁶ To be constitutional under equal protection principles, an enactment must have a public-regarding reason other than to disadvantage a group.

2. City of Cleburne v. Cleburne Living Center

The Court next addressed animus in an equal protection case twelve years later in *Cleburne*, unanimously concluding that the City of Cleburne had unconstitutionally denied a special zoning permit to a proposed group home for the cognitively disabled (or, as the language of the time labeled them, the “mentally retarded”).⁴⁷ The Court first rejected the idea that classifications aimed at the cognitively disabled should formally be subjected to heightened scrutiny, even though there had been a long history of legal discrimination against, and social antipathy toward, the group.⁴⁸ Among other reasons for rejecting heightened scrutiny, the Court noted that “lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.”⁴⁹ But in particular cases, the Court observed that discrimination against the cognitively disabled would indeed be “invidious,” justifying “judicial correction under constitutional norms.”⁵⁰ Quoting *Moreno*, the Court held that

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 534–35 (alteration in original) (quoting *Moreno v. U.S. Dep’t of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972), *aff’d*, 413 U.S. 528 (1973)).

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

48. *Id.* at 444–46, 461–63 (Marshall, J., concurring in part and dissenting in part).

49. *Id.* at 443.

50. *Id.* at 446.

“some objectives—such as ‘a bare . . . desire to harm a politically unpopular group’—are not legitimate state interests.”⁵¹

Why did the denial of a special zoning permit for a group home constitute animus? The City did not concede that it had acted simply out of the desire to harm cognitively disabled people. Instead, the City said it was responding to the “negative attitude of the majority of property owners” nearby and to “the fears of elderly residents of the neighborhood.”⁵² “But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding,” the Court responded, did not justify treating a home for the cognitively disabled differently from proposed apartments or other multiple-unit dwellings.⁵³ The same fate awaited the City’s worry that the home would be located near a junior high school, whose students might harass people living in the home.⁵⁴ These “vague, undifferentiated fears” by a “portion of the community” could not “validate what would otherwise be an [E]qual [P]rotection violation” if state officials themselves harbored them.⁵⁵

Other asserted reasons for denying the special use permit—the fact that the home would sit on a 500-year-flood plain, doubts about who would be legally responsible if a resident caused damage, and concerns about neighborhood density—did not rationally explain why the City would have allowed homes for other groups like fraternities, nursing homes, boarding houses, or dormitories.⁵⁶ All of the City’s justifications appeared to be strained efforts to allow it to act on prejudice and fears of the cognitively disabled. “The short of it,” Justice White’s opinion concluded, “is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded”⁵⁷

3. *Romer v. Evans*

Eleven years later, Justice Kennedy wrote the 6–3 opinion in *Romer*.⁵⁸ In that decision, the Court struck down Colorado’s Amendment 2, a broad state constitutional amendment that wiped away all existing antidiscrimination protections that specifically protected gay men, lesbians, and bisexuals at every level and in every department of state government.⁵⁹ Amendment 2 was a backlash against the limited success of gay-rights activists in securing modest

51. *Id.* at 446–47 (citation omitted) (quoting *Moreno*, 413 U.S. at 534).

52. *Id.* at 448.

53. *Id.*

54. *Id.* at 449.

55. *Id.*

56. *Id.* at 449–50.

57. *Id.* at 450.

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

59. *Id.* at 624.

antidiscrimination protection in a few areas.⁶⁰ The Court was concerned that Amendment 2 was almost unlimited in scope and significantly injured gay people.⁶¹ On the first point regarding its scope, the Court noted that Amendment 2 was “[s]weeping and comprehensive” and “far reaching” in altering the legal status of homosexuals, placing them “in a solitary class.”⁶² The Amendment withdrew “from homosexuals, but no others, specific legal protection from the injuries caused by discrimination.”⁶³ It applied to “all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.”⁶⁴ It repealed and forbade existing protection from discrimination in state government employment and at state universities, among other areas of law.⁶⁵

The Court discerned violations of the Equal Protection Clause in two respects. The first was that the law was “at once too narrow and too broad”: it withdrew civil rights protections across the board for homosexuals alone.⁶⁶ The second was that by “imposing a broad and undifferentiated disability on a single named group,” it was “inexplicable by anything but animus toward the class it affect[ed].”⁶⁷ Importantly, the Court cited previous rational-basis cases in which it had upheld laws that simply “work[ed] to the disadvantage of a particular group.”⁶⁸ But those cases, involving matters like the regulation of optometry, reviewed laws in which both the justification and the burden were limited.⁶⁹ Those contexts allow the Court to “ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”⁷⁰ Amendment 2 was “unprecedented” in its sweep, observed the Court, which was itself “instructive” because “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”⁷¹

60. *Id.* at 623–25.

61. *Id.* at 630.

62. *Id.* at 627.

63. *Id.*

64. *Id.* at 629.

65. *Id.* at 629–30.

66. *Id.* at 633.

67. *Id.* at 632.

68. *Id.*

69. *Id.* (citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (judging a law favoring certain pushcart vendors); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (reviewing a law favoring optometrist over opticians); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (reviewing a law favoring vehicles that displayed ads of owner’s products); and *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552 (1947) (reviewing a law favoring persons related to current river boat pilots)).

70. *Id.* at 633; *see R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) (“If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”).

71. *Romer*, 517 U.S. at 633 (alteration in original) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)).

The too-broad-and-too-narrow structure of Amendment 2 “raise[d] the inevitable inference that the disadvantage imposed [was] born of animosity toward the class of persons affected.”⁷² It is not that broad laws are invariably unconstitutional. They are constitutional if they “can be explained by reference to legitimate public policies which justify the *incidental* disadvantages they impose on certain persons.”⁷³

But the “immediate, continuing, and real injuries” inflicted by Amendment 2 were not simply incidental to the law, concluded the Court.⁷⁴ Instead, the Court cited the objective fact that in justifying such a sweeping measure, the official rationales for Amendment 2 were very narrow: protecting the liberties of landlords and employers who object to homosexuality and conserving state government resources for fighting other kinds of discrimination.⁷⁵ Animus was *inferred* from the unprecedented gap between an all-encompassing law and its claimed narrow purposes.

4. United States v. Windsor

The final substantive section of Justice Kennedy’s opinion in *Windsor*, Section IV, directly addressed the animus issue.⁷⁶ Quoting *Moreno*, the Court stated the basic anti-animus principle: “The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”⁷⁷ The opinion devoted the next four pages to explaining why the majority believed animus was present in the Defense of Marriage Act (DOMA), concluding with this statement of its holding:

[T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.⁷⁸

As the Court had just spent four pages explaining, a purpose to “demean” a class is a purpose to inflict a dignitary injury on them, even apart from any more concrete injury.⁷⁹ The problem with such a purpose is that it is a form of animus. It was, for reasons the Court had just adumbrated, the principal

72. *Id.* at 634.

73. *Id.* at 635 (emphasis added).

74. *Id.*

75. *Id.*

76. *United States v. Windsor*, 570 U.S. 744, 769–75 (2013).

77. *Id.* at 770 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

78. *Id.* at 774.

79. *See id.* at 770–74.

congressional purpose driving the passage of DOMA.⁸⁰ The equal protection principle incorporated in the Fifth Amendment's liberty guarantee, like the Fourteenth Amendment's own Equal Protection Clause, forbids such a purpose. DOMA was held unconstitutional because it reflected impermissible animus.

How did the *Windsor* Court determine there was animus behind DOMA? There were several indicia of animus, according to the Court. The first, drawn from *Romer*, is that “[d]iscriminations of an unusual character’ especially require careful consideration.”⁸¹ A departure from the usual substantive approach toward an issue that targets a politically unpopular group “is strong evidence of a law having the purpose and effect of disapproval of that class.”⁸² Here is where the usual federalism-based approach to marital status played a crucial role. Against the backdrop of federal deference to state choice in family relations, DOMA was suspicious. An extraordinary and unprecedented act required an extraordinary and unprecedented justification apart from the self-justifying desire to demean or injure a stigmatized class of people.

Linked to the abandonment of deference to state marital determinations was Congress's acknowledged desire to discourage state experimentation in a field where states, in fact, had long been laboratories of experimentation on everything from the legal obligations of spouses to the dominance of males over females to divorce.⁸³ In none of these other profound changes in marriage had Congress acted to defend the traditional understanding of the institution. That is, Congress was not concerned with simply defining the limits of federal programs touching marriage but acted with the “purpose to influence or interfere with state sovereign choices about who may be married.”⁸⁴

Second, the Court reasoned that the legislative history and text of DOMA demonstrated the congressional desire to interfere with the “equal dignity of same-sex marriages” recognized by some of the states.⁸⁵ It then pointed to sections of the House Report that explicitly laid out the congressional purpose “to defend the institution of traditional heterosexual marriage,” to prevent the “radical” redefinition of marriage from including “homosexual couples,” to express “moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality,” and to emphasize “traditional moral teachings reflected in heterosexual-only marriage laws.”⁸⁶ This purpose of interfering with state

80. *Id.*

81. *Id.* at 770 (alteration in original) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)); *see also id.* at 768.

82. *Id.* at 770.

83. *See id.* at 766–71.

84. *Id.* at 771.

85. *Id.* at 770.

86. *Id.* at 770–71 (quoting H.R. REP. NO.104-664, at 12–13, 16 (1996)).

choice in a matter reflecting the dignity of same-sex marriages was, the Court determined, evident in the very title of the Act.⁸⁷

Third, the Court noted that both in *practice* and in principal *effect*, the Act reflected animus because of its *Romer*-like scope. It was “a system-wide enactment with no identified connection to any particular area of federal law.”⁸⁸ It injected “inequality into the entire United States Code,” simultaneously excluding a particular class of married couples from more than one thousand regulations and statutes governing estate taxes, Social Security, housing, criminal sanctions, copyright, veterans’ benefits, access to healthcare, and bankruptcy protection.⁸⁹ This broad effect could not be seen as designed to promote a non-animus-based purpose like “governmental efficiency” in the administration of federal programs, concluded the Court.⁹⁰

Fourth, there was no legitimate congressional purpose that “over[came] the purpose and effect [of DOMA] to disparage and to injure” married same-sex couples “whom the State, by its marriage laws, sought to protect in personhood and dignity.”⁹¹ That is, whatever legitimate purpose might be hypothesized for DOMA could not really explain its passage. Given the considerations the Court cited, including the devastating impact of DOMA on gay families, the best way to understand the law was as an expression of animus.

These considerations led the Court to conclude that DOMA was an assault on the dignity and social status of married same-sex couples. “The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States,” the Court asserted.⁹²

Windsor thus elaborated upon the animus doctrine. It laid out the twin concerns of that doctrine to protect both practical and dignitary interests. It announced a series of factors that should go into the determination of whether the legislature has acted with malice toward a class, including deviations from usual substantive considerations governing a decision, the legislative history and language of a statute, the practical effect of the statute, and the comparative explanatory weakness of non-animus-based justifications for the statute. An animus-based law, the Court suggested, is likely to be a product of a legislature that is either hostile to the interests of a class or heedless of them. A more deliberative and conscientious process, one not blinded by fear and loathing of a class, is more likely to yield new insights and increased understanding of them.

87. *Id.* at 771.

88. *Id.*

89. *Id.*

90. *Id.* at 772.

91. *Id.* at 775.

92. *Id.* at 770.

Such a process is correspondingly less likely to lead to results not tainted by animus.

Chief Justice Roberts, in dissent, implicitly agreed that it is unconstitutional to “codify malice,” though he thought there needed to be “more convincing evidence” of the malice than the Court presented.⁹³ Justice Scalia and Justice Alito, in their separate dissents, also did not challenge the basic premise that animus is an impermissible basis for legislation.⁹⁴

In fact, the Court’s decisions in the animus quadrilogy suggest that the inquiry into legislative motive—or, more often, purpose—is not a subjective one.⁹⁵ It rests on a variety of considerations that are objective in the sense that they do not depend on discovering subjective legislative intent.

The quadrilogy suggests that these factors include consideration of the following: (1) the statutory text (textual);⁹⁶ (2) the political and legal context of passage (contextual);⁹⁷ (3) the legislative proceedings, including evidence of animus that can be gleaned from the sequence of events that led to passage, the legislative procedure, and the legislative history accompanying passage (procedural);⁹⁸ (4) the law’s harsh real-world effects, from which an animus-based purpose can be inferred (effectual);⁹⁹ and (5) the utter failure of alternative explanations to offer legitimate ends along with means that really advance those ends (pretextual).¹⁰⁰

D. Limited Judicial Role

In its form as an independent force in constitutional law, animus doctrine has been the minimalist alternative to more substantive decisions in each of the Supreme Court cases in which it has been found. It does not rely on adventurous theories of constitutional substance, like the existence of some

93. *Id.* at 776 (Roberts, C.J., dissenting).

94. *See id.* at 778–802 (Scalia, J., dissenting); *id.* at 802–18 (Alito, J., dissenting). They also did not explicitly endorse the anti-animus principle. For his part, Justice Scalia denounced the Court for suggesting that Congress and the President had “hateful hearts” in supporting DOMA. *Id.* at 795 (Scalia, J., dissenting). “Laying such a charge against them,” he declared, “should require the most extraordinary evidence . . .” *Id.* at 795–96. For a response to Justice Scalia’s dissent, see Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 NW. U. L. REV. COLLOQUY 131 (2013). For a discussion of the indicia supporting the animus holding, see *infra* Part III. Justice Alito criticized the Court for “cast[ing] all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.” *Id.* at 813 (Alito, J., dissenting). For a discussion of the objection that *Windsor* is constitutional name-calling, see *infra* Part II.C.4.

95. *See Animus and Its Discontents*, *supra* note 6, at 183–84.

96. *See Romer v. Evans*, 517 U.S. 620, 624 (1996); *Windsor*, 570 U.S. at 770.

97. *See* U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 537–38 (1973); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985); *Romer*, 517 U.S. at 623–24; *Windsor*, 570 U.S. at 770–71.

98. *See Moreno*, 413 U.S. at 536–57; *Windsor*, 570 U.S. at 771–73.

99. *See Romer*, 517 U.S. at 627–28; *Windsor*, 570 U.S. at 770–74.

100. *See Moreno*, 413 U.S. at 537; *Cleburne*, 473 U.S. at 449–50; *Romer*, 517 U.S. at 635; *Windsor*, 570 U.S. at 770–72.

hitherto undeclared fundamental right or special scrutiny of judicially selected classifications. These substantive approaches assume a great deal more constitutional certainty about the ultimate ends of law than is often warranted by the facts of given cases. Animus doctrine is concerned with the legislative *process* rather than with legislative *results*. It allows the legislature more freedom to pursue chosen ends in ways that it deems appropriate but seeks to ensure that democratic bodies choose those ends and means in a way that seriously and non-maliciously accounts for relevant interests.¹⁰¹

Consider, for example, that *Windsor* was comparatively minimalist.¹⁰² It was perhaps the least aggressive or theoretically ambitious route the Court could have taken in striking down DOMA.¹⁰³ The other main contending arguments for the Court's attention—strict scrutiny under equal protection doctrine or under fundamental-rights analysis—would have left the Court no principled choice but to invalidate the laws of thirty-seven states that had failed to recognize same-sex marriages. But we know how the same-sex marriage story ended. Two years later, the Court followed the more aggressive route by holding that same-sex couples have a fundamental right to marry under the liberty protected by the Due Process Clause.¹⁰⁴

The animus principle should be used sparingly and only in extraordinary cases, where analysis of the objective factors leaves little doubt that the outcome reached by the governmental decision maker (for example, a zoning board, a legislature, or voters) was the product of animus.

II. ANIMUS DOCTRINE IN THE FEDERAL COURTS, 2013–2022

With the ground now laid for an understanding of animus doctrine in constitutional law through *Windsor*, this Part reviews the treatment of the doctrine in the Supreme Court and lower federal courts since *Windsor*. Federal courts have certainly not rejected animus analysis. It continues to be possible to argue successfully that malice played a constitutionally impermissible role in government decisions. But the decisions since *Windsor* have not cast much new light on the doctrine.

