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

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

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1 Department of Agriculture v. Moreno, [cite].


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


5 It should be noted that the conjoining of the Court’s *de facto* rejection of suspect class analysis and embrace of the animus concept was not something the justices intended. See William D. Araiza, “Was *Cleburne* an Accident,” 19 U. Pa. J. Const’l Law 621 (2017) (explaining, based on a study of the justices’ publicly-available records, that the *Cleburne* Court’s animus analysis was an afterthought that was not consciously understood as the logical follow-up to its rejection of suspect class status for the intellectually disabled plaintiffs in that case).
lesbian advocates at the Court, most notably *Romer v. Evans* and *United States v. Windsor*. It also provided the foundation of Justice O’Connor’s equal protection-based concurrence in *Lawrence v. Texas*, and arguably percolated under the surface of Justice Kennedy’s 2015 majority opinion in *Obergefell v. Hodges*. The Court’s embrace of this idea has been noticed by lower courts, which over the last decade and a half have shown themselves more and more willing to decide cases on this ground. Most recently, animus has played an important role in several of the lower court opinions invalidating the executive orders issued by President Trump to limit immigration from majority-Muslim nations. The fact that these latter opinions spoke of animus against religions, and thus cast their opinions doctrinally as grounded on one or both of the First Amendment’s religion clauses, rather than the Equal Protection Clause, suggests the flexibility and portability of the concept—characteristics that presumably will make it all the more useful as the nation confronts the prospect of renewed xenophobia and deep cultural conflict on matters including but extending beyond religion.

And yet, prominent scholars raise troubling questions about either the wisdom, coherence, and/or staying power of the animus concept. Steven Smith and others have criticized the idea for its potential to inflame political and cultural disagreement, given the allegedly-disparaging connotation of “animus.” Indeed, Professor Smith has gone so far as to label such a doctrinal approach “the jurisprudence of denigration.” Other scholars have made similar arguments to courts. Indeed, in an amicus brief in pre-*Obergefell* same-sex marriage case, a

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6 [cite]  
7 [cite]  
8 [cite]. Indeed, such percolation should not be surprising, given that Justice Kennedy wrote the majority opinions in *Romer* and *Windsor*. [what about Lawrence?]  
9 [cites]  
11 [cite]
group of prominent legal scholars took the unusual position of urging the Court to grant cert. in one of the marriage cases, but not taking a position on the proper outcome. Instead, they urged the Court simply to reject the idea that laws prohibiting same-sex marriage were enacted out of animus. 12 Echoing Professor Smith, these scholars warned that finding that those laws were motivated by animus would “unnecessarily vilify” with those who oppose same-sex marriage, and thereby “chill public debate.” 13 They also argued that voters in those states who enacted initiatives banning same-sex marriage “without doubt acted from a number of motivations, many entirely unrelated to animus.” 14

Other scholars critique animus from other perspectives. Most notably, Katie Eyer has written that the animus concept as “descriptively incomplete and substantively problematic, as part of her call for most robust rational basis review across the board, rather than focused on particular cases where a court suspects animus. Writing primarily but not exclusively from a pedagogical standpoint, she urges that those cases not be excised, as sui generis “animus cases,” from what she calls “the rational basis canon.”

Even scholars more sympathetic to the animus project sometimes lay bare problems and challenges posed by the doctrine. Most notably, Susannah Pollvogt and Carpenter have defended the usefulness of the animus idea and laid out approaches for a judicially-workable animus doctrine. 15 Their approaches, however, leave unanswered important questions about how

12 See, e.g., Brief of Stephen Calabresi, et al in Herbert v. Kitchen, No. 14-124, 2014 WL 4380924 (urging the Court to grant review in a same-sex marriage case, but, without arguing for a particular result simply arguing that the Court should reject an animus justification for striking down state same-sex marriage bans).
13 Id. at [xxx].
14 Id. at [xxx].
15 See Carpenter, supra. note 3; Susannah Pollvogt, “Unconstitutional Animus,” [cite].
courts should identify animus and what the consequences should be of a decision that animus at least partially inflected a government action.

Separately, Carlos Ball has attempted to distinguish between different types of anti-gay discrimination for purposes of identifying animus.\(^\text{16}\) He endorses the Court’s conclusion in *Windsor* that the Defense of Marriage Act was motivated by animus. But he also defends Justice Kennedy’s opinion in *Obergefell* against the charge, leveled by Chief Justice Roberts’s dissent, that same-sex marriage opponents were unfairly characterized as bigots. Professor Ball’s careful distinction between Kennedy’s analysis in these two cases, and his description of *Obergefell* as based in something other than a dismissal of same-sex opponents as bigots, requires a nuanced understanding of how different types of discrimination relate differently to animus. In particular, it requires an understanding of how animus relates both to the concept of bigotry and to the dignitary harms Justice Kennedy sought to protect against by rejecting the constitutionality of same-sex marriage bans in *Obergefell*.

The critiques noted above are serious, and the holes and ambiguities they identify in animus doctrine are real. If animus doctrine is to have a future—in equal protection in particular but also in constitutional law more generally—it will have to develop responses, or, perhaps more accurately, it will need to be adapted to blunt the strongest versions of these critiques. This article considers these objections—and, in the case of sympathetic scholars, their insights—as part of a larger project of constructing a theory and doctrine of animus that can lay legitimate claim to a place in the Court’s constitutional law jurisprudence.

\(^\text{16}\) Carlos Ball, “Bigotry and Same-Sex Marriage,” 84 *UMKC L. Rev.* 639 (2016).
Part I of this Article lays the necessary groundwork by briefly recounting the history of equal protection animus at the Supreme Court. This Part also summarizes an argument I have made elsewhere that the Court’s statements about equal protection animus should be understood in the context of the Court’s more general approach to equal protection, and, in particular, its construction of a discriminatory intent jurisprudence. The goal of Part I is to present the current state of play of equal protection animus, before the rest of the article presents and considers the objections to and glosses on the idea that scholars have proffered.

Part II presents those objections. As noted above, the main critiques of animus fall into two categories. First, some critics object to animus based on concerns about the effects on legal and political discourse of courts accusing some participants in democratic debate of acting in response to something as distasteful as “animus.”17 Some of those same critics also launch a more practical objection, arguing that it is simply impossible to confidently determine whether a given law was enacted out of animus.18 Second, critics such as Katie Eyer worry that focusing on animus, or identifying animus as the ratio decendi for the cases Part I identifies, throws equal protection doctrine onto the wrong track, by mis-describing those cases and by implicitly submerging the usefulness of standard rational basis review as a tool for emerging social groups to gain legal validation of their equality claims.

Part II then turns to those scholars who have embraced the animus idea, either normatively and/or as an accurate description for what the Court has in fact done. It focuses on Susannah Pollvogt and Dale Carpenter, scholars who have written thoughtfully about equal protection animus, and on Carlos Ball, who has carefully distinguished animus from other

18 See, e.g., Calabresi et al., supra. note [xxx].
phenomena that might similarly support decisions rejecting particular instances of discrimination. This Part sketches out their theories of animus—what it is, how one finds it, and the significance of a court determination that it exists in a given situation.

The presentation in Part II provides the foundation for Part III’s answer to the critics and adoption of much, but not all, of Pollvogt’s and Carpenter’s tools for constructing a viable theory of animus. Part III presents a reconstructed picture of animus doctrine, one that accounts for the issues raised by scholars and discussed in Part II.

Part IV concludes the article by contextualizing the animus principle in the broader sweep of American constitutional law. In particular, it highlights the similarity between that principle and nineteenth-century principle prohibiting class legislation. To be sure, these two principles arose in very different historical circumstances. But they aimed at a similar constitutional wrong: the imposition of burdens on groups—often disliked groups—motivated by nothing more than that dislike, rather than a legitimate public purpose. Understanding the animus principle as the modern descendant of the class legislation prohibition helps legitimize the Court’s emerging animus doctrine as an important part of the Court’s overall Fourteenth Amendment jurisprudence.

I.

Animus Triumphant

As the Introduction stated, animus—and equal protection animus in particular—has become a central concept in American constitutional jurisprudence. In the equal protection context, animus has stopped into the void left by the Supreme Court’s abandonment of suspect
class analysis, and has furnished an alternative approach to analyzing at least some important
equal protection issues.

A. The Rise of Animus

At the modern Court, animus can trace its foundations back to the 1973 case of
Department of Agriculture v. Moreno.\(^{19}\) In that case, Justice Brennan, writing for the Court,
famously stated that “a bare congressional desire to harm a politically powerless group can never
count as a legitimate [government] interest.”\(^{20}\) Of all of what were to become the canonical
animus cases, Moreno was in many ways the easiest, given the explicit (if sparse) legislative
history reflecting a straightforward desire among at least some congresspersons to harm a
disliked group (“hippies” and their “communes”).\(^{21}\)

Moreno’s seeds eventually bore fruit. A dozen years later,\(^{22}\) in City of Cleburne v.
Cleburne Living Center,\(^{23}\) the Court held that a city’s decision to prohibit the establishment of a
group home for intellectually disabled persons in a residential neighborhood violated the Equal
Protection Clause, because it was based on “irrational prejudice.” The Court’s sequencing of its
analysis—that is, its preliminary decision denying suspect class status to the intellectually
disabled and its subsequent conclusion that the city’s decision was tainted by “prejudice”—has
led to speculation that its suspect class analysis somehow set up or provided the foundation for

\(^{19}\) 413 U.S. 528 (1973).
\(^{20}\) 413 U.S. at [xxx]
\(^{21}\) See 413 U.S. at [xxx]
\(^{22}\) To be sure, cases before that date repeated Moreno’s warning about the lack of constitutional justification
provided by “a bare . . . desire to harm a politically powerless minority.” But in those cases the Court found the
Beazer, 440 U.S. 560, 593 n. 40 (1979); but see id. at 597, 609 n. 15 (White, J., joined by Marshall, J., dissenting).
Recent scholarship calls that causative relationship into serious question. Nevertheless, even if the connection was unintended, those two aspects of the decision have combined to mark both the end of the Court’s decade-and-a-half long experimentation with political process-based suspect class analysis and the rise of a new approach to equal protection, which features a more granular approach to equal protection issues and a willingness to discredit at least some decisions as being tainted with unconstitutional animus.

A decade after Cleburne, the Court in Romer v. Evans employed this new approach to strike down, for the first time in the Court’s history, an instance of sexual orientation discrimination as violating equal protection. Romer concerned Colorado’s Amendment 2, a voter-enacted initiative that sought to prohibit any claim of protected status that might be made because of a person’s sexual orientation. The Court struck down Amendment 2. Taking the next logical step after Cleburne, the Court concluded that, because it could not find any rational relationship between a legitimate government interest and the broad legal disabilities Amendment 2 imposed, animus remained as the only possible explanation for Amendment 2.

This step—infering animus rather than, as in Moreno, finding direct evidence of it or, as in Cleburne, finding it as legislators’ endorsement of their constituents’ dislike of the group—

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24 See, e.g., Phan v. Virginia, 806 F.2d 516, 521 n.6 (4th Cir. 1986) (characterizing Justice Marshall's dissent in Cleburne as, in turn, describing the majority's "second order rational basis" analysis as "occur[ring] in cases in which the law in question approaches, but falls short, of the ... suspect classifications usually triggering strict scrutiny").
26 [cite]
27 [quote Amendment 2 and clarify any ambiguity in the description in the text]
28 520 U.S. at [xxx].
29 See Cleburne, 473 U.S. at 448 (noting the trial court’s finding that the City Council rested its decision in part on constituents’ negative reactions to the would-be residents of the group home).
may have been necessary to the Romer Court, given that otherwise it would face the unpleasant
task of explicitly tarring the citizenry of Colorado with bad motivations.30

The next step in the progression of animus was expounded only by a single justice,
Justice O’Connor, in her concurring opinion in Lawrence v. Texas.31 In Lawrence, a five-justice
majority voted to strike down Texas’s sodomy law as violating the due process rights of gays and
lesbians to engage in intimate conduct, and in the process to overrule the Court’s contrary
decision in Bowers v. Hardwick. Justice O’Connor, who had voted with the majority in
Hardwick, relied instead on the Equal Protection Clause as authority for striking down the Texas
law.32 Her opinion surveyed the cases this Part has discussed up to now, and concluded that they
stood for the proposition that “When a law exhibits such a desire to harm a politically unpopular
group, we have applied a more searching form of rational basis review to strike down such laws
under the Equal Protection Clause.”33 Her synthesis of the Moreno-Cleburne-Romer trilogy
confirmed, first, that those cases were indeed connected, and, second, that their common
characteristic—“law[s] exhibit[ing] . . . a bare desire to harm a politically unpopular group—
triggered “a more searching form of rational basis review.”34