A. *Animus Doctrine in the Supreme Court*

President Trump's focus on reducing both entry and immigration into the United States produced two major decisions dealing directly with animus. Both rejected animus claims against those policies.

101. This point has been developed at some length by others. See generally KOPPELMAN, *supra* note 22.

102. See *supra* Part I.C.4.

103. See *supra* Part I.C.4.

104. Obergefell v. Hodges, 576 U.S. 644 (2015).

1. Trump v. Hawaii¹⁰⁵

The Immigration and Nationality Act (INA) delegates to the President the power to restrict entry to non-citizens when he decides their entry “would be detrimental to the interests of the United States.”¹⁰⁶ Shortly after his inauguration in January 2017, Trump used this authority by executive order to suspend “entry of foreign nationals from seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen” (EO–1).¹⁰⁷ His Administration claimed these countries were not providing adequate information about their nationals to allow U.S. immigration officers to make an informed decision about permitting their entry.¹⁰⁸ A district court entered a temporary restraining order against EO–1.¹⁰⁹

In response, Trump revoked EO–1 and issued a second version (EO–2).¹¹⁰ The second order restricted entry of foreign nationals from six of the initial seven countries (dropping Iraq) on the grounds that they were state sponsors of terror or were compromised by terrorist organizations.¹¹¹ The second order was also blocked by federal courts, but the Supreme Court stayed the injunctions except as to those foreign nationals with a relationship to a person or entity in the United States.¹¹²

In September 2017, after a fifty-day multi-agency review of risks and information sharing by foreign countries, Trump issued a third order to increase “vetting” of foreign nationals from eight countries—Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen (EO–3).¹¹³ The Proclamation asserted the “entry restrictions were necessary to ‘prevent the entry of those foreign nationals about whom the United States Government lack[ed] sufficient information’; ‘elicit improved identity-management and information-sharing protocols and practices from foreign governments’; and otherwise ‘advance [the] foreign policy, national security, and counterterrorism objectives’ of the United States.”¹¹⁴ It also claimed “these restrictions would be the ‘most likely to encourage cooperation’ while ‘protect[ing] the United States until such time as improvements occur[ed].’”¹¹⁵

105. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

106. *Id.* at 2403 (citing 8 U.S.C. § 1182(f)).

107. *Id.* (citing Exec. Order No. 13769, 3 C.F.R. 272 (2017)).

108. *Id.* (citing Proclamation No. 9645, 3 C.F.R. 135 (2017)).

109. *Id.*

110. *Id.* at 2403–04 (citing Exec. Order No. 13780, 3 C.F.R. 301 (2017)).

111. *Id.* at 2404 (citing Exec. Order No. 13780, 3 C.F.R. 301 (2017)).

112. *Id.*

113. *Id.* at 2405.

114. *Id.* (second alteration in original) (quoting Proclamation No. 9645, 3 C.F.R. 135 (2017)).

115. *Id.* (first alteration in original) (quoting Proclamation No. 9645, 3 C.F.R. 135 (2017)). Chad was later dropped from the list of the countries whose nationals were subject to special entry restrictions after the Department of Homeland Security (DHS) determined it had sufficiently improved its practices. *Id.* at 2406 (citing Proclamation No. 9723, 3 C.F.R. 77 (2018)).

Plaintiffs, including the State of Hawaii, three people with family members from the affected countries applying for visas, and a non-profit association that operated mosques, claimed both that Trump lacked the statutory authority to issue the order and that it violated the Establishment Clause because it was motivated by animus toward Islam.¹¹⁶

The Court began its review by noting the President's broad statutory authority to make determinations about whether to suspend the entry of foreign nationals into the United States.¹¹⁷ "The text of § 1182(f) states:"

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.¹¹⁸

This provision "exudes deference" to the President in every respect, the Court noted.¹¹⁹ There could be no searching inquiry into the persuasiveness of Trump's justifications for the Proclamation given the statutory and traditional authority granted to the Executive in the context of foreign-national entry to the country.¹²⁰ The Court concluded the Trump order was "squarely within the scope of Presidential authority under the INA."¹²¹

The question remained whether Trump's exercise of his authority was nevertheless issued for the unconstitutional purpose of excluding Muslims as a class. The primary purpose, the plaintiffs charged, was "religious animus," and the "stated concerns about vetting protocols and national security were but pretexts."¹²²

The plaintiffs based their attack mostly on various inflammatory, anti-Muslim statements Trump had made both before and after he became president.¹²³ While running for office, Trump issued a "'Statement on Preventing Muslim Immigration' that called for a 'total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.'"¹²⁴ "That statement remained on his campaign website until May 2017."¹²⁵ He also charged that "Islam hates us" and "asserted that the United States was 'having problems with Muslims coming into the

116. *Id.*

117. *Id.* at 2408.

118. *Id.* (citing 8 U.S.C. § 1182(f)).

119. *Id.*

120. *See id.* at 2408–09.

121. *Id.* at 2415.

122. *Id.* at 2417.

123. *Id.*

124. *Id.* (quoting Joint Appendix at 158, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965)).

125. *Id.* (citing Joint Appendix, *supra* note 124, at 130–31).

country.”¹²⁶ “Shortly after being elected, when asked whether violence in Europe had affected his plans to ‘ban Muslim immigration,’ [he] replied, ‘You know my plans. All along, I’ve been proven to be right.’”¹²⁷ Shortly after his inauguration, Trump issued EO–1.¹²⁸

One of [Trump’s] advisers explained that when the President “‘first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”¹²⁹ “The adviser said [Trump] assembled a group of Members of Congress and lawyers that “‘focused on, instead of religion, danger . . . [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country.’”¹³⁰

After EO–1 was blocked in federal court, Trump replaced it with EO–2.¹³¹ He “‘expressed regret that his prior order had been ‘watered down’ and called for a ‘much tougher version’” of what he called the “‘Travel Ban.’”¹³²

“‘Shortly before the release of the Proclamation,’” he said the “‘travel ban . . . should be far larger, tougher, and more specific,’ but ‘stupidly that would not be politically correct.’”¹³³ On November 29, 2017, Trump “‘retweeted links to three anti-Muslim propaganda videos.’”¹³⁴

In response to questions about those videos, the President’s deputy press secretary denied that the President [thought] Muslims [were] a threat to the United States, explaining that “‘the President has been talking about these security issues for years now, from the campaign trail to the White House” and “‘has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.’”¹³⁵

This claim about Trump’s real motives afforded the Court an opportunity to speak for the fifth time about animus doctrine. It did so in a way that both reaffirmed the existence of the principle and clamped down on its reach.

The charge of constitutionally impermissible animus arose in the context of an Establishment Clause claim rather than an Equal Protection Clause claim.¹³⁶ But as we shall see, it does not appear that particular doctrinal distinction made any difference in the animus analysis. If the challenge had been

126. *Id.* (citing Joint Appendix, *supra* note 124, at 120–21, 159).

127. *Id.* (quoting Joint Appendix, *supra* note 124, at 123).

128. *Id.*

129. *Id.* (quoting Joint Appendix, *supra* note 124, at 125, 229).

130. *Id.* (alterations in original) (quoting Joint Appendix, *supra* note 124, at 229).

131. *Id.* at 2403–04.

132. *Id.* at 2417 (quoting Joint Appendix, *supra* note 124, at 131–32).

133. *Id.* (omission in original) (quoting Joint Appendix, *supra* note 124, at 133).

134. *Id.*

135. *Id.* (quoting *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 267 (4th Cir. 2018), *judgment vacated*, 138 S. Ct. 2710 (2018)). I have limited my presentation of Trump’s anti-Muslim statements, and their connection to the Proclamation, to those the Court itself recounted. However, Justice Sotomayor catalogued a more extensive list of such remarks in her dissent. *See id.* at 2435–38 (Sotomayor, J., dissenting).

136. *Id.* at 2403.

rooted in Equal Protection Clause terms, rather than in Establishment Clause religious terms, the animus analysis would not vary.

Something else about the case did make it unusual, however. The Court framed its analysis of the animus challenge by noting the limited and deferential nature of its review in matters of foreign entry and national security.¹³⁷

Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. These various aspects of plaintiffs' challenge inform our standard of review.¹³⁸

Ordinarily, the Court noted, any review of a “national security directive regulating the entry of aliens abroad” would end once it determined the policy is “facially legitimate and bona fide.”¹³⁹ EO-3 was facially neutral toward religion. The asserted justifications regarding security were entirely permissible.¹⁴⁰

But the Government conceded that the Court could look beyond the facial neutrality of the order, allowing the Court to test the sincerity and strength of the justifications.¹⁴¹

For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.¹⁴²

The application of rational-basis review made *Trump v. Hawaii* very much like the animus quadrilogy. Those cases—*Moreno*, *Cleburne*, *Romer*, and *Windsor*—did not apply heightened scrutiny.¹⁴³ A big difference, however, is that the plaintiffs lost in *Trump*.

137. *See id.* at 2418–19.

138. *Id.* at 2418.

139. *Id.* at 2418, 2420; *see Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

140. *Id.* at 2420–23.

141. *Id.* at 2420 (citing Transcript of Oral Argument at 16–17, 25–27, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965)).

142. *Id.* (citation omitted).

143. *See* U.S. Dep't of Agric. v. *Moreno*, 413 U.S. 528, 538 (1973); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *Romer v. Evans*, 517 U.S. 620, 635 (1996); *United States v. Windsor*, 570 U.S. 744, 793–94 (2013) (Scalia, J., dissenting).

The reason why they lost is important to animus doctrine. If they lost because of the special context of deference owed the government in the area of national security and alien entry, that is one thing. It would not necessarily say much about the viability of future animus claims. But if they lost because the Court adopted a more generally government-friendly animus analysis, that is something else. Which is it?

The Court cited three of the four classic animus cases (leaving out only *Windsor*), noting that it was extraordinary for the Court to hold a policy unconstitutional on the grounds that it pursues an illegitimate objective:

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a “bare . . . desire to harm a politically unpopular group.” In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the city’s stated concerns about (among other things) “legal responsibility” and “crowded conditions” rested on “an irrational prejudice” against the intellectually disabled. And in another case, this Court overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. The amendment, we held, was “divorced from any factual context from which we could discern a relationship to legitimate state interests,” and “its sheer breadth [was] so discontinuous with the reasons offered for it” that the initiative seemed “inexplicable by anything but animus.”¹⁴⁴

Note that the Court characterizes *Moreno* as having held that the law there “lack[ed] any purpose” other than to harm a group.¹⁴⁵ In context, this cannot mean that there was not even another asserted purpose. The government never offers animus as the justification for a law or policy. *Moreno* itself reviewed Congress’s other asserted purposes: improving nutrition, strengthening the market for agricultural products, and preventing fraud in the food stamp program.¹⁴⁶ The problem in *Moreno* was that none of these objectives explained why Congress had decided to exclude nontraditional households (“hippies”) from the program. The Court must be saying that once the asserted justifications are stripped away, the only *remaining* foundation is animus.

The Court set a high bar in *Trump* for utterly discounting non-animus-based explanations: “It cannot be said that it is impossible to ‘discern a relationship to legitimate state interests’ or that the policy is ‘inexplicable by anything but animus.’”¹⁴⁷ When the Court uses double-negative language like that, you can

144. *Trump v. Hawaii*, 138 S. Ct. at 2420 (alterations in original) (first quoting *Moreno*, 413 U.S. at 534; then quoting *Cleburne*, 473 U.S. at 448–50; then quoting *Romer*, 517 U.S. at 620, 632, 635).

145. *Id.* (emphasis added).

146. *Moreno*, 413 U.S. at 533–35.

147. *Trump v. Hawaii*, 138 S. Ct. at 2420–21.

be sure it is bending over backwards to accept the government's justifications. In fact, the Court found "persuasive evidence that the entry suspension has a legitimate grounding in national security concerns."¹⁴⁸ The Court seemed to concede that even if there was some "religious hostility" expressed in the President's statements about the policy, "we must accept that independent [national security] justification."¹⁴⁹ In other words, evidence of animus is not quite the doctrinal "silver bullet" some scholars had believed it was.¹⁵⁰

How did the Court know that the Trump Proclamation could be plausibly explained as the product of something other than a desire to lash out at Muslims? In conducting that analysis, the Court looked at several factors identified as significant by the animus quadrilogy.¹⁵¹

a. Text

The Court began its analysis of the animus factors by noting the neutrality of the text. "The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices,"¹⁵² Chief Justice Roberts wrote. "The text says nothing about religion."¹⁵³ The Court repeatedly referred to what it called the "facial neutrality" of the order.¹⁵⁴ To find animus, it would be necessary to look well beyond the face of the Trump Proclamation.

b. Political and Legal Context

The plaintiffs made the case that the political context indicated animus against Muslims.¹⁵⁵ The Trump campaign and the early days of his presidency bristled with stereotyped hostility toward Muslims as America-hating and dangerous. The President continually exploited voters' fears of Muslims as potential terrorists.¹⁵⁶ His own words indicated an ill will toward them. Those words were emphatic, oft repeated, related directly to the very policy under review, and were made by the ultimate decision maker himself rather than by a subordinate or someone to whom he simply delegated authority. Indeed, as two scholars have persuasively argued, "[t]here has never been a case in which the

148. *Id.* at 2421.

149. *Id.*

150. See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 889, 930 (2012).

151. See factors discussed *supra* Part I.C.

152. *Trump v. Hawaii*, 138 S. Ct. at 2421.

153. *Id.*

154. *Id.* at 2418–20, 2423.

155. *Id.* at 2415.

156. *Id.* at 2417.

Court was presented with more evidence of religious animus on the part of a single and final executive decisionmaker.”¹⁵⁷

Chief Justice Roberts quoted some of Trump’s anti-Muslim statements.¹⁵⁸ But the Court could not bring itself to directly criticize the President’s words. Instead, it simply observed that a president has “extraordinary power” to speak to and on behalf of the people.¹⁵⁹ It held up George Washington, Dwight Eisenhower, and George W. Bush as examples of Presidents who had used this power to espouse religious freedom and tolerance.¹⁶⁰ Eisenhower and Bush specifically defended tolerance for Muslims.¹⁶¹ As for the plaintiffs’ argument that Trump had violated this constitutional tradition, the Court had a flaccid response:

[T]he issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.¹⁶²

Evidently, the Court did not regard the President’s own statements as terribly “significant” on the issue of whether the President had acted with animus in issuing the first two orders or the ultimate Proclamation. The larger *legal* context of the Proclamation was critical: an executive decision implicating national security.

In addition, the Court appears to have been influenced by the fact that Trump had removed three Muslim-majority countries (Iraq, Sudan, and Chad) from the list after EO–1. That, too, was part of the legal background for the Proclamation.¹⁶³

c. Procedural History

The list of restricted countries did not spring suddenly from the President’s fevered imagination. Instead, EO–3 benefited from a substantive administrative-review process, which helped cleanse it of suspicion of animus.¹⁶⁴ “The Proclamation,” concluded the Court, “reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies.”¹⁶⁵

157. Kendrick & Schwartzman, *supra* note 6, at 168.

158. *Trump v. Hawaii*, 138 S. Ct. at 2417.

159. *Id.* at 2417–18.

160. *Id.* at 2418.

161. *Id.*

162. *Id.*

163. *Id.* at 2422.

164. *Id.* at 2404–06.

165. *Id.* at 2421.