The next case, and the final one to explicitly reference animus, was United States v.
Windsor,35 decided a decade to the day after Lawrence. In Windsor a five-justice majority held

30 This concern might have been particularly salient in 1996, when an earlier round of the gay rights culture wars
was in full bloom, and when attitudes about homosexuality, while evolving, could not be fairly described as
presumptively welcoming.
32 539 U.S. at 579 (O’Connor, J., concurring in the judgment). Three justices dissented. See id. at 586 (Scalia, J.,
joined by Rehnquist, C.J. and Thomas, J.).
33 Id. at 580 (O’Connor, J., concurring in the judgment). She also observed that strike-downs under that standard
were “most likely . . . where . . . the challenged legislation inhibits personal relationships.”). Ibid.
34 Id. at [xxx] (O’Connor, J., concurring in the judgment). To be sure, the 5-justice majority also used language that
suggested the same concern about the use of law to demean or harm. [cite “demean” language from majority
opinion]
35 133 S.Ct. 2675 (2013).
that Section 3 of the federal Defense of Marriage Act (DOMA) violated the equal protection component of the Fifth Amendment’s Due Process Clause. Section 3 defined marriage for federal law purposes to consist only of a man and a woman, with the result that persons in same-sex marriages recognized by their home states\(^\text{36}\) would not enjoy marital status for purposes of federal rights and responsibilities. Writing for five justices, Justice Kennedy began by expressing concern that Section 3 contravened the normal deference the federal government showed to state-law definitions of marriage. He acknowledged instances where the federal government had in fact rejected such state-law definitions, but he noted that Section 3’s omnibus approach, under which “over 1,000 statutes and numerous federal regulations that DOMA controls,” “depart[ed]” from the “history and tradition of reliance on state law to define marriage.”\(^\text{37}\) As such, it constituted a “discrimination[] of an unusual character” that merited “special consideration” to determine its constitutionality.\(^\text{38}\)

Justice Kennedy concluded that Section 3 did in fact violate the Constitution. Citing the legislative history and even DOMA’s title, he concluded that the law “seeks to injure the very class New York [the same-sex marriage-recognizing state in question] seeks to protect” by granting same-sex couples the right to marry. After citing Moreno’s now-famous language about “a bare congressional desire to harm a politically unpopular group,” he concluded that Section 3’s refusal of federal marital status to same-sex couples validly married under their state’s law “is strong evidence of a law having the purpose and effect of disapproval of that class.” With regard to purpose, he cited congressional debates, the statute’s title, and even Congress’s brief as an intervenor to conclude that “interference with the equal dignity of same-sex couples” was the

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\(^{36}\) When Windsor was being written, eleven states and the District of Columbia recognized same-sex marriage. See Windsor, 133 S.Ct. at 2689.

\(^{37}\) 133 S.Ct. 2692.

\(^{38}\) Ibid.
statute’s “essence.” With regard to DOMA’s effect, he stated that the law “demeans” same-sex couples and “humiliates” their children. Only in the last paragraph of his opinion did he conclude that the law lacked a legitimate government interest.\footnote{cite} ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

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

B. Animus in the Travel Ban Litigation

[To be filled in]

II.

Animus Attacked and Defended

\footnote{cite} 135 S.Ct. at 2602.
The success of the animus argument in the gay rights cases since *Romer*, and its potential for broader applicability, both in equal protection law and beyond, has, unsurprisingly, placed animus at the center of an intense scholarly debate. Critics have attacked the animus concept from [several] different perspectives. For their part, scholars who either accept or approve of the animus principle have attempted to flesh out the undertheorized components of what they offer as a more detailed judicial doctrine. This Part of the article lays out these scholars’ arguments, and points out their points of commonality and contention.

A. Animus as “Denigration”

A foundational critique of the animus idea maintains that it reflects accusations of ill-will and subjective prejudice. Stated most colorfully by Professor Smith as “the jurisprudence of denigration,” such accusations are understood as flowing from the extreme lack of social consensus on fundamental questions of liberty and equality. Professor Smith argues that such accusations reflect the only potential point of social consensus left—namely, that acting out of “prejudice” or “animus” is unquestionably wrong. Indeed, he suggests that a jurisprudence founded on a search for such bad motives nicely reflects courts’ limited competence, and, in particular, their inability to employ other types of reasoning methods, such as straightforward moral reasoning. Of course, he notes, the problem is that labelling conduct as such does

42 Smith, “Denigration,” *supra*. note [xxx].
43 See Smith, “Denigration,” *supra*. note [xxx] at [xxx]. See also Steven Smith, “Against Civil Rights Simplism: How Not to Accommodate Competing Legal Commitments” (hereafter “Simplism”), [cite], at 3-4; *Romer*, 517 U.S. at 636, 644 (Scalia, J., dissenting) (“Of course it is our moral heritage that one should not hate any human being or class of human beings.”).
nothing to establish that, as a matter of such consensus, the conduct is in fact considered to be wrong.\textsuperscript{45}

The results of such a jurisprudence are, to Smith and others of like mind, predictably bad. Given that the subjects of animus doctrine often reflect deep-seated cultural concerns—e.g., sexuality and gender identity—but also situations, such as that in \textit{Cleburne}, where constituents feel a deep-seated unease with the group they are trying to segregate, it is easy for one side of the battle to lob accusations that the other side is acting out of “prejudice,”\textsuperscript{46} “animus,” or “a bare . . . desire to harm.”\textsuperscript{47} But those accusations, combined with the nature of the underlying issues, simply poison the dialogue and compromising that Professor Smith sees as necessary exactly because of the deep-seated and incompatible views held by both sides.

Professor Smith is not alone in his bleak assessment of the consequences of an animus conclusion. For example, in 2014 an ideologically-diverse group of legal scholars took the unusual step of submitting, in a pre-\textit{Obergefell} same-sex marriage case, an \textit{amicus} brief urging the Court to grant \textit{cert.} but urging only that the Court “correct” lower courts’ alleged over-emphasis on the animus aspect of its decision in \textit{Windsor}.\textsuperscript{48} These scholars’ negative focus—that is, their desire simply to have the Court retreat from the animus aspect of \textit{Windsor} (or

\textsuperscript{45} See Smith, “Denigration,” \textit{supra.} note [xxx] at 695 (“However sound and sensible [reliance on the animus idea] may be, its effect on public discourse can be unfortunate, and counterproductive. If the one non-question-begging normative proposition that virtually everyone agrees on is that it is wrong to act from hatred or ill-will, then it follows that when debates over public issues occur, a potentially effective form of rhetoric will be to argue that your opponents are acting from . . . hatred or ill-will. That is the one kind of argument that, if persuasive, will speak to everyone. By contrast, appeals to utility, to universalizability, or to religiously informed conceptions of virtue and goodness, even if persuasive on their own terms, will fail to engage the views and premises of large sections of the public audience. But practically everyone will agree that if a position or party is motivated by hatred or ill-will towards others, then that position or party is ipso facto in the wrong.”).

\textsuperscript{46} \textit{Cleburne}, 473 U.S. at 450 (“The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice”).

\textsuperscript{47} \textit{Moreno}, 413 U.S. at 534.

\textsuperscript{48} See Calabresi, et al., \textit{supra.} note [xxx].
perhaps to “correct” lower courts’ alleged over-emphasis on it)—appears to have flowed from their concerns about the implications of a conclusion that the same-sex marriage bans then at issue were grounded in animus. According to them, such a conclusion “impugned the motives”\textsuperscript{49} of the voters who enacted the anti-same-sex marriage initiatives.

Such “impugning,” these scholars argued, would have negative social effects. They argued that it would widen social strife on a deeply-contested cultural issue, which in turn would make it more difficult for the anti-same-sex marriage side to accommodate itself to an adverse result.\textsuperscript{50} In turn, they implied that the bitterness of such a defeat—and, conversely, the unambiguous moral high ground that would be held by the marriage rights forces—would make it difficult to forge a post-marriage war compromise between public marriage rights and private conscience rights.\textsuperscript{51}

One can also identify in these arguments a deeper critique. Made most explicitly by Professor Smith,\textsuperscript{52} this critique suggests that the animus idea reflects a type of “Manichean”\textsuperscript{53} thinking that divides the world into saints (who reject views labelled as animus-driven) and sinners (who embrace such views). The critique maintains that such binary thinking not only renders impossible compromise and post-war peace on the particular issue in question, but also undermines the foundations of democratic deliberation more generally, by failing to recognize that fellow citizens have worldviews and motivations that merit respect, even if that respect takes

\textsuperscript{49} Id. at [xxx].
\textsuperscript{50} [cite]; see also Smith, “Simplism,” supra. note [xxx], at 8 (“The targets of such accusations—namely, those who are denigrated by distant outsiders as disingenuous and hateful even though they themselves know otherwise—are of course likely to feel resentful, abused, and alienated. Justified or not, these perceptions do not contribute to a healthy, positively engaged civic character.”).
\textsuperscript{51} [cite]. For a statement that arguably illustrated their concerns, see Mark Tushnet, “Abandoning Defensive Crouch Liberalism,” https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html (May 6, 2016).
\textsuperscript{52} See Smith, “Simplism,” supra. note [xxx] at 8-9; see also Steven Smith, [read and cite the piece he cites in one of these sources]
the form of respectful disagreement. Indeed, even the “saints’” own self-image undermines the possibility of deliberation, given how such a distorted self-image makes self-knowledge impossible or at least much harder to achieve. In turn, such “self-delusions” render similarly unlikely the possibility of empathy with others’ views—not just on a given issue, but as a general matter.

B. Animus As Unknowable

On a far more practical note, scholars have also remarked on the difficulty of discerning when animus exists. This concern manifests itself most clearly in cases whether the challenged action in question takes the form of a voter initiative, such as Amendment 2 in Romer or the same-sex marriage prohibitions that were enacted in the late 1990’s and the 2000’s. In such cases, scholars insist on the fundamental unknowability of the motivations of a large and diverse group of voters passing judgment on a morally-fraught issue that might be rife with implications from a variety of perspectives, some obvious, some suspected, and others unpredictable.55

But concerns about legislative motivation extend beyond the context of voter-enacted initiatives. The question of legislatures’ motivations—whether they can be uncovered, if so, how, and with what doctrinal effect—has occupied scholars and courts for at least a generation.56 Nor have courts been consistent on this question. Indeed, from remaking on the difficulty of determining such intent in 1968,57 and flatly declaring the impossibility of that task three years

55 See Calabresi, et al., supra. note [xxx] at [xxx]; see also Smith, “Simplism,” supra. note [xxx], at 7 (“arguments that centrally turn on ascriptions of animus to large classes of people are likely at best to vastly oversimplify a complex set of beliefs, perspectives, and motivations”).
57 See O’Brien, 391 U.S. at [xxx].
later, the Court enshrined a closely-related concept, “discriminatory purpose,” as a threshold requirement equal protection requirement just a few years later. When combined with what is alleged to be the high-stakes nature of a finding of a particular type of intent—that is, “animus”—the epistemological difficulty here would seem to send a strong cautionary signal about widespread use of the animus idea.

C. Animus as Incomplete and Misleading

Katie Eyer criticizes the animus idea from a very different perspective. Critiquing what she describes as “the canon of rational basis review,” she argues that animus (as well as the form of rational basis review that is described as explicitly sharper than the traditional version of such review) “fail[s] to provide an accurate accounting of the scope and significance of meaningful rational basis review.” Eyer’s project seeks to unearth and display the phenomenon of rational basis review that is, to use her term, “meaningful,” with the goal of demonstrating the utility of rational basis arguments to emerging social movements seeking recognition of their equality claims.

Eyer does not deny that rational basis review indeed often takes the ultra-deferential form reflected in well-known cases such as Railway Express v. City of New York and Williamson v. Lee Optical. But she argues that such review can also be more searching; indeed, she claims that courts have often employed that more searching variety at the behest of social movements. Eyer’s project aims at unearthing this additional facet of rational basis review in order to ensure

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58 See Palmer, 403 U.S. at [xxx].
59 Washington v. Davis, [cite].
60 See supra. Part II (A).
61 See infra. note 62.
63 [cite]
64 [cite]
that future litigators learn the potential usefulness of making rational basis claims, both to win victories *simpliciter* but also to help encourage a judicial and extra-judicial conversation about that particular type of equality claim, with the possible goal of achieving more explicit judicial and political protection.