The Court described the internal review process for EO–3 at length.¹⁶⁶ The DHS consulted with the State Department and several intelligence agencies to assess the information needed to confirm the identity of those seeking to enter the United States and to determine whether they presented a security threat.¹⁶⁷ This assessment included whether the foreign countries adequately managed identity information and whether they provided data about criminal history and possible terrorist links.¹⁶⁸ It also included review of whether the country “is a known or potential terrorist safe haven.”¹⁶⁹ DHS determined sixteen countries had insufficient data-management practices and that another thirty-one countries were “at risk.”¹⁷⁰ From there, the State Department engaged in a fifty-day diplomatic effort to encourage those countries to improve. Eight countries remained deficient after this effort, and six of those ended up on Trump’s Proclamation list.¹⁷¹

The problem with the Court’s analysis is that it did not consider the full context. EO–3 could not properly be analyzed in separation from EO–1 or EO–2. The third version of the order was at least tainted, if not fatally poisoned, by the animus evident in the earlier versions.

d. Effects

In the Court’s view, the actual effect of the Proclamation on Muslim entry to the United States was not significant. Even the fact that five of the listed nations had majority-Muslim populations “[did] not support an inference of religious hostility.”¹⁷² The Court noted that only “8% of the world’s Muslim population” was subject to EO–3 and that both Congress and prior administrations had listed those countries as state sponsors of terrorism.¹⁷³ The order exempted Iraq, “one of the largest predominantly Muslim countries in the region.”¹⁷⁴ If Trump’s policy had started out as a broad Muslim ban, it had not ended that way.

And whatever the harmful effects were toward Muslims as a group, they were mitigated by the flexibility and leniency built into the policy. And even as to Muslims in the five named countries, Trump’s limitation on travel into the United States was not a categorical “ban.” The restrictions were conditional. They were to be reviewed every 180 days to determine whether they were still

166. *Id.* at 2404–06.

167. *Id.* at 2404 (citing Proclamation No. 9645, 3 C.F.R. 137 (2017)).

168. *Id.* (citing Proclamation No. 9645, 3 C.F.R. 137 (2017)).

169. *Id.* at 2404–05 (citing Proclamation No. 9645, 3 C.F.R. 138 (2017)).

170. *Id.* at 2405 (citing Proclamation No. 9645, 3 C.F.R. 138 (2017)).

171. *Id.* (citing Proclamation No. 9645, 3 C.F.R. 138–40 (2017)).

172. *Id.* at 2421.

173. *Id.*

174. *Id.*

needed.¹⁷⁵ Nationals from the listed countries could use nonimmigrant visas to enter the United States, and there were exceptions for permanent residents and those granted asylum.¹⁷⁶ EO–3 also created a waiver program that was available for humanitarian reasons, including undue hardship.¹⁷⁷ These qualifications softened the hard edges of the policy, reducing any harmful effects.

e. Pretext

There were reasons to believe the national-security justifications for Trump’s edict were a pretext for anti-Muslim animus. The President himself had directed his Administration to implement what he called the “Muslim ban” in the “right way to do it legally.”¹⁷⁸ That was the point at which lawyers were enlisted to aim not at religion but at supposed terrorism connections. That led to EO–1. When courts nevertheless held the policy unconstitutional, the Administration responded with EO–2.¹⁷⁹ Then that policy, too, was struck down.¹⁸⁰

Still, the final EO–3 was “expressly premised” on national security concerns. The Court was not unwilling to explore the “sincerity” of these concerns, but again, its review was deferential and limited.

The plaintiffs contended that the directive was overbroad and did not actually serve the interests of security, undercutting the claim that it was actually intended to buttress security.¹⁸¹ The Court had an answer for that contention:

But we cannot substitute our own assessment for the Executive’s predictive judgments on such matters, all of which “are delicate, complex, and involve large elements of prophecy.” While we of course “do not defer to the Government’s reading of the First Amendment,” the Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving “sensitive and weighty interests of national security and foreign affairs.”¹⁸²

Once again, at a critical juncture in its analysis, the Court highlighted the special need for deference, especially on any conclusion of fact related to efficacy.¹⁸³ The President was presumptively sincere in his concern for national security because, despite everything he had said on the matter and despite the

175. *Id.* at 2422 (citing Proclamation No. 9645, 3 C.F.R. 146 (2017)).

176. *Id.* (citing Proclamation No. 9645, 3 C.F.R. 143–44 (2017)).

177. *Id.* at 2422–23 (citing Proclamation No. 9645, 3 C.F.R. 144 (2017)).

178. *Id.* at 2417.

179. *Id.* at 2403–04.

180. *Id.* at 2404.

181. *Id.* at 2421.

182. *Id.* at 2421–22 (first quoting *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); then quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33–34 (2010)).

183. *See id.*

tortured history of the three orders twisting to make the ban “legal,” the Court was wary of second-guessing him.

The Court also bridled at the comparison of the “facially neutral” Trump Proclamation to President Roosevelt’s “morally repugnant” executive order authorizing the internment of Japanese-Americans during World War II: “The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.”¹⁸⁴

In short, none of the six factors in the animus analysis indicated the final Proclamation was driven by animus. If the Court had reviewed EO–1, or perhaps EO–2, there would have been a stronger case for animus. By the time the case reached the Court, there was still smoke, but the fire had been tamped down.

The best that can be said on behalf of animus doctrine in *Trump v. Hawaii* is this: Because it effectively forced the Administration to modify and justify its anti-Muslim ban, animus doctrine had gained a limited victory. It evidently had a salutary disciplining effect, even if the ultimate result was defeat for the claimants.

2. Department of Homeland Security v. Regents of the University of California¹⁸⁵

In 2012, the Obama Administration created an immigration relief program known as the Deferred Action for Childhood Arrivals (DACA), which allowed undocumented immigrants who arrived as children to apply for a two-year forbearance before removal from the country.¹⁸⁶ They were also eligible for work authorizations and federal aid (some 700,000 people qualified for DACA by 2020).¹⁸⁷ In 2014, the DACA program was expanded. A new, related program was also created to allow forbearance, work eligibility, and federal benefits to the parents of those children.¹⁸⁸ It was known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and would have authorized 4.3 million people to apply.¹⁸⁹ But DAPA was blocked by federal courts before it could be implemented.¹⁹⁰

184. *Id.* at 2423.

185. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

186. *See id.* at 1901.

187. *Id.*

188. *Id.* at 1902.

189. *Id.*

190. *Id.* at 1902–03.

In June 2017, the Trump Administration decided to rescind the DAPA program.¹⁹¹ Three months later, it decided to do the same for DACA.¹⁹² That decision was challenged on statutory grounds as a violation of the Administrative Procedure Act (APA).¹⁹³ The decision was also challenged on Equal Protection Clause grounds as having been propelled by racially discriminatory animus against Latinos, especially Mexicans.¹⁹⁴ All three challenges under the APA were successful, and two district courts held that the Equal Protection Clause claims were adequately alleged.¹⁹⁵

Ultimately, the Supreme Court concluded that the Trump Administration had indeed violated the APA.¹⁹⁶ But the Court also concluded that the plaintiffs failed to make claims from which animus could plausibly be inferred.¹⁹⁷

It is worth pausing to consider why two district courts had previously concluded that animus had been adequately alleged in the DACA litigation.¹⁹⁸ Both courts followed the logic of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,¹⁹⁹ which held that a racially invidious purpose could be inferred from a variety of factors, including a disparate impact (harmful effect) on the disadvantaged group, statements made by the decision maker(s), and unusual procedural or substantive aspects of the process leading to the decision.²⁰⁰ Rescission of DACA certainly had a disproportionate impact on Latinos and Mexicans, who comprised 93% of program participants.²⁰¹

That was just the beginning. As in the Muslim-ban litigation, Trump's own statements on the campaign trail and as President were cited as evidence of racial animus:

When President Trump announced his candidacy on June 16, 2015, for example, he characterized Mexicans as criminals, rapists, and “people that have lots of problems.” Three days later, President Trump tweeted that “[d]ruggies, drug dealers, rapists and killers are coming across the southern border,” and asked, “When will the U.S. get smart and stop this travesty?” During the first Republican presidential debate, President Trump claimed that the Mexican government “send[s] the bad ones over because they don’t want to pay for them.” And in August 2017, he referred to undocumented

191. *See id.* at 1903.

192. *See id.*

193. *Id.*

194. *Id.* at 1903, 1915.

195. *Id.* at 1903–04.

196. *Id.* at 1901.

197. *Id.* at 1915.

198. *See Regents of the Univ. of Cal. v. Dep’t of Homeland Sec.*, 298 F. Supp. 3d 1304, 1315 (N.D. Cal. 2018), *aff’d sub. nom.* 908 F.3d 476 (9th Cir. 2018), *rev’d in part and vacated in part sub. nom.* 140 S. Ct. 1891 (2020); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 274 (E.D.N.Y. 2018), *rev’d in part sub. nom.* Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

199. *Regents*, 298 F. Supp. 3d at 1313–15; *Batalla Vidal*, 291 F. Supp. 3d at 276–79.

200. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

201. *Regents*, 298 F. Supp. 3d at 1314; *Batalla Vidal*, 291 F. Supp. 3d at 274–75.

immigrants as “animals” who are responsible for “the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, MS 13.”²⁰²

The courts wrestled with whether statements such as these, related to the affected groups but not directly tied to the decision itself (rescission of DACA), could be used to infer animus. The concern was summed up here by one court: “Should campaign rhetoric be admissible to undermine later agency action by the victors? This order recognizes that such admissibility can readily lead to mischief in challenging the policies of a new administration. We should proceed with caution and give wide berth to the democratic process.”²⁰³ The other district court also recognized the problem: “[S]earching for evidence of discriminatory motivation in campaign-trail statements is potentially fraught,”²⁰⁴ wrote the court. “Old statements may say little about what lay behind a later decision. Statements made in the throes of a heated race may be ‘contradictory or inflammatory.’” Plaintiffs would have incentive to conduct an “evidentiary snark hunt” for past statements.²⁰⁵ Furthermore, “an equal-protection claim brought against the President raises difficult questions of whether—and, if so, for how long—any Executive action disproportionately affecting a group the President has slandered may be considered constitutionally suspect.”²⁰⁶

Despite these concerns, the district courts concluded President Trump’s prior statements had evidentiary value regarding his purportedly invidious purpose.²⁰⁷ Both courts concluded that while such statements might not suffice to show animus at the summary judgment stage or at trial, they were enough to withstand a motion to dismiss on the pleadings.²⁰⁸ “At the very least, one might reasonably infer that a candidate who makes overtly bigoted statements on the

202. *Regents*, 298 F. Supp. 3d at 1314 (alterations in original) (citations to record omitted). The *Batalla Vidal* court cited even more statements indicating Trump’s animus:

To establish discriminatory purpose, Plaintiffs identify a disheartening number of statements made by President Donald Trump that allegedly suggest that he is prejudiced against Latinos and, in particular, Mexicans. These comments include (1) then-candidate Trump’s assertions that Mexican immigrants are not Mexico’s “best,” but are “people that have lots of problems,” “the bad ones,” “criminals, drug dealers, [and] rapists”; (2) Trump’s characterization of individuals who protested outside a campaign rally as “thugs who were flying the Mexican flag”; (3) Trump’s statements that a U.S.-born federal judge of Mexican descent could not fairly preside over a lawsuit against Trump’s for-profit educational company because the judge was “Mexican” and Trump intended to build a wall along the Mexican border; and (4) pre- and post-Inauguration characterizations of Latino/a immigrants as criminals, “animals,” and “bad hombres[.]”

Batalla Vidal, 291 F. Supp. 3d at 276–77 (alterations in original) (citations to record omitted).

203. *Regents*, 298 F. Supp. 3d at 1315.

204. *Batalla Vidal*, 291 F. Supp. 3d at 278.

205. *Id.* (quoting *Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting from the denial of reconsideration en banc)).

206. *Id.*

207. *Id.* at 277; *Regents*, 298 F. Supp. 3d at 1315.

208. *Id.*

campaign trail might be more likely to engage in similarly bigoted action once in office.”²⁰⁹

The *Batalla Vidal* court was also unimpressed by the Administration’s argument that the only officials charged with making the decision were the Acting Secretary of DHS or the Attorney General, who had made no such bigoted statements about Mexicans. The court waved away that argument by asserting a basic constitutional principle: “Our Constitution vests ‘executive Power’ in the President, not in the Secretary of DHS, who reports to the President and is removable by him at will.”²¹⁰ It would be odd if the President, having “directed the end of the DACA program,” could “launder” his “discriminatory intent” by implementing it through “an agency under his control.”²¹¹

A third consideration for the district courts related to the process by which the rescission had been made. “DACA received reaffirmation by the agency as recently as three months before the rescission, only to be hurriedly cast aside on what seems to have been a contrived excuse (its purported illegality),”²¹² the district court in *Regents* wrote. “This strange about-face, done at lightning speed, suggests that the normal care and consideration within the agency was bypassed.”²¹³

In a second major loss for animus doctrine, the Supreme Court reversed these conclusions, holding that the allegations were insufficient to state a claim on their face.²¹⁴ This time, unlike in *Trump v. Hawaii*, the Court used *Arlington Heights* as the basic framework for its conclusions.²¹⁵ The Court noted that to plead animus, a plaintiff needed to “raise a plausible inference that an ‘invidious discriminatory purpose was a *motivating factor*’ in the . . . decision.”²¹⁶ This statement departed from the *Trump v. Hawaii* decision, which had intimated that a successful animus claim could only be made if the invidious purpose was *the only one* motivating the decision.

The evidence of disparate impact on Latinos did not count as evidence of animus, the Court held, because Latinos made up a disproportionate share of the immigrant population.²¹⁷ Any change to a “cross-cutting” immigration relief program could be expected to affect them disparately. There was nothing unusual or alarming about that.²¹⁸

209. *Batalla Vidal*, 291 F. Supp. 3d at 278.

210. *Id.* at 279 (quoting U.S. CONST. art. II, § 1, cl. 1).

211. *Id.*

212. *Regents*, 298 F. Supp. 3d at 1315.

213. *Id.*

214. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915–16 (2020).

215. *Id.*

216. *Id.* (emphasis added) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

217. *Id.*

218. *Id.*

The plurality also concluded there was nothing unusual about the events leading to the September 2017 DACA rescission.²¹⁹ The DAPA memo of three months before, which said DACA would remain in effect, had merely declined to address DACA. It had not reaffirmed it. It did not address the merits of the DACA policy.²²⁰ And there was nothing strange about the Attorney General's subsequent conclusion that DACA was illegal.²²¹

Most importantly for purposes of animus doctrine, the Court did not think Trump's pre- or post-campaign statements about Mexican immigrants had any bearing on whether the DACA rescission was motivated by animus. Here is the Court's entire analysis of the relevance of those statements:

Finally, the cited statements are unilluminating. The relevant actors were most directly Acting Secretary Duke and the Attorney General. As the *Batalla Vidal* court acknowledged, respondents did not "identify[] statements by [either] that would give rise to an inference of discriminatory motive." Instead, respondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But, even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as "contemporary statements" probative of the decision at issue. Thus, like respondents' other points, the statements fail to raise a plausible inference that the rescission was motivated by animus.²²²

Once again, the Court avoided any explicit condemnation of Trump's use of malicious claims about Mexican immigrants, calling them mere "critical statements."²²³

More importantly for animus doctrine, even if the President's statements could be viewed as showing animus, they were not probative because Trump was not among "[t]he relevant actors [who] were most directly"²²⁴ involved in the decision. That responsibility fell to the acting head of DHS, who issued the rescission, and to the Attorney General, who reached the conclusion that DACA was illegal.²²⁵

The plurality ignored the obvious fact that the President is the chief executive who is ultimately responsible for his Administration. Trump was allowed to whitewash his animus through the authority of Executive Branch officials. Though they were doing the animus-laced bidding of the President, they themselves appeared to harbor no animus for which there was actual

219. *Id.* at 1916.

220. *Id.*

221. *Id.*

222. *Id.* (alterations in original) (citations omitted) (first quoting *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 278 (E.D.N.Y. 2018), *rev'd in part sub. nom. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); then quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)).

223. *Id.*

224. *Id.*

225. *Id.*

evidence. The President was free to enlist his subordinates and avoid responsibility. Unlike in *Trump v. Hawaii*, the President himself did not issue an order or proclamation rescinding DACA.