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

D. Animus Distinguished and Defended

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

1. *Animus Distinguished*

One approach to animus cautions that it should not be appealed to as an all-purpose tool to challenge a given type of discrimination. A leading example of this approach is Carlos Ball’s
attempt to explain that *Obergefell* did not accuse same-sex marriage opponents of bigotry.\(^{65}\) Professor Ball notes that Justice Kennedy’s majority opinion focused instead on the demeaning *effects* of same-sex marriage bans on the same-sex couples who wished to marry, and on their children.\(^{66}\) Given that, according to Justice Kennedy, same-sex couples wished to marry for the reasons that society valued marriage more generally, the exclusion of those couples from the right to marriage “has the effect of teaching that gays and lesbians are unequal in important respects” and “demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.”\(^{67}\) Indeed, he noted that Justice Kennedy went out of his way to acknowledge the honorable foundations for much religious and philosophical opposition to same-sex marriage.\(^{68}\) From analysis such as this, Professor Ball concludes that *Obergefell* did not accuse opponents of same-sex marriage of bigotry.

Much of the impetus for Professor Ball’s careful analysis seems to have stemmed from the *Obergefell* dissents, which accused Justice Kennedy of leveling exactly this charge against same-sex marriage opponents.\(^{69}\) But the import of his analysis extends beyond *Obergefell* and, indeed, beyond gay rights. Professor Ball teaches that a doctrinal tool such as animus cannot be applied uncritically to any type of discrimination or, indeed, to any general type of discrimination that has in fact been condemned as grounded in animus in particular circumstances. In other words, he cautions that animus cases such as *Windsor* (which he applauds) must sometimes be distinguished—even when, as in *Obergefell*—the same type of discrimination is challenged before a court.

\(^{65}\) Ball, *supra.* note [xx].

\(^{66}\) *Id.* at 649.

\(^{67}\) 135 S.Ct. at 2602.

\(^{68}\) See Ball, *supra.* note [xx], at [xx].

\(^{69}\) See *Obergefell*, 135 S.Ct. at [xxx] (Roberts, C.J., dissenting); *id.* at [xxx] (Scalia, J., dissenting).
This lesson is an important one. Within the ambit of gay rights, and indeed even same-sex marriage rights, the headlines are already speaking of follow-up litigation to Obergefell that considers the limits of same-sex marriage opponents’ rights to refuse to associate or endorse such ceremonies (and potentially such statuses). Most notably, Masterpiece Cakeshop v. Colorado Civil Rights Commission, which considers the extent of a baker’s free speech and free religious exercise rights to decline to provide a wedding cake for a same-sex marriage ceremony, is before the Supreme Court. Unless the Court unconditionally vindicates such constitutional rights claims or, conversely, vindicates full application of state law anti-discrimination rights, the result of Masterpiece Cakeshop will likely be further litigation to flesh out the meaning of whatever (likely ambiguous) rules the Court hands down. Professor Ball’s caution about uncritical application of the animus principle tells us that such follow-up litigation—as well as other types of discrimination claims that will likely be made in the future— must be analyzed carefully, so that animus can only be applied when that principle truly applies to the facts of the given case.

2. Animus Defended

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

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70 See, e.g., Doe v. Trump, No. 17-1597 (D.D.C. 2017) (issuing preliminary injunction against application of President Trump’s order denying transgendered persons the right to serve in the military).
i. Carpenter

Professor Carpenter’s analysis of animus comes as a defense of the Court’s decision in United States v. Windsor, the case in which the Court struck down Section 3 of the Defense of Marriage Act.\(^\text{71}\) Revealingly titled “Windsor Products: Equal Protection From Animus,” his analysis attempts to connect the Court’s canonical animus cases with its Carolene Products-based theory justifying more careful judicial review as an appropriate response to political process breakdown.\(^\text{72}\) Moving from such high theory to practicalities, Professor Carpenter concludes his analysis by articulating a set of factors that should help determine when animus exists, and applies those factors to DOMA.

Professor Carpenter’s analysis is important, both at the level of high theory and practicalities. He attempts to ground the animus principle in concerns about political dysfunction that he argues connects that principle both with Carolene Products and with the framing generation’s concern with faction.\(^\text{73}\) This attempt is important because it seeks to contextualize animus within the broader sweep of American constitutional law. Similarly, his identification of practical criteria for determining the existence of animus in a given case aspires to provide a set of workable guideposts for courts considering claims of unconstitutional animus.

Nevertheless, his analysis is incomplete and, in some ways, flawed. It is incomplete in that it does not attempt to connect the animus principle with the Nineteenth century concept of class legislation, which itself was a direct descendant of the framers’ concerns with faction

\(^{71}\) Carpenter, supra. note [xxx].

\(^{72}\) See, e.g., Carpenter, supra. note [xxx] at 226 (“Animus doctrine addresses the deeply problematic potential of a democratic republic to consistently oppress a politically unpopular minority, a concern articulated in Carolene Products.”); see also id. at 221-222 & 229-230.

\(^{73}\) See id. at [xxx].
(which Carpenter does mention).\textsuperscript{74} This omission\textsuperscript{75} is important because the class legislation concept occupied courts’ thinking about the proper scope of government power throughout the Nineteenth century, first among state courts interpreting state constitutions,\textsuperscript{76} and after 1868, federal courts interpreting the Fourteenth Amendment.\textsuperscript{77} If the modern animus principle can be connected to the class legislation idea, its claim to a legitimate place in American constitutional law would be much strengthened. Moreover, the very act of drawing that connection would assist in the task of creating an animus doctrine that could then stake such a claim. Part V of this article begins the work of drawing that connection.

Carpenter’s discussion of animus is also incomplete for a separate reason. His analysis relies on the familiar \emph{Arlington Heights} discriminatory intent factors as tools for identifying the presence of animus.\textsuperscript{78} That reliance is unsurprising, and appropriate: as I have argued in other writing, the concept of discriminatory intent bears close logical and doctrinal parallels to the animus principle.\textsuperscript{79} But those factors—and the discriminatory intent question they help to answer—play a more nuanced role than Carpenter offers.