Two other considerations figured in the plurality's conclusion that Trump's malignant view of Mexicans did not support a finding of unconstitutional animus. First, most of the bigoted statements were "remote in time" from the DACA decision—almost all were made before he became President, and some were uttered as far back as 2015.²²⁶ But the infamous comment that undocumented immigrants were "animals" bringing "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, [and] MS 13" was made in August 2017.²²⁷ The DACA rescission occurred just a month later in September 2017.²²⁸ Yet to the Court, these did not count as "contemporary statements" and thus were not probative of whether the decision was made with ill will.²²⁹

Second, the plurality concluded the statements were not related to the DACA rescission.²³⁰ They constituted more generalized commentary about Mexican immigrants.²³¹ Trump did not say "DACA recipients" were "[d]ruggies, drug dealers, rapists and killers . . . coming across the southern border."²³² He simply asserted that undocumented Mexican immigrants generally were "[d]ruggies, drug dealers, rapists and killers . . . coming across the southern border."²³³ Thus, once again, Trump's remarks did not poison the rescission, so they were not "probative of the decision at issue."²³⁴

This very formal and implausible analysis amounted to a remarkable degree of hair-splitting by the plurality to avoid allowing the plaintiffs *even to plead animus*, much less to allow it to reach trial. It is hard to imagine the *Moreno* Court, concerned as it was about isolated epithets in the congressional record about "hippie communes," allowing these presidential remarks to stand.²³⁵ The *Windsor* Court, too, which relied on evidence from a single committee report, would not have sustained such comments.²³⁶

226. *Regents*, 140 S. Ct. at 1916.

227. *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304, 1314 (N.D. Cal. 2018), *aff'd sub. nom.* 908 F.3d 476 (9th Cir. 2018), *rev'd in part and vacated in part sub. nom.* *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

228. *Regents*, 140 S. Ct. at 1903.

229. *Id.* at 1916.

230. *Id.*

231. *Id.*

232. *Regents*, 298 F. Supp. 3d at 1314.

233. *Id.*

234. *Regents*, 140 S. Ct. at 1916.

235. *See* U.S. *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–535 (1973).

236. *See* *United States v. Windsor*, 570 U.S. 744, 770–71 (2013).

For the second time in an animus decision, the Court failed even to cite *Windsor*.²³⁷ Just two years after the retirement of Justice Kennedy in July 2018, *Regents* offered a very poor prognosis for animus doctrine.

3. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission²³⁸

Since *Windsor*, only one litigant before the Supreme Court has been able to show unconstitutional government hostility.²³⁹ Jack Phillips, owner of Masterpiece Cakeshop in Colorado, refused to make a wedding cake for a gay couple.²⁴⁰ When the gay couple brought a sexual-orientation complaint to the Colorado Civil Rights Commission, Phillips defended on the ground that his First Amendment rights shielded him from state government sanction.²⁴¹ The Commission rejected his argument.²⁴² Phillips appealed through the state courts and ultimately to the Supreme Court, where he prevailed on free exercise grounds.²⁴³

But the Court's holding did not rest on the view that religious adherents do not have to comply with otherwise valid and facially neutral laws of general applicability. Instead, the Court concluded that the Commission had exhibited impermissible "hostility" in its consideration of Phillips's case.²⁴⁴ He did not receive the "neutral and respectful consideration to which [he] was entitled."²⁴⁵

What was the evidence of this hostility? At the first public hearing on the case, "commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons [were] less than fully welcome in Colorado's business community."²⁴⁶ One commissioner said: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."²⁴⁷ The Court worried that these statements might be interpreted "as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced."²⁴⁸ At a second meeting, another commissioner asserted:

237. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

238. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

239. See *id.* at 1723–24.

240. *Id.* at 1724.

241. *Id.* at 1725–26.

242. *Id.* at 1726.

243. *Id.* at 1726–27, 1732.

244. *Id.* at 1732.

245. *Id.* at 1729.

246. *Id.*

247. *Id.* (alteration in original).

248. *Id.*

[R]eligion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.²⁴⁹

These comparisons of the baker's beliefs to beliefs about the Holocaust or slavery were beyond the pale. There were no objections to these statements from other commissioners. Nor had the state court repudiated them. Nor had they been disavowed in the State's briefs. Those facts "cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case."²⁵⁰

Also indicating some hostility toward the baker's religious beliefs was the State's contrasting treatment of three other bakers who refused customer requests to write anti-gay-marriage messages on cakes.²⁵¹ The Commission had not found their conduct a violation of Colorado antidiscrimination rules. In fact, it analyzed the other cases in ways that seemed inconsistent and less favorable to Phillips.²⁵²

The state court of appeals compounded the problem by stating in a footnote in its opinion that the Commission had justifiably distinguished the other bakers' cases because they had merely rejected the requests "because of the offensive nature of the requested message."²⁵³ But it is not the role of government to assess offensiveness. "The Colorado court's attempt to account for the difference in treatment," the Supreme Court observed, "elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs."²⁵⁴

The Court did not use the word "animus" in its opinion, did not explicitly address animus doctrine, and did not cite the line of cases in the classic animus quadrilogy. (*Windsor* was mentioned only to note that the baker's refusal preceded it chronologically.²⁵⁵) But it observed that the state government's duty

249. *Id.*

250. *Id.* at 1730.

251. *Id.*

252. *Id.*

253. *Id.* at 1731 (quoting *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. App. 2015)).

254. *Id.* Others have argued this is a tendentious and likely mistaken reading of the record. See Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 138–45 (2018); Bernard Bell, *A Lemon Cake: Ascribing Religious Motivations in Administrative Adjudications – A Comment on Masterpiece Cakeshop (Part II)*, YALE J. ON REG.: NOTICE & COMMENT (June 20, 2018), <http://yalejreg.com/nc/a-lemon-cake-ascribing-religious-motivation-in-administrative-adjudications-a-comment-on-masterpiece-cakeshop-part-ii>. The claim of bias was not raised at any point in the lower court proceedings, so it was not preserved for appeal. It was, therefore, arguably inappropriate to reverse on this basis. The Court may have been reaching for some way to decide the case without reaching the merits of the First Amendment claims.

255. *Id.* at 1721, 1728.

was to be scrupulously neutral and tolerant toward religious beliefs, especially in the context of an adjudicatory proceeding.²⁵⁶

In his closest invocation of “animus,” Justice Kennedy wrote: “The Constitution ‘commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from *animosity* to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.’”²⁵⁷ Citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which itself cited *Arlington Heights*, the Court next noted the considerations that go into determining whether the Government acted neutrally under the Free Exercise Clause: “Factors relevant to the assessment of governmental neutrality include ‘the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.’”²⁵⁸ These factors, of course, appear repeatedly in the classic animus decisions.

What should we make of the place of *Masterpiece Cakeshop* in the animus pantheon? One temptation is to distinguish it altogether from the group of animus decisions. It is, one might say, a species of the free exercise doctrine, which is a jurisprudence unto itself. It does not directly rely on any of the canonical animus decisions and does not discuss the equal protection doctrine.

Still, as with the animus cases, *Masterpiece Cakeshop* is concerned with shielding people from malignity in governmental decision making. It demands respect and concern for them. It should not matter that here, the object of government disfavor—a traditionalist Christian business owner—could hardly have qualified as a politically unpopular minority at some point in the recent past. It may very well be that now—before the particular commission members that Phillips faced, and under the circumstances he faced them—he was the object of scorn. One might say his interests were not respectfully considered.

The evidence of animus in *Masterpiece Cakeshop* was thin. The statements made by two commission members were equivocal and may simply have been statements of fact. “It cannot be constitutionally prohibited animus for public officials to observe that religious believers have made discriminatory claims in the past and that contemporary justifications for violating civil rights might take similar form, even if they are offered sincerely and in good faith,” argue two scholars.²⁵⁹

We also have no idea whether any of the other commission members agreed with those commission members. Even the state appeals court’s

256. *Id.* at 1731.

257. *Id.* (emphasis added) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)).

258. *Id.* (quoting *City of Hialeah*, 508 U.S. at 540).

259. Kendrick & Schwartzman, *supra* note 6, at 142.

conclusion about “offensiveness” may only have signaled the court’s view that the customers’ requests for anti-gay messages did not count as anti-creed (religious) discrimination under the state antidiscrimination law, and thus that those customers’ complaints failed at the outset to state a claim. It seems the Court has a hair-trigger sense of what constitutes hostility when it comes to finding governmental animus with respect to religion but not so much for immigrants or foreign nationals entering the United States.

As an animus decision, can *Masterpiece Cakeshop* be squared with *Trump v. Hawaii*, decided two months later, or with *Regents*, decided two years later?²⁶⁰

Both *Trump* and *Masterpiece Cakeshop* involved decision maker hostility toward a religion. Whether the challenge arises under the Free Exercise Clause or the Establishment Clause, the underlying theory is the same—there can be no government hostility on the basis of religion. There was nothing equivocal about Trump’s criticism of Muslims and references to a “Muslim ban.” If anything, *Trump* presented far stronger evidence of authoritative hostility. That suggests the main difference between *Trump* and *Masterpiece Cakeshop* was the religion targeted by the government official. But the fact remains that *Trump* involved the special context of deference on matters of foreign-national entry into the country and matters of national security. And it is not clear that the final version of the policy reflected Trump’s initial anti-Muslim hostility rather than bona fide concerns about some foreign nations’ poor identity-information and vetting practices.

Regents is in some ways more difficult to reconcile with *Masterpiece Cakeshop*. Once again, a governmental decision maker made targeted, hostile remarks. The comments of President Trump at issue in *Regents* were loaded with racial and ethnic stereotypes. The two commissioners’ comments in *Masterpiece Cakeshop* were far milder and more ambiguous. *Regents* did not involve the extraordinary deference of *Trump*. For *Regents*, the most that can be said is that most of Trump’s remarks were more remote in time from the relevant decision and were not made in the context of the decision itself. In *Masterpiece Cakeshop*, the commissioners’ statements were made at the time of the very adjudicatory proceeding at which a decision was being made.²⁶¹ Also, *Regents* held that Trump had effectively laundered his animus through two subordinates who issued the actual DACA rescission.²⁶² The Colorado commissioners were themselves among the immediate decision makers. This undermines the claim, made by

260. Many scholars have noted the tension between *Trump v. Hawaii* and *Masterpiece Cakeshop*. See, e.g., *id.* at 135–36 (“Finally, it is impossible to ignore the obvious inconsistency between the Court’s demand for tolerance and respect in *Masterpiece* and its abdication of that demand in *Trump v. Hawaii*, which upheld President Trump’s travel ban. There are many ironies here, but after the travel ban case, we can find no principled application—no integrity—in the etiquette of animus doctrine.” (footnotes omitted)).

261. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1730.

262. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020).

some scholars, that animus doctrine was “inverted” or “reversed” in *Masterpiece Cakeshop*.²⁶³

B. *Animus Doctrine in Lower Federal Courts*²⁶⁴

Since *Windsor*, more than thirty-five federal court decisions have discussed animus claims in a substantive way.²⁶⁵ In most of these cases, animus claims fared poorly. In rare cases where animus claims succeeded, they added little to animus doctrine as an independent constitutional force because they also involved forms of discrimination (e.g., racial, national origin, or religious) that are already closely scrutinized by courts.

1. *Animus Based on Sexual Orientation or Gender Identity*

More surprising, perhaps, is the litigation in which the doctrine hardly barked at all: President Trump’s decision, communicated in three tweets with no prior analysis or consultation of military experts, to ban military service by transgender people.²⁶⁶ There were powerful reasons to believe anti-transgender animus drove that decision.²⁶⁷ But animus barely registered in the three major lawsuits filed in district courts around the country.²⁶⁸

Prior to *Obergefell*, one circuit court suggested that animus might be at work in states’ refusals to recognize or license same-sex marriages. The United States Court of Appeals for the Seventh Circuit noted that Indiana recognized first-cousin marriages entered out of state if both cousins were at least sixty-five years old while refusing recognition of prohibited same-sex marriages entered out of state.²⁶⁹ Indiana offered no logic for the distinction. “This suggests animus against same-sex marriage,” observed the court, “as is further suggested

263. See discussion *infra* Part III.B.2.

264. Here, I do not include cases involving constitutional tort claims grounded in allegations of retaliatory animus. See, e.g., *Mitchell v. Kirchmeier*, 28 F.4th 888, 896 (8th Cir. 2022) (“[I]o prevail on a First Amendment retaliation claim, the plaintiff must show that the defendant would not have taken the adverse action but for harboring ‘retaliatory animus’ against the plaintiff because of his exercise of his First Amendment rights.” (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019))). These cases bear a resemblance to many equal protection animus cases but are distinct in that the animus is triggered by a constitutionally protected activity rather than by the characteristics of the plaintiff. I also do not include cases here where a plaintiff does “not allege[] class-based discrimination, but instead claims that she has been irrationally singled out as a so-called ‘class of one.’” *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 601 (2008); see, e.g., *Green Genie, Inc. v. City of Detroit*, 599 F. Supp. 3d 544, 553–54 (E.D. Mich. 2022) (discussing a marijuana dispensary that proceeded as a “class of one” alleged animus in denial of business zoning permit by city).

265. See cases cited *supra* note 2.

266. *Karnoski v. Trump*, 926 F.3d 1180, 1186 (9th Cir. 2019).

267. See, e.g., *Eric Merriam*, *supra* note 6.

268. *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019); *Stockman v. Trump*, 331 F. Supp. 3d 990 (C.D. Cal. 2018), *vacated by* No. 18-56539, 2019 WL 6125075 (9th Cir. Aug. 26, 2019); *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019).

269. *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014).

by the state's inability to make a plausible argument for its refusal to recognize same-sex marriage.²⁷⁰ The court offered no further elaboration.

But that same year, the United States Court of Appeals for the Sixth Circuit completely rejected the animus-based constitutional case against a state prohibition on same-sex marriage.²⁷¹ It canvassed a couple of the animus decisions—*Cleburne* and *Romer*—and concluded that the doctrine was most apt to apply where a novel law targeted a single group of people.²⁷² That was not the case with state laws limiting marriage to one man and one woman. Such laws merely codified a “long-existing, widely held social norm” and reflected the fear that courts might try to change the practice.²⁷³ They did not “convey . . . malice or unthinking prejudice.”²⁷⁴

The court pointed out that it was essentially impossible to know the motives of the millions of people who voted in favor of the state constitutional amendments to block same-sex marriages.²⁷⁵ “If assessing the motives of multimember legislatures is difficult, assessing the motives of *all* voters in a statewide initiative strains judicial competence,” asserted the court.²⁷⁶ “The number of people who supported each initiative—Michigan (2.7 million), Kentucky (1.2 million), Ohio (3.3 million), and Tennessee (1.4 million)—was large and surely diverse.”²⁷⁷ Although *Romer* also involved a voter-approved state constitutional amendment, the Supreme Court did not try to psychoanalyze the voters. Instead, it asked whether anything could explain the amendment other than animus.²⁷⁸ At the end of the day, the Supreme Court in *Obergefell* relied mainly on the fundamental right to marry (with a soupçon of equal protection analysis).²⁷⁹ It ignored animus doctrine. In fact, Justice Kennedy praised the noble intentions and good faith of gay-marriage opponents.²⁸⁰

In 2016, LGBT rights groups challenged a Mississippi law that sought to immunize persons and businesses from legal consequence for refusing to provide goods and services to married same-sex couples.²⁸¹ The law had been passed in reaction to *Obergefell*. The district court relied heavily on *Windsor*.²⁸²

270. *Id.*

271. *DeBoer v. Snyder*, 772 F.3d 388, 408 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at 409.

276. *Id.*

277. *Id.*

278. *Id.* at 410.

279. *Obergefell v. Hodges*, 576 U.S. 644, 672–75 (2015).