Carpenter’s use of those factors is also slightly misfocused. He writes that, in the race context, “[t]he impermissible purpose [that is exposed by the \emph{Arlington Heights} factors] is the purpose to discriminate on the purpose of race,” while “[i]n animus cases, the impermissible purpose is the purpose to inflict injury or indignity.”\textsuperscript{80} This equation of the two relevant

\textsuperscript{74} See, e.g., Howard Gilman, \emph{The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence} 19-60 (Duke U.P. 2001) (drawing the connection between the framers’ concern about faction and the subsequent generation’s concern about class legislation).
\textsuperscript{75} Carpenter does make one brief reference to the anti-class legislation impetus for the Fourteenth Amendment. See Carpenter, \textit{supra.} note [xxx] at 229-230.
\textsuperscript{76} [cite]
\textsuperscript{77} See, e.g., Barbier v. Connolly, [cite and quote?] \textsuperscript{78} See Carpenter, \textit{supra.} note [xxx] at [xxx].
\textsuperscript{79} See Araiza, \emph{Animus, supra.} note [xxx] at [xxx].
\textsuperscript{80} Carpenter, \textit{supra.} note [xxx] at 243.


“purposes” is off by a slight, but meaningful, degree. In the race context, the purpose inquiry seeks to establish whether the government was indeed classifying (or “discriminating”) on the basis of race. But such classification is not itself impermissible. To be sure, invidious race classification—which we might colloquially call “discrimination”—is a constitutional wrong. But establishing that the government indeed classified based on race (or any other status that merits heightened scrutiny) does not by itself end the case. Instead, it merely triggers the heightened scrutiny that the Court has described as “smoking out” invidious—and thus unconstitutional—uses of race.81 Thus, the intent inquiry plays an intermediate, not a final, step, in the constitutional analysis.

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

This may seem like a trivial distinction. But, as Part IV explains, this distinction matters for purposes of understanding the significance of the seemingly heightened rationality review that scholars observe in animus cases.82 Thus, it matters for purposes of understanding what the Court has done in its animus cases. More generally, this distinction also matters when, in Part V, we consider whether, and if so how, the animus idea can be connected to the Nineteenth century concern about class legislation.

81 Justice O’Connor (using the “smoking out” language quoted in the text) made this most clear in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).
82 See infra. Part IV [xxx].
ii. Pollvogt

[to be filled in]

III.

Animus Identified and Properly Understood

The challenges posed to the animus principle, described in Part III, require that the doctrine be placed on a firmer doctrinal footing. This part seeks to do that work. It begins by offering a practical, workable doctrinal pathway for courts charged with determining whether animus exists. In so doing it builds on the foundation built by Professors Ball, Carpenter, and Pollvogt. Continuing, this part of the article then expands its scope, first by considering the doctrinal significance of an animus finding and, in turn, the moral salience of such a finding. In so doing it responds to the critiques set forth in Part III. With animus thus explained, Part IV considers how animus can fit within the broader sweep of American constitutional law.

A. Reconstructing Animus

1. How to Find Animus

The search for animus in any given case confronts courts with problems that implicate both practicality and higher-level theory. At the most practical, doctrinal level animus claims confront courts with the question whether animus necessarily reflects subjective ill-will on the part of the decision-maker. A requirement that courts must identify such ill-will would bode poorly for the doctrine’s future usefulness. Most fundamentally, the institutional nature of most government action means that the very concept of discrimination motivated by subjective dislike
is of questionable coherence. To be sure, this is not always the case: for example, class-of-one equal protection cases and litigation over President Trump’s immigration executive orders both raise the specter of government action taken by a single or a small set of decision-makers motivated by subjective ill-will. Nevertheless, the institutional nature of most government decisions renders questionable the very inquiry into subjective ill-intent, even if the Supreme Court is willing to insist that equal protection plaintiffs show some level of “discriminatory intent” when challenging facially-neutral laws.

Relatively, even assuming that such inquiries are conceptually coherent, the well-known proof problems that surface when courts attempt to divine such an intent present formidable problems. Whose statements during the legislative debate count? How much weight do they have when a judge evaluates the entire legislature’s aggregate intent? Can judges legitimately pierce the veil of ostensibly neutral-sounding justifications to conclude that some invidious intent lurked below? In particular, if animus is correctly considered a particularly intense subjective frame of mind, what is a judge to make of equally idiosyncratic countervailing evidence? To consider but one relevant example, of the three Cleburne, Texas city council members who voted

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83 [cites]  
84 Many, though certainly not all, class-of-one equal protection cases feature allegations of mean-spirited action taken against the plaintiff by one or more government officials motivated by vendettas against the plaintiff. See, e.g., Geinosky v. Chicago, 675 F.3d 743 (7th Cir. 2012) (class-of-one plaintiff alleging orchestrated harassment by city parking officers who conspired to ticket his car so continuously that he received tickets for illegally parking his car in different parts of Chicago at exactly the same time). See generally Araiza, “Irrationality and Animus,” supra. note [xxx] at 498-500 (discussing lower courts’ resistance to the Supreme Court’s conclusion, in Olech, that subjective ill-will was not a necessary part of a plaintiff’s class of one claim).  
85 See, e.g., IRAP, supra. note [xxx].  
86 See, e.g., Olech v. Village of Willowbrook, 160 F.3d 386 (7th Cir. 1998) (concluding that a class-of-one defendant had acted with ill-will toward the plaintiff), aff’d on a different ground, 528 U.S. 562 (2000); IRAP, supra. note [xxx] at [xxx] (using evidence of the President’s statements while a candidate to establish that the challenged executive order was grounded in unconstitutional animus).  
87 See Washington v. Davis; see also Feeney, infra. note 92.  
88 Cf. Smith, “Denigration,” supra. note [xxx] at 687 (suggesting that even the inquiry into discriminatory purpose required by Washington v. Davis implies some level of subjective ill-will, by pairing “discriminatory” with “hateful” purposes).
against the permit for the group home for intellectually disabled persons, one of them had sat on
the board of a school for intellectually disabled persons, while another had a disabled
grandchild. How, if at all, should a judge factor in those facts when judging whether those
council members (let alone the council as a whole) “disliked” or harbored “irrational prejudice”
toward the intellectually disabled?

These problems dog equal protection doctrine, even if they may be especially acute in
animus doctrine. It should not be surprising then, that the best-known doctrinal phenomenon
implicating bad intent—the “discriminatory purpose” requirement most closely associated with
Washington v. Davis—acknowledges the fundamentally objective nature of the inquiry. Even
while using language suggesting human motivation, the Court’s explanation of the
discriminatory purpose requirement establishes that a court can find the requisite discriminatory
purpose by reference to objective factors, including (but not limited to) the historical background
of the decision, the deviation from normal decisional procedures, and, indeed, the extent of the
disparate impact itself.

The Court’s explanation of how judges can find discriminatory purpose can play a useful role
in the related area of animus. As I explain in more detail in other writing, the Court’s canonical
animus cases, carefully read, reveal reliance on the factors the Court has identified as relevant to
the discriminatory purpose inquiry. Moreno featured troubling legislative history.  

89 See Araiza, Animus, supra. note [xxx] at 39.
90 473 U.S. at 450.
91 See text accompanying supra. notes 88-90 (suggesting this acuteness).
92 See, e.g., Feeney, [cite] (requiring that a challenged law must have been enacted “because of, not in spite of” its
disparate impact on a given classification tool).
93 See Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, [cite] (discussing these and other factors as
relevant to the discriminatory purpose inquiry).
94 See generally Araiza, Animus, supra. note [xxx].
95 See 413 U.S. at [xxx]; compare Arlington Heights, [cite] (identifying legislative history as a factor in the intent
analysis).
featured a decisional process that one observer described as an emotional and strongly negative constituent reaction that triggered an after-the-fact search for legitimate justifications,\textsuperscript{96} impacting a group the Court acknowledged as at least somewhat politically powerless.\textsuperscript{97} Both \textit{Romer} and \textit{Windsor} featured government actions that deviated from the normal substance of the decision-maker’s conduct, in the course of imposing both wide and deep burdens on a precisely-targeted group.\textsuperscript{98} While one can dispute the precise correspondence between any of these observations and their corresponding \textit{Arlington Heights} factor, the sheer number of these observations, and conceptual closeness of these phenomena to those factors, strongly suggests that, as least as a descriptive matter, the Court’s animus jurisprudence has built upon its discriminatory intent jurisprudence.

In addition to the parallels one can find between the \textit{Arlington Heights} factors and the factors the Court has used in the animus cases, one can also find a doctrinal parallel in the burden-shifting structure of the two inquiries. Just as with discriminatory intent analysis, the animus cases, carefully read, reveal a sequence of shifting burdens. In particular, those cases reveal that, once the \textit{Arlington Heights}-related factors combine to identify a plausible claim of animus, the burden shifts to the government-defendant to justify its decision. Thus, after the \textit{Moreno} Court identified the troubling legislative history expressing a desire to punish “hippies” and “hippy communes,” it then proceeded to consider the government’s proffered interests, but rejected

\textsuperscript{96} \textit{See Araiza, Animus, supra.} note [xxx] at 38-39.

\textsuperscript{97} \textit{Cleburne}, 432 U.S. at 445.

\textsuperscript{98} \textit{See Araiza, Animus, supra.} note [xxx] at 53-56 (discussing \textit{Romer}); \textit{id.} at 67-69 (discussing \textit{Windsor}). The second of these characteristics thus echoes, albeit imprecisely, the Court’s acknowledgement in \textit{Arlington Heights} that the extent of a law’s disparate impact is relevant to the discriminatory intent inquiry. \textit{See id.} at 56-58 (explaining how this “disparate impact” helped the Court explain why Amendment 2 was unconstitutional); \textit{id.} at 67-69 (similarly explaining how this factor influenced the Court’s analysis in \textit{Windsor}).
them using scrutiny more stringent than is normally associated with rational basis review. 99

Similarly, in Cleburne the Court led off its rationality review of the city’s decision by identifying, and condemning, the city’s reliance on its constituents’ fear of and discomfort with the would-be residents of the group home. 100 It then proceeded to consider the city’s more legitimate justifications, again subjecting them to scrutiny that both has been rightly characterized as stricter than normal. 101 The Court’s other animus cases feature similar sequences. 102

These similarities between discriminatory purpose jurisprudence and the animus cases are not coincidental. As students learn in an introductory Constitutional Law class, discriminatory purpose is the gateway to the heightened scrutiny that courts perform when legislation either explicitly or (more relevantly here) purposefully classifies on a suspect ground. In turn, that heightened scrutiny seeks to uncover situations where the challenged law is concluded to be so tenuously related to a government interest of the requisite importance that it is held to be invidious. Justice O’Connor’s opinion in City of Richmond v. J.A. Croson Co. 103 illustrates this dynamic: as she famously explained, applying heightened scrutiny to each and every racial classification “smokes out” those uses of race that are motivated by what she described as illegitimate notions of racial inferiority or “simple racial politics.” 104 To be sure, scholars ever since Croson have criticized the Court’s insistence that classifications defended as benign had to

99 See 413 U.S. at [xxx]; see also id. at [xxx] (Rehnquist, J., dissenting) (commenting on the unusual stringency of the Court’s scrutiny).

100 See 473 U.S. at [xxx].

101 See 473 U.S. at [xxx] (scrutiny); id. at [xxx] (Marshall, J., concurring in the judgment in part and dissenting in part) (commenting on the unusual strictness of the Court’s review).

102 See Araiza, Animus, supra. note [xxx] at [xxx] (discussing Romer); id. at [xxx] (discussing Windsor).


104 488 U.S. at 493 (plurality opinion).
run the gauntlet of strict scrutiny. But for our more descriptive purposes, the point is simply that the Court believed that such scrutiny, preceded by a discriminatory purpose inquiry if required by the law’s facial neutrality, was necessary in order to reach the ultimate conclusion about whether the law was invidious.

Animus shortcuts the process of identifying invidiousness. Recall that the Court has applied the animus idea in cases where, for whatever reason, it is not willing to apply explicitly heightened scrutiny to the law in question. (Hence many scholars’ characterizations of animus cases as cases involving heightened review in disguise.) Thus, in animus cases, the tool of heightened scrutiny is, by definition, unavailable. But the end point of the Court’s review is the same: in both animus and heightened scrutiny cases, the court ultimately seeks to determine whether the challenged law reflects discrimination that can fairly be described as invidious.

Without the tool of heightened scrutiny, however, courts in animus cases are left only with the Court’s intuitions about the kinds of laws that “really” reflect something “bad,” even though ostensibly they aim to promote legitimate public purposes. In other words, they’re left with the Arlington Heights factors normally used to determine discriminatory intent. To be sure, in animus cases the Court has applied those factors to answer something different than the discriminatory intent question—rather than answering that question, they use those factors to resolve the ultimate constitutional issue about the invidiousness of the discrimination.