280. *Id.* at 656–57.

281. *Barber v. Bryant*, 193 F. Supp. 3d 677, 696 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017).

282. *Id.* at 707.

After reviewing the political context in which the bill was passed and statements in the legislative record, the district judge concluded: “The title, text, and history of HB 1523 indicate that the bill was the State’s attempt to put LGBT citizens back in their place after *Obergefell*.”²⁸³ The broad effect of the law “would demean LGBT citizens, remove their existing legal protections, and more broadly deprive them their right to equal treatment under the law.”²⁸⁴ It was a rare, but short-lived, victory for an independent animus claim. The United States Court of Appeals for the Fifth Circuit reversed, holding that the plaintiffs lacked standing.²⁸⁵

In 2021, a district court in Massachusetts ruled that the plaintiffs had adequately pled facts to support an inference of animus in a rule promulgated under the Affordable Care Act by the Trump Administration to remove anti-discrimination protection for transgender people.²⁸⁶ That Trump rule had repealed an Obama Administration prohibition on categorical insurance coverage exclusions for care related to gender transition.²⁸⁷ The effect of the new rule was to decrease coverage of care for gender-transition services, making the treatments more expensive and therefore less accessible.²⁸⁸

The plaintiffs’ constitutional argument against the Trump rule hinged on a claim of unconstitutional animus against transgender people.²⁸⁹ Citing *Arlington Heights*, the district court ruled that facts supporting anti-transgender animus had been adequately pled.²⁹⁰ This conclusion was based on both the plausible allegation that transgender healthcare services would be diminished (effect) and on the following statements by Roger Severino, Director of the Office of Civil Rights (OCR) at HHS:

For instance, as recently as summer of 2016, he published pieces arguing that transgender people “us[e] government power to coerce everyone, including children, into pledging allegiance to a radical new gender ideology” and that transgender military personnel serving openly “dishonors the[] sacrifice” of veterans.²⁹¹

These statements, especially those regarding the supposed “coercion” of children, had the baseless, obsessional, and hysterical qualities often associated with homophobia.²⁹² Yet, the statements had been made in 2016, before

283. *Id.* at 708.

284. *Id.* at 709.

285. *See* Barber v. Bryant, 860 F.3d 345, 358 (5th Cir. 2017).

286. *Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep’t of Health & Hum. Servs.*, 557 F. Supp. 3d 224, 246 (D. Mass. 2021).

287. *Id.* at 230–32.

288. *Id.* at 238.

289. *Id.* at 243.

290. *Id.* at 246.

291. *Id.* (alterations in original).

292. WILLIAM N. ESKRIDGE, JR., *GAYLAW 3* (Harvard Univ. Press 1999).

Severino was appointed head of OCR at HHS. And they were not made in connection with promulgation of the rule itself in 2020.

The Government argued that under *Regents*, such statements were not probative evidence of animus.²⁹³ The district court's response was to distinguish *Regents*, noting that the plurality there had only held that President Trump's pre- and post-election statements about Mexican immigrants were "both 'remote in time and made in unrelated contexts' and not made by the 'relevant actors' (i.e., the acting secretary of DHS and the Attorney General)."²⁹⁴ But Severino was a "relevant actor"—a decision maker in HHS itself. In addition to Severino's statements, HHS had "deprioritiz[ed] . . . LGBTQ+ issues in the leadup to the rulemaking (including by removing LGBTQ+ health issues from its four-year strategic plan and instructing staff at the Centers for Disease Control and Prevention not to use 'transgender' in its 2019 budget request)."²⁹⁵ Here, the court seemed to rely on a permissible inference of animus in the sequence of events leading to the decision (context). It was perhaps thin evidence as compared to *Regents* but was enough to survive a motion to dismiss for failure to state a claim. This was a rare victory for an independent animus claim in the decade after *Windsor*.

In two other decisions involving the targeting of transgender people, courts avoided direct reliance on animus doctrine by resolving the disputes on substantive constitutional grounds. The United States Court of Appeals for the Fourth Circuit's decision in *Grimm v. Gloucester County School Board* struck down a school district's policy barring students from using single-sex restrooms in accordance with their gender identity.²⁹⁶ There was plenty of evidence in the record to show parents' and school administrators' animus against transgender students.²⁹⁷ But the court rested its decision on constitutional and statutory (Title IX) sex discrimination grounds.²⁹⁸

In *Hecox v. Little*, the United States District Court for the District of Idaho enjoined enforcement of a state law excluding transgender women from participating on women's sports teams.²⁹⁹ The State had sought to justify the exclusion on the ground that it ensured fairness in women's sports by barring males from women's teams.³⁰⁰ But, the State was willing to allow a transgender female plaintiff to play on women's teams if her doctor signed a form stating that she was female.³⁰¹ If that was true, the court concluded, "[T]he Act does

293. *Bos. All. of Gay, Lesbian, Bisexual, & Transgender Youth*, 557 F. Supp. 3d at 246.

294. *Id.* (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020)).

295. *Id.*

296. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

297. *Id.* at 598–600.

298. *Id.* at 606–17 (affirming the district court's grant of summary judgment on equal protection grounds); *id.* at 617–19 (affirming the district court's grant of summary judgment on Title IX grounds).

299. *Hecox v. Little*, 479 F. Supp. 3d 930, 988 (D. Idaho 2020).

300. *Id.* at 978–79.

301. *Id.* at 983.

not ensure sex-specific teams at all and is instead simply a means for the Idaho legislature to express its disapproval of transgender individuals.”³⁰² The court then quoted the classic *Moreno* line that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”³⁰³ Yet, the thrust of the decision is that the Idaho policy violated the Equal Protection Clause because of its discrimination based on transgender status, not its bare animus.³⁰⁴

2. *Animus Based on Race or National Origin*

When the government classifies based on race or (sometimes) national origin, that action draws a high degree of constitutional scrutiny under the Equal Protection Clause.³⁰⁵ There is no need to claim special malice or ill will. Indeed, the classification may have been based on a well-intentioned desire to compensate for racial wrongs. Animus or invidiousness becomes an issue only when the government has acted in a facially neutral way that nonetheless produces a racially disparate impact. Then the Court looks behind the stated reasons for the policy and asks whether producing that disparity was itself a motive for the action.³⁰⁶ Even if there were no animus doctrine, this inquiry into racially invidious motive would occur. Nevertheless, many claims of racially invidious purpose have borrowed the language of animus. The concept is often referred to in litigation as “racial animus.”³⁰⁷

In 2016, the United States Court of Appeals for the Ninth Circuit considered litigation brought by a group of developers who claimed that the city had denied a rezoning request because of racial animus by neighbors against more housing for Hispanic residents.³⁰⁸ The Court analyzed the animus claim by using the *Arlington Heights* factors, including the sequence of events, departures from the usual substantive considerations, and disparate impact.³⁰⁹ There was no allegation that city officials themselves acted on racial animus. But “[t]he presence of community animus can support a finding of discriminatory motives by government officials, even if the officials do not personally hold such views.”³¹⁰ At the zoning commission hearing, no member of the public used explicitly biased language. But they did use racial “code

302. *Id.*

303. *Id.* at 983 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

304. *See generally id.* at 988 (“[T]he [c]ourt finds Plaintiffs are likely to succeed in establishing the Act is unconstitutional as currently written . . .”).

305. *See Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013).

306. *See Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016).

307. *See, e.g., id.*

308. *Id.* at 498.

309. *Id.* at 504.

310. *Id.*

language” about “large families,” “unattended children,” and crime.³¹¹ The city had rejected its own zoning commission recommendation to approve the project.³¹² The developers also alleged a history of animus in opposition to affordable housing projects.³¹³ That was enough for the court to hold that the allegations in the complaint were sufficient to state a claim for animus.³¹⁴ Because the claim was based on racial or national-origin animus, it added nothing very significant to animus as an independent constitutional doctrine.

After *Trump v. Hawaii* was decided, a federal district court in Texas considered the claims of Mexican citizens who alleged that revocation of humanitarian parole and detention by federal immigration officials violated the Constitution and the Administrative Procedure Act.³¹⁵ They claimed that the policies were motivated by discriminatory animus based on national origin.³¹⁶ As evidence, they cited various anti-Mexican statements from Trump both before and after he became President.³¹⁷ The court was willing to consider the extrinsic evidence following *Trump*, but it was clearly reluctant to do so. It concluded that while Trump had made remarks “critic[al] of Mexicans,” he had not connected these with any threat to revoke parole for Mexicans.³¹⁸ The revocation of paroles “could be reasonably understood to result from a justification independent of unconstitutional grounds,” namely, the government’s interest in locating offenders if there was an adverse ruling on their asylum claims.³¹⁹ The actions of immigration officials demonstrated more aggressive and harsh enforcement of border controls, a matter that was at the center of Trump’s campaign for president, the court held, rather than animus based on national origin.³²⁰

In another case, Oregon voters by referendum rejected a law passed by the state legislature granting drivers’ licenses to residents without proof of legal status in the country.³²¹ The plaintiffs claimed the voters’ rejection of the law “was motivated by animus towards Mexicans and Central Americans and not rationally related to a legitimate” objective.³²² The Ninth Circuit upheld the district court’s dismissal on jurisdictional grounds.³²³ The court concluded that even if the referendum vote were invalidated, there would be no basis to grant

311. *Id.* at 505.

312. *Id.* at 507.

313. *Id.* at 508.

314. *Id.* at 509.

315. *Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917, 922–23 (W.D. Tex. 2018).

316. *Id.* at 929.

317. *Id.* at 930.

318. *Id.*

319. *Id.* at 931.

320. *Id.* at 931–32.

321. *M.S. v. Brown*, 902 F.3d 1076, 1079–80 (9th Cir. 2018).

322. *Id.* at 1081.

323. *Id.* at 1082.

the plaintiffs the relief requested (i.e., driving permits without proof of legal residence) because there would be no state law under which it could do so.³²⁴ Under Oregon law, the state legislature's proposal could not become law unless passed by a majority of voters in a referendum.³²⁵ The plaintiffs did not (and could not) allege that a majority of voters would have approved the proposal in a referendum untainted by animus. Courts cannot command the state to enact laws or rearrange the state's legislative process. The plaintiffs would simply have to go back to the political process—the same process they alleged was poisoned by animus. They pointed out that the process “is an illusion for members of disfavored minority groups as long as their rights are subject to popular veto referend[a] infected by racial or other class-based animus.”³²⁶ The Ninth Circuit responded:

We do not deny the force of this argument, which has shaped our Fourteenth Amendment jurisprudence for the last eighty years. [Citing *Carolene Products*.] Nonetheless, the risk of improper animus infecting the political process does not confer upon the federal courts the power to assume the functions of a legislature or the people in their legislative capacity. We recognize that our opinion reflects an asymmetry in federal judicial power: federal courts have the power to remedy injuries flowing from a discriminatory law, but not the power to remedy injuries that exist after the discriminatory rejection of a law—at least where fundamental rights or other similarly vested rights are not at stake.³²⁷

Animus doctrine could not compensate for the burdens created by what the court called “our constitutional structure and the democratic system of government it establishes.”³²⁸ A doctrine designed to cleanse the democratic process of malice was powerless once again.

Another immigration issue bedeviling the Trump administration was its decision to end the Temporary Protected Status (TPS) program for refugees from El Salvador, Haiti, Nicaragua, and Sudan.³²⁹ The termination was challenged in federal district court on several legal grounds, including that the decision was infected with the racial and national-origin animus of President Trump.³³⁰

In a January 2018 meeting with congressional representatives to discuss the TPS designations, Trump wondered, “Why are we having all these people from shithole countries come here?” He then expressed a preference for immigrants from predominantly white countries like Norway. “Why do we need more

324. *Id.* at 1083–91.

325. *Id.* at 1084–85.

326. *Id.* at 1090 (alteration in original).

327. *Id.* at 1090–91.

328. *Id.* at 1091.

329. *See Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1091–92 (N.D. Cal. 2018).

330. *Id.* at 1092.

Haitians?”³³¹ He instructed congressional negotiators to take them out of any immigration deal.³³² The main issue for the district court was whether Trump’s racial animus could be attributed to the Secretary of DHS, the administrator who actually ordered the changes in TPS designations.³³³ Issuing its decision after *Trump* but before *Regents*, the district court held that there was sufficient indication to survive a motion to dismiss that Trump’s animus had influenced the DHS decision.³³⁴ Among other things, the *Trump* decision was distinguishable on the grounds that the TPS alterations did not involve national security or foreign policy.³³⁵ The decision was based on national-origin animus, again adding little to the development of animus as an independent constitutional doctrine.

Seven different district courts have addressed the constitutionality of Section 1326 of the INA, which criminalizes unauthorized reentry to the United States by removed aliens.³³⁶ In *United States v. Machic-Xiap*, a Guatemalan defendant moved to dismiss an indictment charging him with repeated illegal entry.³³⁷ He claimed Section 1326 discriminated against people from Latin America.³³⁸ The Oregon district court noted that the INA was facially neutral but had a disparate impact on immigrants from Latin America.³³⁹ Further, the court found that there was evidence of racial animus in the legislative history of a predecessor law known as the Undesirable Aliens Act of 1929.³⁴⁰ Under *Arlington Heights*, this “historical background” was one factor in determining whether animus was present in the current law.³⁴¹ However, there was “scant” evidence of animus in the INA itself. It was not simply a silent reenactment of a prior statute that was motivated by racial animus.³⁴² There were no procedural or substantive irregularities in the INA. Its provisions were fully debated and considered.³⁴³

In *United States v. Carrillo-Lopez*,³⁴⁴ the United States District Court for the District of Nevada reached the opposite conclusion. The principal disagreement was on the question whether the 1952 Act had “cleansed” the widely acknowledged racial animosity behind the 1929 Act.³⁴⁵ The court held

331. *Id.* at 1099–1100.

332. *Id.* at 1100.

333. *Id.* at 1123.

334. *Id.* at 1132.

335. *Id.* at 1129.

336. Immigration and Nationality Act, 8 U.S.C. § 1326.

337. *United States v. Machic-Xiap*, 552 F. Supp. 3d 1055, 1060 (D. Or. 2021).

338. *Id.*

339. *Id.* at 1072–73.

340. *Id.* at 1060–61, 1073–74.

341. *Id.* at 1073–74.

342. *Id.* at 1075–76.

343. *Id.* at 1076.

344. *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021).

345. *Id.* at 1009–11.

that the racial animus of the 1929 Act was relevant to the enactment of the 1952 Act.³⁴⁶ Moreover, there was sufficient evidence that animus infected the passage of Section 1326 in 1952.³⁴⁷ The court summarized its conclusion this way:

Specifically, the Court considers: a relative lack of discussion compared to robust Congressional debate regarding other provisions of the INA; explicit, recorded use of the derogatory term “wetback” by supporters of Section 1326; Congressional silence while increasingly making the provision more punitive; Congress’ failure to revise in the face of President Truman’s veto statement calling for a reimagination of immigration policy; knowledge of the disparate impact of Section 1326 on Mexican and Latinx people; and passage of the so-called “Wetback Bill” by the same Congress only months prior. The Court recognizes that this evidence is circumstantial, and that each instance may not be as probative when considered alone. But in its totality, the cited evidence is sufficient to demonstrate that racial animus was at least one motivating factor behind the enactment of Section 1326.³⁴⁸

But this has been a distinctly minority view of animus analysis under Section 1326. Five district courts subsequently disagreed with the district court’s decision in *Carrillo-Lopez*, holding that Section 1326 did not reflect invidious racial animus by Congress.³⁴⁹ As a whole, these decisions reflect a very restricted view of animus principles in constitutional law.

3. *Animus Based on Religion*

Like racial animus, “religious animus” draws a high degree of constitutional scrutiny. Government may not act out of hostility toward a particular sect or toward religion as a whole.³⁵⁰ Even if there were no animus doctrine, this inquiry into religiously invidious motive would occur.

In a decision from the United States Court of Appeals for the Second Circuit in late 2019, the appellate court reviewed a school’s claim that a city violated, *inter alia*, the Equal Protection Clause by limiting or prohibiting a school’s ability to build a rabbinical college on its campus.³⁵¹ The proposal would have added 4,500 people to the village’s population of 3,200.³⁵² The district court found that the zoning restrictions were tainted by unconstitutional

346. *Id.* at 1011.

347. *Id.*

348. *Id.*

349. *See* *United States v. Hernandez-Lopez*, 583 F. Supp. 3d 815 (S.D. Tex. 2022); *United States v. Muñoz-De La O*, 586 F. Supp. 3d 1032 (E.D. Wash. 2022); *United States v. Rodriguez-Arevalo*, 603 F. Supp. 3d 142 (M.D. Pa. 2022); *United States v. Barrera-Vasquez*, No. 2:21cr98, 2022 WL 3006773 (E.D. Va. July 28, 2022); *United States v. Paredes-Medina*, No. 2:21-cr-00323, 2022 WL 7683738 (D. Nev. Oct. 13, 2022).

350. *See* *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *see also* U.S. CONST. amend. I.

351. *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 945 F.3d 83, 83 (2d Cir. 2019).

352. *Id.* at 103.

animus against Hasidic Jews.³⁵³ That conclusion was based on the timing of the decision and based on comments made during the zoning proceedings.³⁵⁴

In most respects, the Second Circuit reversed, declaring that the evidence was simply too thin to show hostility.³⁵⁵ But with respect to proposed zoning amendments that would preemptively block the college's dormitories, the Second Circuit affirmed the animus findings based primarily on angry and bigoted comments made by citizens at a hearing.³⁵⁶

[V]illager after villager spoke out against the . . . project, and the hearing was characterized by “outbursts,” “shouts,” and frequent interruptions. One villager complained that “there is no denying . . . what is going on here tonight is that there is a group who wants to take over this village,” and that the rabbinical college would “totally change[] the entire concept of the village,” forcing current villagers to “pay[] the expenses of somebody else’s lifestyle.” Another found it “really funny how we’re talking about law, when you have a group [the Hasidic community] that breaks every law there is.” Another proclaimed that “[t]his is a disgrace. It is an absolute[] disgrace. You are in the wrong town, and the wrong village. . . . If you allow this school to be brought to this village, you’re going to destroy everything that everybody here worked for all their life and I will never, ever, let that happen.” And yet another explained that “in America, we have the sense of community. That’s our face. We’re going to be another Kiryas Joel [a predominantly Hasidic community]. That’s why we are emotional.”³⁵⁷

The portrayal of Hasidic Jews as conspiratorial, law-breaking, and destructive of communities played into anti-Semitic stereotypes of Jews. The question was whether such statements influenced the actual decision makers in city government.³⁵⁸ The Second Circuit was less sure about this but deferred to the district court’s factfinding based on the public comments, the series of events, the context of the decision, and ambiguous statements by the commissioners themselves.³⁵⁹ It appeared animus was a “significant factor in the position taken by . . . those to whom the decision-makers were knowingly responsive.”³⁶⁰

Additionally, a separate zoning restriction known as the “Wetlands Law” prohibited building any structure within 100 feet of the boundary of any wetland without a permit.³⁶¹ It further limited the persons who could apply for a permit to those who were deprived of *all* reasonable use of their property,

353. *Id.* at 89.

354. *Id.* at 108.

355. *Id.* at 119.

356. *Id.* at 122.

357. *Id.* at 120–21 (alterations in original) (footnotes omitted).

358. *Id.* at 122.

359. *Id.*

360. *Id.* (quoting *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 280 F. Supp. 3d 426, 453 (S.D.N.Y. 2017), *aff’d in part, and rev’d in part*, 945 F.3d 83 (2d Cir. 2019)).

361. *Id.* at 120.

which was more restrictive than the prior standard.³⁶² In addition to the evidence of animus in the public comments made at the commission hearing, the stated objective of protecting wetlands appeared to be a pretext for prohibiting the religious college's housing.³⁶³ There had been no study of the "need for or most appropriate means of enacting wetlands protection."³⁶⁴ There was no doubt that the animus-based restrictions imposed by the city and its zoning commission had a discriminatory effect on the college: its dormitory could not be built.

In the aftermath of *Masterpiece Cakeshop*, claims of anti-religious animus in the context of LGBT antidiscrimination enforcement have not invariably succeeded. In *New Hope Family Services, Inc. v. Poole*,³⁶⁵ the district court rejected a religious-adoption-service agency's claim that a neutral and generally applicable state antidiscrimination law requiring such agencies to serve same-sex couples violated the Equal Protection Clause because it reflected animus against the agency.³⁶⁶ The district court concluded there was no evidence of discriminatory enforcement or other indicia of discriminatory purpose.³⁶⁷

But the Second Circuit reversed, holding that there were sufficient indicia of animus to allow the agency to survive a motion to dismiss.³⁶⁸ Among other considerations, the regulation implementing the statute appeared to be more restrictive of religious accommodation than the statute itself. The complete closure of the provider ordered by the state officials seemed like an extreme remedy, especially after they had allowed it to operate for five years under the same policies. Other indicia came from ambiguous but arguably hostile statements in the record. When the adoption agency protested that it could not recommend same-sex couples, state officials responded that "[s]ome Christian ministries have decided to compromise and stay open."³⁶⁹ When a reporter asked about the closure of a long-standing Christian adoption provider, a spokesperson for the state said "[t]here is no place for providers that choose not to follow the law."³⁷⁰

These statements, the Second Circuit concluded, were similar enough to quotes from the Colorado antidiscrimination commission in *Masterpiece*

362. *Id.*

363. *Id.*

364. *Id.* at 122.

365. *New Hope Fam. Servs., Inc. v. Poole*, 387 F. Supp. 3d 194 (N.D.N.Y. 2019), *rev'd in part, vacated in part*, 966 F.3d 145 (2d Cir. 2020).

366. *Id.* at 123–24.

367. *Id.*

368. *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020).

369. *Id.* at 168.

370. *Id.*

Cakeshop to allow the adoption agency's suit to proceed.³⁷¹ Finally, the appeals court noted that other religious providers had also been required to close.³⁷²

If we assume, as we must on dismissal, that the effect of [the state agency's] comply-or-close method for enforcing [the law] fell almost exclusively on adoption services holding particular religious beliefs, that is some reason to suspect that the object of the law was to target those beliefs and to exclude those who maintain them from the adoption process.³⁷³

The "some-reason-to-suspect" standard was a remarkably forgiving one for religious plaintiffs, especially in light of *Trump* and *Regents*. On remand, the district court granted the adoption provider a preliminary injunction.³⁷⁴

4. *Animus Based on Other Considerations*

Animus claims were turned aside in the only two non-LGBT cases in which the doctrine was asserted as an independent matter. In 2018, a Michigan district court granted summary judgment against a wind turbine developer who alleged that the city was motivated by animus when it required the developer to submit an economic impact study and denied a special use land permit.³⁷⁵ The court concluded that the plaintiff was required to show animus against the company itself, not "animus" against wind energy as a matter of policy.³⁷⁶ Heated comments at public meetings against the policy did not show malice against any class of people. The company merely had evidence of ideological opposition to wind energy.³⁷⁷ The court concluded: "Tuscola and the Township disagree over whether the proposed wind energy development would be harmful, but a disagreement over policy is not reflective of unconstitutional animus."³⁷⁸ The decision at least helped clarify that animus is ill will toward *people*, not mere vehement opposition to ideas or policy.

In *Allentown Victory Church v. City of Allentown*,³⁷⁹ the district court rejected a church's assertion that the city had denied its request for a zoning variance

371. *Id.*

372. *Id.* at 169.

373. *Id.*

374. *New Hope Fam. Servs., Inc. v. Poole*, 493 F. Supp. 3d 44 (N.D.N.Y. 2020), *rev'd in part, vacated in part*, 966 F.3d 145 (2d Cir. 2020). On September 6, 2022, the district court granted a permanent injunction for New Hope. The New York Office of Children and Family Services was enjoined from enforcing the statute "insofar as it would compel New Hope to process applications from, or place children for adoption with, same-sex couples or unmarried cohabitating couples, and insofar as it would prevent New Hope from referring such couples to other agencies . . ." *New Hope Fam. Servs., Inc. v. Poole*, No. 5:18-CV-01419, 2022 WL 4094540, at *7 (N.D.N.Y. Sept. 6, 2022).

375. *Tuscola Wind III, LLC v. Almer Charter Twp.*, 327 F. Supp. 3d 1028, 1056 (E.D. Mich. 2018).

376. *Id.* at 1050.

377. *Id.*

378. *Id.*

379. *Allentown Victory Church v. City of Allentown*, No. 5:21-CV-03021, 2022 WL 4071851 (E.D. Pa. Sept. 1, 2022).

based on “discriminatory animus”—presumably stereotypes about those with disabilities or a history of substance abuse.³⁸⁰ The church had sought to operate a drug and alcohol rehabilitation facility. When the city rejected the variance, the church brought claims for violations of the Fair Housing Act and the Americans with Disabilities Act.³⁸¹ But the only basis for the animus claim was the bare assertion in its briefing on summary judgment that zoning board members “misapplied” and “lacked sufficient knowledge of” the FHA and ADA.³⁸² “[T]he [Board’s] outlandish misstatements of the law can only be characterized as deliberative indifference,” argued the church.³⁸³ “The [Board] has intentionally discriminated against AVC through its deliberative indifference to its ADA rights.”³⁸⁴ The court categorically rejected the “deliberate indifference” theory as lacking any basis in case law and because the church had offered nothing more than unsupported assertions.³⁸⁵

III. ANIMUS DOCTRINE SCHOLARSHIP, 2013–2022

If animus doctrine has withered in judicial decisions, it has bloomed in legal scholarship. No fewer than three dozen articles and an illuminating book have touched significantly on the subject in the decade since *Windsor*.³⁸⁶ But conservative scholars have mostly ignored the doctrine. When they have discussed it at all—entirely in the context of the struggle over same-sex marriage—it has been to voice concerns that judicial decisions will poison American politics and that policy views they advocate for will be attacked as hateful.³⁸⁷ On the other hand, faced with an increasingly conservative Supreme Court, progressive scholars have pinned their hopes on animus doctrine, and they have mostly been disappointed. Some of these scholars have even found it threatening because it has been used successfully as a shield against antidiscrimination law and because it has not been used to protect what they regard as marginalized people.³⁸⁸

The problem with many of these perspectives is that animus doctrine—like the freedom of speech or due process of law—has neither a progressive nor a conservative policy preference. It is about the process by which law is made

380. *Id.* at *7.

381. *Id.* at *1.

382. *Id.* at *7.

383. *Id.* (alterations in original).

384. *Id.* (alterations in original).

385. *Id.*

386. *See, e.g.,* ARAIZA, *supra* note 7.

387. Hadley Arkes, *Worse Than It Sounds, and It Cannot Be Cabined*, NAT’L REV. (June 26, 2013), <https://web.archive.org/web/20160509120643/www.nationalreview.com/bench-memos/352114/worse-it-sounds-and-it-cannot-be-cabined-hadley-arkes>.

388. *See* Murray, *supra* note 6, at 292.

and enforced, not about substance. Governmental decision makers are capable of acting maliciously against either side of the political divide.

What follows is a brief consideration of some of the scholarship on animus doctrine over the past decade. I divide the scholarly perspectives into “progressive” and “conservative” categories for ease of reference to refer generally to policy and legal/constitutional views. But by no means do I suggest that these scholars can be so neatly cabined into a particular set of views. Indeed, a fair number of them might well reject these labels.

A. Conservative Perspectives on Animus Doctrine

Conservative scholars and jurists have limited their critiques of animus doctrine to concerns about the impropriety of having judges charge citizens and legislators with bigotry. They have not undertaken a systematic analysis of the basis for, or the methodology of, the doctrine. They offer no explanation for the animus quadrilogy of 1973 through 2013 or for the decisions that have followed in the decade since.

1. The Post-Windsor Reaction

After *Windsor*, numerous conservative academic and non-academic critics, especially opponents of same-sex marriage, excoriated the Court for allegedly insulting those who supported DOMA. For example, Professor Hadley Arkes described the opinion as “hate speech” in the *National Review*.³⁸⁹ For Justice Kennedy, Arkes wrote, “[t]he defense of marriage was simply another way of disparaging and ‘denigrating’ gays and lesbians, and denying dignity to their ‘relationships.’”³⁹⁰ Plausible justifications for marriage as the union of one man and one woman were to be viewed as “so much cover for malice and blind hatred.”³⁹¹ And Professor John Yoo lamented in the *National Review* that the Court had damned 342 members of the House, eighty-five Senators, and President Bill Clinton as “all guilty of antigay bias in 1996, when DOMA was enacted.”³⁹²

Religious conservatives declared they were under assault after *Windsor*. Writing in the Catholic magazine *Commonweal*, Professor Richard Garnett warned that the animus rationale threatened religious freedom:

389. See Arkes, *supra* note 387.

390. *Id.*

391. *Id.*

392. John Yoo, *Windsor: Tarring ‘The Political Branches with Bigotry,’* NAT’L REV. (June 26, 2013), <http://www.nationalreview.com/corner/windsor-tarring-political-branches-bigotry-john-yoo>. Justices Scalia and Alito first sounded this alarm about *Windsor* in their respective dissenting opinions. See *United States v. Windsor*, 570 U.S. 744, 795–96 (2013) (Scalia, J., dissenting); *id.* at 813 (Alito, J., dissenting).

We should be concerned that the characterization by the majority in *Windsor* of DOMA's purpose and of the motives of the overwhelming and bipartisan majority of legislators that supported it reflects a view that those states—and religious communities—that reject the redefinition of marriage are best regarded as backward and bigoted, unworthy of respect. Such a view is not likely to generate compromise or accommodation and so it poses a serious challenge to religious freedom.³⁹³

Professor Patrick Lee wrote that “[the] strident campaign to redefine marriage will only become more intense in the next few years. Catholics will be increasingly labeled as bigots and hate mongers.”³⁹⁴

But *Windsor* did not actually label DOMA supporters “bigots.” It is true that *Windsor* declared, for the third time in seventeen years, that moral disapproval of homosexuality is an illegitimate basis for legislation fencing out homosexuals.³⁹⁵ Supporters of DOMA claimed that moral legislation is good for people, that homosexual acts are immoral, and that nobody is better off when people engage in homosexual acts.³⁹⁶ That is not a bare desire to harm anyone, they say; it is a desire to make men moral,³⁹⁷ which makes them good, which helps them. A sodomy law criminalizing homosexual acts might be good for homosexuals on this account.

It is the case that animus doctrine, like much of constitutional law, has a normative component. It expresses the normative principle, implicit in equal protection and in the postulates of a liberal democracy, that every individual has dignity and is worthy of respect. It offers the observation that unreasoning prejudice against persons expressed in law is inconsistent with the commitment to the equal protection of the law. Government must not act maliciously to injure or disparage people and must not act as if their interests are unworthy of any consideration.

But to say that the *moral* condemnation of homosexuality enacted in a broad and unprecedented law like DOMA is impermissible animus is not the same as saying that *all* reasons for rejecting same-sex marriage are animus-based. It is also not to say that those who hew closely to the traditional religious understanding of marriage are themselves hateful. The focus of animus doctrine is not on the bad nature of the *person* who supports legislation. The focus is on the inadmissibility of the *reasons* for supporting the legislation in a republic committed to the concept of equal protection for every person. The issue in *Windsor* was whether, in context, Congress's decision to select one category of

393. Richard W. Garnett, *Worth Worrying About? Same-Sex Marriage & Religious Freedom*, COMMONWEAL (Aug. 5, 2013), <https://www.commonwealmagazine.org/worth-worrying-about>.

394. Patrick Lee, *Is Marriage Bigoted and Discriminatory?*, CATH. WORLD REP. (July 20, 2013), http://www.catholicworldreport.com/Item/2431/is_marriage_bigoted_and_discriminatory.aspx.

395. See *Windsor*, 570 U.S. at 775.

396. See *id.* at 771.

397. See generally ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993).

potential future marriages for second-class status reflected animus against the persons entering those marriages.³⁹⁸

This characterization of the *Windsor* holding may not ease the hurt feelings or quiet the indignation of traditional-marriage supporters, of course. The insult to them, if an insult at all, is not unique to an animus holding, however. An alternative holding based on heightened scrutiny of sexual-orientation classifications would have informed them that traditional sexual morality is akin to race-based discrimination. A rational-basis holding resting on the irrelevance of the means (denying federal recognition to married same-sex couples) to the stated ends (*inter alia*, encouraging responsible procreation) would have suggested that they suffered at least momentary insanity when they urged passage of DOMA. There is no nice way to tell people that policies they have fervently supported are unconstitutional. Nor would these alternative routes to eliminating DOMA be more solicitous of religious beliefs.

The inescapable fact is that opponents of the Court's decision in *Windsor* would have objected strenuously to *any* basis for striking down DOMA. Their real complaint about *Windsor* lay in its substantive conclusion, not in its supposed disrespect toward Congress, President Clinton, and the millions of Americans who backed the law.

In a couple of notable works, Professor Steve Smith has argued that *Windsor* threatened to poison and polarize the nation's politics.³⁹⁹ In a 2014 article, for example, Smith laid out his view that the *Windsor* court had in essence accused Congress and millions of Americans of acting from pure malevolence.⁴⁰⁰ This amounted, he charged, to attacking the character or motive of one's opponents, a move that he termed "profoundly insulting."⁴⁰¹

Professor William Araiza has responded at length to Smith's concerns.⁴⁰² Their exchange largely concerns whether animus doctrine requires that individual actors be found to have acted based on malice (subjective animus) or whether collective bodies (like Congress or a zoning commission) can be found to have acted based on malice despite their individual members' lack of such a motivation (objective animus).⁴⁰³ Araiza believes that the hurt feelings of government bodies or officials can be salvaged by "a mitigation strategy that assumes explicit conclusions of subjective bad intent should be minimized."⁴⁰⁴

I am puzzled by much of this exchange. I have no difficulty concluding that individual members of Congress voting for DOMA harbored animus against gay people or gay couples. At the very least, they acted based on their

398. See *Windsor*, 570 U.S. at 749–52.

399. See, e.g., Smith, *supra* note 10, at 675.

400. *Id.* at 677.

401. *Id.* at 678.

402. See William D. Araiza, *Objectively Correct*, 71 FLA. L. REV. F. 68 (2020).

403. See *id.* at 69; Smith, *supra* note 10, at 678 n.8.

404. Araiza, *supra* note 402, at 69.

constituents' animus. There is ample evidence of this in the congressional record.⁴⁰⁵ But I am equally convinced that Congress's institutional motivations for DOMA can be gleaned from objective factors. The animus doctrine itself requires an objective inquiry.⁴⁰⁶ People can act from bad motives—like hatred—and still be essentially good people. Maybe they suffer from a moral blind spot with respect to some group or some issues but are otherwise good folks. I see no reason why condemning their particular actions requires condemning them *in toto*.

Still, what is the upshot of this debate? Smith does not deny the general consensus that animus-based action is immoral.⁴⁰⁷ In fact, he recognizes that the rejection of hatred of others may be one of the few remaining areas of overlapping consensus in public policy and law.⁴⁰⁸ “More specifically,” Smith writes, “the proposition that *it is wrong to act from pure hatred or hostility* still commands virtually universal agreements: Utilitarians and deontologists, religious believers and secularists, can all embrace that proposition.”⁴⁰⁹

If it is true that such a broad moral consensus exists, it must also be true that some people occasionally do act on pure hatred or hostility toward others. If that empirical claim is conceded, the main area of disagreement will be only over whether a given person, body, or institution on a certain occasion has acted primarily based on hate-filled motivations against others. When that has happened, then such an action may be condemned morally. If animus doctrine is correct, then it may also be condemned constitutionally.

I take Smith's ultimate concern to be more practical than theoretical. Smith is worried that the very exercise of discerning animus will further polarize our politics and law, writing:

[Those accused of animus] will find their accusers' ascription of evil motives to be false, ignorant, and insulting. And thus, suspicion and resentment proliferate and the cultural gap grows wider. Sympathetic understanding shrivels, and the accusations of hatred become even more plausible (at least to the accusers) and more rhetorically necessary. The downward spiral proceeds.⁴¹⁰

Decisions like *Windsor* based on the animus doctrine threaten “to undermine inclusiveness, destroy mutual respect, and promote cultural

405. Carpenter, *supra* note 8, at 217–21. *Contra* Smith, *supra* note 10, at 698 (writing that there is “no cogent evidence to support the proposition” that Congress in DOMA acted on animus).

406. Carpenter, *supra* note 8, at 189–90.

407. *See* Smith, *supra* note 10, at 682.

408. *See id.* at 695.

409. Steven D. Smith, *Objective Animus?*, 71 FLA. L. REV. F. 51, 52 (2020) [hereinafter *Objective Animus*]; *see also* Smith, *supra* note 10, at 695 (“[T]he only form of non-question-begging argument that may clearly qualify as admissible in public discourse over controverted issues may be an argument that one's opponents are acting hatefully or at least in a way that disrespects the full humanity or equal worth of their political adversaries.”).

410. *Objective Animus*, *supra* note 409, at 52.

division.”⁴¹¹ While Smith acknowledges that the Court is not solely to blame for the explosion of the “culture wars,” it “has surely contributed to that unfortunate development.”⁴¹²

This sounds like a plausible thesis. The problem is that there is no evidence to support it. Smith cites no factual basis for the proposition that judicial decisions overruling democratic choices tend to inflame politics or culture, much less any evidence supporting the proposition that the particular doctrines upon which courts rely, or the specific words they use, have such a destructive effect.

I am dubious that the particular doctrines or words the Court employs have much effect on how people receive its decisions. At least there is no evidence of such a cultural effect stemming from the major animus decisions. In fact, in the specific context of same-sex marriage, the opposite has happened. Since *Windsor*, Americans’ support for same-sex marriage has risen steadily from about 50% to about 70%.⁴¹³ On the issue of gay marriage, the Supreme Court’s decisions have not had the predicted corrosive effect. It is possible that the Court’s animus rationale in *Windsor* left opponents of same-sex marriage embittered. But again, there is no evidence for that proposition: Support for same sex marriage has risen among all demographic groups, including among Republicans and people of faith.⁴¹⁴

We have not been treated to annual marches protesting the Supreme Court’s decision on the anniversary of *Obergefell* or *Windsor*. Opponents of same-sex marriage do not block marriage-license bureaus or shout at same-sex couples from bullhorns trying to dissuade them from their nuptials. This is not to say that all opponents of gay marriage have given up their moral or prudential grounds for opposing it but only to observe that the basis for the Court’s marriage decisions has had no discernible effect on the intensity of their opposition or on any residual debate over the issue.

2. *The Post-Obergefell Reaction*

Furthermore, it is evident that many conservative opponents of the Court’s pro-same-sex marriage decisions are indifferent to the basis for its decisions or the way in which the Court phrased the decisions. We know this because of their reaction to *Obergefell*. Rather than relying on animus doctrine to strike down state laws barring recognition of gay marriages, the Court relied on the fundamental right to marry and a somewhat opaque rationale under the Equal

411. Smith, *supra* note 10, at 700.

412. *Id.* at 701.

413. Justin McCarthy, *Two in Three Americans Support Same-Sex Marriage*, GALLUP (May 23, 2018), <https://news.gallup.com/poll/234866/two-three-americans-support-sex-marriage.aspx>.

414. *Attitudes on Same-Sex Marriage*, *supra* note 13.

Protection Clause.⁴¹⁵ Indeed, Justice Kennedy praised opponents of gay marriage for their good faith and rectitude:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.⁴¹⁶

This is a remarkable statement. A parallel note of grace and understanding would not have been uttered in *Loving v. Virginia*⁴¹⁷ for those opposed to interracial marriage. As Professor Carlos Ball has argued, the import of the *Obergefell* decision is not to impugn the *motives* of those opposed to same-sex marriage (whose beliefs are deemed “decent and honorable”) but rather to focus on the unconstitutional *impact* of excluding gay couples by law from the institution (it “demean[s] and stigmatize[s]” them).⁴¹⁸

Nevertheless, prominent legal conservatives have alleged that the Court accused gay-marriage opponents of rank bigotry. It made no difference to them how the Court actually explained its decision. Judicial conservatives were primed to be offended by any opinion backing same-sex marriage. I will give just two examples, though these could be multiplied many times over.

In an opinion reminiscent of Justice Alito’s dissent in *Windsor*, Chief Justice Roberts filed a dissent of his own in *Obergefell*.⁴¹⁹ Most of Chief Justice Roberts’s dissent chastises the majority for making policy in the guise of constitutional law.⁴²⁰ That much is familiar to any reader of a dissent where the Court has invalidated a legislative enactment. But Chief Justice Roberts added a remarkable paragraph toward the end:

Perhaps the most discouraging aspect of today’s decision is the extent to which the majority feels compelled to sully those on the other side of the debate. . . . By the majority’s account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States’ enduring definition of marriage—have acted to “lock . . . out,” “disparage,” “disrespect and subordinate,” and inflict “[d]ignitary wounds” upon their gay and lesbian neighbors. These apparent assaults on the character of fairminded people will have an effect, in society and in court. Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution

415. See *Obergefell v. Hodges*, 576 U.S. 644, 664–76 (2015).

416. *Id.* at 672.

417. *Loving v. Virginia*, 388 U.S. 1 (1967).

418. Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 650 (2016); *id.* at 649 (“Kennedy’s opinion 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.”).

419. See *Obergefell*, 576 U.S. at 686–713 (Roberts, C.J., dissenting).

420. See *id.*

protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted.⁴²¹

Here, Chief Justice Roberts confuses the effects of denying marriage (dignitary and material harm) with casting aspersions on the motives of those legislators and voters opposed to same-sex marriage.⁴²² Justice Kennedy's opinion did not assault the character of gay-marriage opponents or call them bigots. It did the opposite. Even when the Court conspicuously declines to write an opinion based on the animus doctrine, it is accused by many conservatives of writing an opinion based on that doctrine. Once again, there is just no nice way to tell people that their most cherished beliefs, as enforced by law, are unconstitutional.

Also notable is Chief Justice Roberts's warning that the Court's assault would have "an effect, in society and in court."⁴²³ What "effect" might that be? In his own *Obergefell* dissent, Justice Alito offered more detail:

By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.⁴²⁴

These forecasts of "bitterness," "harsh treatment," and "lasting wounds," have not proven true. As noted above, support for same-sex marriage has grown considerably among all demographic groups since *Windsor* and *Obergefell*.⁴²⁵ There are continuing conflicts at the margins in a few cases where business owners have declined to serve same-sex weddings.⁴²⁶ But these are being worked out over time and, though widely publicized, they are few. In contrast to the decades-long fight over abortion rights, most Americans have moved on from opposition to gay marriage.

But even acclaimed conservative legal scholars were in high dudgeon after *Obergefell*. To take one example, Adrian Vermeule depicted the decision as rooted in animus doctrine.⁴²⁷ Vermeule archly described Justice Kennedy's opinion as a "celebration of progressive judicial heroism, and its overcoming of

421. *Id.* at 712 (Roberts, C.J., dissenting) (alterations in original). In a similar vein, Justice Alito wrote sarcastically: "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." *Id.* at 741 (Alito, J., dissenting).

422. Ball, *supra* note 418, at 640.

423. *Obergefell*, 576 U.S. at 712 (Roberts, C.J., dissenting).

424. *Id.* at 742 (Alito, J., dissenting).

425. McCarthy, *supra* note 413.

426. See, e.g., 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

427. See ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 118–20 (2022).

the bigotry of the ages” which “requires the very aspersions” that Chief Justice Roberts complained about.⁴²⁸ Progressive legalism, he charged, attacks “the very foundations of our law, condemning them as rooted in ‘animus.’”⁴²⁹ Again, *Obergefell* rejected “a legal restriction that prevailed in Western law for millennia, stamping it as unreasoned prejudice and animus.”⁴³⁰ And yet again, *Obergefell* deemed opposite-sex-only marriage as “at worst a lamentable pattern of bigotry.”⁴³¹

Such charges reflect either misunderstanding or inattention. They mischaracterize the cause of same-sex marriage by demonstrating no knowledge of, or concern for, the well-being of gay couples and families. Many gay couples marry for the same reason heterosexuals do and allowing them to marry does not threaten heterosexual marriages. It is not animus not to have known those things in the past. Merely to observe that new learning and moral insights are possible is not to say anything necessarily insulting about the past or our ancestors. And as discussed above, merely at the level of reading a legal text, these conservative complaints fail to grasp that *Obergefell* simply did not cast gay-marriage opponents as bigots. It did the opposite.⁴³²

That is not to say there are no fair critiques of *Obergefell* or *Windsor*. Maybe those decisions rushed too quickly to do through constitutional law what should, perhaps could, and would have been done through democratic politics. Maybe the decisions misconceived the equal protection and due process bases they asserted. But it remains true that conservative legal authorities, both in and out of the academy, have been too quick to take personal offense at any decision favorable to same-sex marriage. Their charges of judicial hostility have had a copy-and-paste quality. It would not matter to them how the Court reasoned to the result.

B. *Progressive Perspectives on Animus Doctrine*

In general, critics of animus doctrine on the left expect too much of it. They want it to do the work of substantive constitutional law, and when it fails that test, they are deeply disappointed. But that is like expecting a bicycle to fly. Animus doctrine is a humble, minimalist approach with only a small role in constitutional law. We should not expect theories of process to do the work of substantive law. That must be left for a variety of substantive doctrines of constitutional protection. Animus doctrine, already in a parlous state, cannot bear such mission creep.

428. *Id.*

429. *Id.* at 119.

430. *Id.* at 120.

431. *Id.* at 131.

432. In fact, it may be that Justice Kennedy anticipated this particular conservative criticism and attempted to head it off. I am grateful to Jill Hasday for this insight.

1. Professor Araiza

The most sustained, systematic, and perceptive analysis of animus doctrine comes from the work of a progressive scholar, Professor William Araiza. Araiza literally wrote *the* book on the doctrine, *Animus: A Short Introduction to Bias in the Law*,⁴³³ published in 2017. Most of the book is a perceptive discussion of the origins of the animus doctrine, why animus-driven government policies offend equal protection principles, how courts can discern whether animus is present in given acts by government, and what should be done when animus is found.⁴³⁴ Much of the book goes beyond the scope of the present discussion.

But Araiza's discussion of *Obergefell*, which does concern a development of the past decade, is relevant and noteworthy.⁴³⁵ *Obergefell* held that the fundamental right to marry under the Due Process Clause applied to same-sex couples.⁴³⁶ No state could deny these couples marriage licenses. That right, in combination with the Equal Protection Clause, also meant married same-sex couples were entitled to the entire constellation of benefits, protections, and rights afforded to opposite-sex couples.⁴³⁷

Araiza recognizes that this was the holding of the decision. He does not claim that animus was the ground upon which the Court decided *Obergefell*. Justice Kennedy's opinion did not even use the word "animus," much less lay out the architecture of an animus holding. But Araiza argues that the animus doctrine influenced the Court's decision by helping it see the dignitary and practical harm caused by fencing gay families out of marriage:

This may not be exactly the same as animus. But when we recall that the foundation of the anti-animus idea is the principle that government has no business imposing burdens on persons simply in order to burden them, we can see how a law that "demeans" and "stigmatizes" comes close to one that we can legitimately describe in those same terms.⁴³⁸

Araiza explains that Justice Kennedy's concept of dignity is closely connected with the animus doctrine.⁴³⁹ "In this sense, animus is a subset of constitutional violations that deal with the deprivation of dignity, in the ways revealed by the cases we have considered [e.g., *Windsor*] and the analysis we have constructed," he notes, adding that "all persons enjoy dignity as a matter of constitutional right."⁴⁴⁰ While Justice Kennedy did not accuse legislators and

433. ARAIZA, *supra* note 7.

434. *See id.*

435. *See id.* at 163–72.

436. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

437. *Id.*

438. ARAIZA, *supra* note 7, at 167.

439. *Id.* at 172.

440. *Id.*

their constituents of bigotry or malice, he did assert that the effect of laws barring same-sex marriage were to “subordinate” a group of people.⁴⁴¹

So why did the *Obergefell* court not base its decision on animus, rather than on the fundamental right to marry, or perhaps base the decision on animus in addition to that fundamental right? Araiza has an answer for this. While in *Windsor* it was possible to impute bad intent to governmental decision makers, it was not so easy to do so in *Obergefell*; in the latter case, many varied state laws were at issue.⁴⁴² A second distinction between the two cases was the fact that in *Windsor*, Congress had departed from the norm of deferring to the states’ definitions of marriage, whereas in *Obergefell* it was the states’ own definitions of marriage that were being challenged.⁴⁴³

Araiza comes close in these passages to suggesting that animus doctrine has a substantive constitutional meaning analogous to fundamental rights, equal protection, or freedom of speech. To the extent he is making that strong claim about the animus doctrine, I doubt he is right. Rather, the focus of animus doctrine is on the reasons why the government acts, not on the substantive rights people enjoy. It does not ensure an affirmative constitutional right to dignity. As I have argued, the doctrine is about monitoring the democratic process, cleansing it of spite, and helping assure that the state is acting based on public-regarding reasons. It is not about guaranteeing substantive outcomes.

It is also not another form of suspect-class analysis. That is not to say, of course, that the doctrine is unconcerned with historical patterns of discrimination against a group of people. Such patterns may suggest that the government is more apt to act based on animus against some groups than others. But historical patterns of discrimination are not a requirement for a finding of animus.

The great insight of Araiza’s argument is to note that subordination and indignity are signposts of animus. State action to subordinate people or to deny them dignity is government action based on animus against them as individuals who are due respect from their government.

In other work during the past decade, Araiza has thoughtfully analyzed the important Supreme Court cases involving the Trump Administration’s policies on the Muslim ban⁴⁴⁴ and DACA.⁴⁴⁵ In discussing the Muslim travel-ban case, Araiza argues that those “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.”⁴⁴⁶ Despite the rejection of an animus claim in the DACA litigation, Araiza finds comfort in the fact that

441. *Id.* at 168.

442. *See id.* at 170.

443. *See id.*

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

445. *See* *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

446. *Animus and Its Discontents*, *supra* note 6, at 170.

the Court “chose even to address the animus issue”—a signal to Araiza that the doctrine lives on.⁴⁴⁷ It survived the retirement of Justice Kennedy, the author of three notable animus opinions. It has been rescued from “the constitutional law discard pile.”⁴⁴⁸

For the reasons I discussed above,⁴⁴⁹ Araiza is more optimistic than I about the future of animus doctrine. Where he sees a “flowering,”⁴⁵⁰ I see at least a bit of wilting.

2. “Inverted” Animus

Some scholars have resented the use of animus claims by litigants opposed to what are regarded as progressive causes, most notably LGBT rights. These scholars view the animus doctrine as the legitimate tool only of groups that have been historically subordinated and marginalized. The most-oft cited complaint from these scholars concerns the Court’s decision in *Masterpiece Cakeshop*,⁴⁵¹ but it includes other examples from the religious-freedom cases involving clashes between gay couples and wedding vendors. One scholar has referred to such cases as “[u]sing [r]everse [a]nimus” to defeat LGBT equality.⁴⁵² Another, aiming especially at *Masterpiece Cakeshop*, has called the phenomenon “inverting animus.”⁴⁵³

These scholars consider it “ironic” that animus principles are used by someone like Jack Phillips, “a straight white male Protestant,” who is part of “a class of persons who, ordinarily, are not assumed to be among the ‘discrete and insular minorities’ in need of anti-discrimination protections.”⁴⁵⁴ Such uses of animus doctrine are compared to claims of “reverse racism” as part of the backlash to affirmative action in the 1970s and 1980s.⁴⁵⁵ The rise of “men’s rights groups” is taken to be another exemplar of this development.⁴⁵⁶ To such scholars, it is troubling that in *Masterpiece Cakeshop*, the animus doctrine was “not used to protect the interests of LGBTQ persons, but rather to protect the interests of an evangelical Christian who sought an exemption from the ambit of laws prohibiting sexual orientation discrimination.”⁴⁵⁷

447. *Resurrecting Animus*, *supra* note 6, at 986.

448. *Id.* at 1007.

449. See *supra* text accompanying notes 405–418.

450. *Animus and Its Discontents*, *supra* note 6, at 215.

451. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018).

452. See Stacey L. Sobel, *The Backlash Boomerang: Using Reverse Animus and Hostility To Limit LGBTQ Equality*, 22 J. CONST. L. 1155, 1155, 1183–90 (2020) (discussing several instances of private litigation on refusing to serve same-sex couples or weddings).

453. Murray, *supra* note 6.

454. *Id.* at 259 (footnote omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

455. *Id.*

456. *Id.*

457. *Id.* at 267.

Straight white Protestant men, in this view, are people with “significant social, political, and economic capital and unsurpassed privileges, opportunities, and access.”⁴⁵⁸ In the traditional antidiscrimination narrative, such people are the “oppressors” against whom others (including LGBT people) must be protected.⁴⁵⁹ The problem with the turn the Court has taken, according to this view, is that animus doctrine would now become the equivalent of a “color-blind” version of antidiscrimination law rather than an “antisubordination” version of such law. As deployed in *Masterpiece Cakeshop*, the animus doctrine is “no longer a shield used to protect LGBTQ persons.”⁴⁶⁰ It has been “inverted” to protect the “oppressor.”⁴⁶¹ It reflects “the weaponization of antidiscrimination law against those who were once the objects of its protections.”⁴⁶²

There are several things to say about this line of thought. One point is that it is true that *Masterpiece Cakeshop* relied on thin evidence of animus by the Colorado Civil Rights Commission against Jack Phillips.⁴⁶³ In comparison to the evidence of animus against Muslims by President Trump in the travel ban case, or of the evidence of animus in the DACA cases, the evidence in *Masterpiece Cakeshop* was minuscule.

But the concept of “inverted” or “reverse” animus makes a factual mistake combined with an underlying doctrinal and theoretical error. The factual mistake is that it is quite possible even for a straight white Protestant man to be the object of government malice in some circumstances. The Supreme Court thought the case of Jack Phillips was one that presented those circumstances. This observation about animus against people in generally dominant groups can be true even if it is also true that straight white Protestant men, generally speaking, are not oppressed. In some places, at some times, and subject to the jurisdiction of some kinds of governmental actors, these “oppressors” may themselves be subjected to hate by state actors. The doctrine looks to the particulars of the circumstances of the person or group, not to the general societal standing of the person or group. There is ample room for argument, of course, over whether Jack Phillips was actually such a victim of state-sanctioned malice. But animus doctrine makes room for this factual case to be made.

The larger doctrinal and theoretical mistake here is that the animus doctrine is misconceived. The animus doctrine is not simply a species of antidiscrimination law, so its application to people like Jack Phillips is not an “inversion” of antidiscrimination law. As noted above, the focus of animus doctrine is not on substance, but on the process by which the state made its

458. *Id.* at 281.

459. *Id.* 281–82.

460. *Id.* at 285.

461. *See id.*

462. *Id.* at 296.

463. *See id.* at 274.

decision and what factors influenced it. In contrast to much of equal protection law, the focus is not on protecting groups that have historically been subjected to discrimination. The focus is on the reasons the government gives for subjecting a person or a group to harmful treatment. If there are no public-regarding justifications for such treatment, but the treatment is rather simply the expression of ill will, then the government has acted improperly, regardless of whether the person is generally a member of a class of oppressors or of the oppressed.

It is true that historically marginalized groups will be more often the subject of animus-driven decision making. But there is no reason to limit the doctrine to such groups who are afforded some security in other aspects of equal protection jurisprudence. If animus doctrine was limited to the protection of marginalized groups, it would have little real independent constitutional force. It would simply be an adjunct of the tiers of scrutiny. Animus doctrine thus picks up some aspects of viewpoint neutrality in First Amendment law. It is agnostic about which groups are benefited or harmed. It can be invoked (often unsuccessfully) by snowboarders or Walmart or even by Christians (69% of the country⁴⁶⁴). In one Sixth Circuit case, *Stemler v. City of Florence*, a woman claimed she was subjected to animus when she was arrested for a DUI because she was a lesbian, but the court noted that malice-driven decisions by authorities would be impermissible even if they were based on her car's bumper sticker or her hair color.⁴⁶⁵

3. *Animus and Rational-Basis Review*

Another critic on the left has observed that the emergence of animus doctrine in both the case law and in efforts by scholars to systematize the doctrine “ought to be deeply concerning to progressives.”⁴⁶⁶ Professor Katie Eyer has argued that rational-basis review under the Equal Protection Clause has been far more favorable to progressive social movements seeking to disrupt the status quo than most constitutional analysts allow.⁴⁶⁷ She notes that outside of strict scrutiny “only four groups have succeeded in achieving sustained meaningful scrutiny under the Equal Protection Clause: women, nonmarital children, noncitizens, and gays and lesbians.”⁴⁶⁸ Three of these have done so through rational-basis review.⁴⁶⁹ Two of them, women and nonmarital children,

464. Jeffrey M. Jones, *How Religious Are Americans?*, GALLUP (Dec. 23, 2021), <https://news.gallup.com/poll/358364/religious-americans.aspx>.

465. *Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1997).

466. Eyer, *supra* note 6, at 216; see also Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018) [hereinafter *The Canon of Rational Basis Review*].

467. *The Canon of Rational Basis Review*, *supra* note 466, at 1319–20.

468. *Id.* at 1332.

469. *Id.* at 1332–33.

eventually “moved on to formal heightened scrutiny.”⁴⁷⁰ This work on rational-basis review is historically and theoretically rich. Analysis of, and extended response to, it is beyond the scope of this Article.

Nevertheless, what does any of this have to do with animus doctrine? Eyer claims that animus scholars are attempting to systematize an extraordinarily ill-defined body of case law and that such an effort creates risks.⁴⁷¹ She worries that it “could severely curtail progressive social movements’ ability to rely on rational basis review as a mechanism of constitutional change.”⁴⁷² In this view, clarity is an enemy; progressive movements have been able to capitalize on the ambiguity of rational-basis review. Animus doctrine might swallow up the successful rational-basis cases by making a finding of animus a prerequisite for invalidation. In this view, animus will become the “new gatekeeper” that “will largely remain closed.”⁴⁷³ She notes that *Trump v. Hawaii*,⁴⁷⁴ where a claim of animus failed, even suggested that animus was the *exclusive* route to success for plaintiffs in rational-basis cases.⁴⁷⁵

There is much to say about this thesis. Professor Araiza has responded at some length to it, and I will have only a few things to add.⁴⁷⁶ As Araiza notes, the fact is that animus is a distinct legal concept in the Supreme Court’s jurisprudence and is therefore in need of explanation and understanding.⁴⁷⁷ Only that effort can help it have the generative force that progressive scholars hope for. Otherwise, the doctrine could be completely ignored by activists, lawyers, scholars, and courts.

And the fact is that animus doctrine has had a decisive role in several important decisions. Most notably, the doctrine has helped the Supreme Court articulate why and how gay men and lesbians are so often subject to hostile class legislation. That is the route by which the Court has reached landmark results for lesbian and gay rights—including results that saved antidiscrimination laws themselves (*Romer*⁴⁷⁸) and rescued federal marriage rights (*Windsor*⁴⁷⁹). The other two major victories (*Lawrence*⁴⁸⁰ and *Obergefell*⁴⁸¹) involved fundamental rights protected by the Due Process Clause, not standard rational-basis review. Of course, it is true that “animus doctrine is *one strand of, or one path toward,* a better

470. *Id.* at 1333.

471. Eyer, *supra* note 6, at 216.

472. *Id.* at 226.

473. *Id.* at 229.

474. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

475. Eyer, *supra* note 6, at 232.

476. *Animus, Its Critics, and Its Potential*, *supra* note 6, at 284–91; *see also Animus and Its Discontents*, *supra* note 6, at 192–97.

477. *Animus, Its Critics, and Its Potential*, *supra* note 6, at 286–87.

478. *See Romer v. Evans*, 517 U.S. 620 (1996).

479. *See United States v. Windsor*, 570 U.S. 744 (2013).

480. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

481. *See Obergefell v. Hodges*, 576 U.S. 644 (2015).

understanding of what equal protection is all about.”⁴⁸² But at least in terms of rational-basis review, animus doctrine has been the only winner for gay-rights causes in the Supreme Court. Far from crowding out or closing the door on rational-basis victories, animus doctrine has helped open the gates.

No animus scholar has argued that a finding of animus is necessary to a successful rational-basis claim. Indeed, scholars of animus have argued that the concept “should be understood as supplementing heightened scrutiny,” and should also serve “to supplement conventional rational basis review.”⁴⁸³ There are in fact many doctrinal paths to equality.

Professor Eyer’s work,⁴⁸⁴ like that of other progressive scholars, treats animus doctrine as an adjunct of progressive social policy concerns. But the concept was not born out of a general desire to “disrupt[] . . . the status quo” on behalf of progressive causes.⁴⁸⁵ Rather it was born of the oldest and most stabilizing principle of a liberal democracy: that people must be treated by government as if they are worthy of respect and care, regardless of who they are, what they have done, or what others think about them. The doctrine responds to concerns present at the founding of the Republic about factions and also responds to concerns during Reconstruction about class legislation. It is not a left-wing principle. It is perhaps the most deeply conservative axiom of a liberal democracy in the sense that it conserves a principle fundamental to our form of government.

CONCLUSION

Hatred is as old as our civilization. So is the moral principle that one should not hate others and should not act on such hatred. Concerns that an angry or fearful majority might nevertheless treat people maliciously were present both at the beginning of our constitutional Republic and in its most divided epoch. The very structure of our government—dividing and separating powers—and our most hallowed egalitarian principle—Equal Protection of the Laws—were seen as safeguards against decisions driven by a “bare . . . desire to harm.” Such decisions are blasphemy in our legal heritage.

Half a century ago,⁴⁸⁶ the Supreme Court put a name to that blasphemy—“animus”—for the first time. Animus doctrine as an independent constitutional force gathered strength and coherence over the next forty years. In a series of decisions, the Court struck down harmful acts driven by spiteful decision-making processes. These rulings protected people from harmful hatred where other constitutional doctrines were inapplicable or exhausted.

482. *Animus, Its Critics, and Its Potential*, *supra* note 6, at 287.

483. *Id.* at 289.

484. Eyer, *supra* note 6; *The Canon of Rational Basis Review*, *supra* note 466.

485. *The Canon of Rational Basis Review*, *supra* note 466, at 1320.

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

But in the past decade, animus doctrine itself has seemed exhausted. The Supreme Court and lower federal courts refused to find animus in government actions that seemed inexplicable by anything but. Compounding the problem was the failure of most of these courts to advance the analysis much beyond weighing the probative value of various statements by decision makers. Scholars across the spectrum of political and constitutional thought have treated the doctrine merely as an extension of their own ideological commitments. The doctrine has reached a methodological and substantive dead end.

Nevertheless, there is surely a future for animus doctrine. It springs from an enduring moral principle that can be applied to new circumstances. Judges may occasionally lose sight of it and scholars may only see it when they want to, but it will be there for as long as we have law.