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105 [cites]
106 See, e.g., Eyer, supra. note [xxx] at [xxx] (citing these scholars).
107 Compare, e.g., Cleburne, 473 U.S. at 450 (“The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.”) with Croson, 488 U.S. at 493 (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”) (plurality opinion).
108 See, e.g., Cleburne, supra. note 107 (describing the city’s action as reflecting “irrational prejudice”).
Similarly, the parallels in these doctrines’ burden-shifting structures are also more than coincidence. In the discriminatory intent context the burden shifting occurs at the stage of determining whether the law in question “really” discriminates on the suspect or quasi-suspect ground, thus opening up the prospect of explicitly heightened review. By contrast, animus becomes a useful doctrinal path for a court exactly when heightened scrutiny is, for whatever reason, unavailable. Thus, in animus cases the burden shifting must, by definition, occur within the domain of rational basis review. As illustrated by the examples discussed above, the animus cases reveal a structure in which judicial suspicion that animus may be lurking triggers more careful scrutiny of the more legitimate justifications offered by the government in defense of the law. In other words, that suspicion triggers judicial scrutiny that puts the onus on the government to justify itself. Importantly, though, that more searching scrutiny occurs under the aegis of the rational basis standard, rather than explicitly heightened scrutiny.

The point, therefore, is that the discriminatory intent factors from Arlington Heights, as well as that case’s burden-shifting structure, can do additional duty as factors that also assist courts in uncovering animus. To repeat, that’s not a coincidence. Because the intent-heightened scrutiny sequence and the animus inquiry both seek to answer the same question about invidiousness, but because the animus inquiry (by definition) avoids heightened scrutiny, it stands to reason that, without explicitly saying so, the Court has latched on to those same factors—and, indeed, the same structure for using them—when asking, in the animus context, a distinct, but closely related question.

109 See supra. notes 99-102 and accompanying text.
110 See Araiza, Animus, supra. note [xxx] at 139-143 (explaining how that more careful review is performed in animus cases, and stressing that that review, while seeking the actual reasons for the challenged government action, nevertheless requires only that the fit be reasonable, rather than particularly tight, and only that the interest be legitimate, rather than unusually pressing).
2. The Doctrinal Significance of An Animus Finding

[This sub-section will argue that the analysis above means that animus should be understood as unconstitutional, full stop. This clarifies ambiguities in Carpenter’s and Pollvogt’s analysis about “how much” animus is necessary to invalidate a government action.

This sub-section will also argue that this understanding is consistent with the Court’s statements, most notably Justice O’Connor’s in Lawrence, that in the Moreno-Cleburne-Romer trilogy a finding of animus triggered more intensive review by a court, with the result that laws were struck down. These kinds of statements imply that, at least theoretically, a court could find animus but nevertheless, after that more careful review, uphold the law. By contrast, this sub-section will argue that those statements reflect the burden-shifting I described above, which is undertaken as part of the Court’s ultimate conclusion about whether animus exists in a particular case.]

B. Responding to the Denigration Critique

The most troubling critique of animus is the one that criticizes the animus idea as attaching an inappropriately pejorative, ad hominem label attached to laws and, by extension, their proponents.\(^{111}\) Beyond the fact that an animus conclusion does indeed necessarily sting, this critique also implicates the well-known difficulties, already mentioned,\(^{112}\) surrounding courts’ search for a legislature’s intent.\(^{113}\) Upon reflection, however, both of these objections can be at

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\(^{111}\) See Carpenter, supra. note [xxx] at [xxx].

\(^{112}\) See text accompanying supra. notes [xxx]-[xxx].

\(^{113}\) See, e.g., Yudof, supra. note [xxx] at 1386-1387 (acknowledging, in the context of commenting on the difficulties courts encounter when attempting to distinguish between “class prejudice” and “reasonable regulation,” that “the inquiry into [legislative] motivation is treacherous.”).
least mitigated, if not fully overcome, by adopting the more nuanced understanding of animus offered above.

One way of mitigating the undoubted sting of an animus conclusion is to construct an understanding of the concept that does not rely exclusively on the sort of subjective ill-will that scholars such as Professor Smith find some discomfiting. To be sure, this construction process will not remove the ill-will component entirely. Such an erasure would be unfaithful to the facts of too many animus cases, which do in fact feature evidence of simple dislike. 114 Perhaps just as importantly, it would drain the concept of “animus” of its core meaning—in softening the blow, such a move would eliminate the force of the concept altogether.

However, there is a way to understand animus as a meaningful concept that nevertheless eases at least some of the sting. As explained earlier, 115 courts confronting a claim of animus can borrow liberally—and explicitly—from the Supreme Court’s explanation of how courts should go about uncovering discriminatory purpose. That earlier explanation invoked a variety of factors, most of which avoid requiring judges to delve into the subjective motivations of government decision-makers. The result of either of such an inquiry is thus a conclusion that does not necessarily indict the subjective motivations of any particular person or members of an institution. To be sure, being adjudged to have acted with “animus” still stings, just like being adjudged to have acted, in Professor Smith’s words, with “hateful or discriminatory purposes.” 116 But these conclusions can be shorn of their most pejorative connotations by distinguishing them from conclusions about subjective motivations. 117

114 [examples. Palmore, Moreno, Price-Cornelison?]
115 See supra. Part [xxx]
116 Smith, supra. note [xxx] at 697.
117 Cf. Restatement (Second) of Torts S 8A cmt. b (1965) (“Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still
At this point the reader may wonder how it is even possible to conclude that a law is tainted with “animus” without also necessarily concluding something about the lawmaker’s ill-will. On this theory, the entire idea of animus appears to focus on ill-will, such that it drains the term of any meaning to apply it to situations lacking such subjective feelings. But on reflection it’s not clear why this has to be. Institutions, not individuals, enact laws, and even though individuals comprise those institutions (whether a legislature or the public enacting an initiative measure), the animus determination must be made at the level of the institution, not the individual member. This must mean that it is the institution’s intent that matters. Even though individuals’ own subjective intents remain relevant to that institutional intent question, the institutional nature of that inquiry strongly supports the use of the sort of objective, institution-focused evidence, of the sort the Court has embraced in the discriminatory intent context.

This same logic should apply in the animus context. As with the discriminatory intent inquiry, the animus inquiry can rely on a combination of evidence of lawmakers’ subjective intentions and more objective evidence, such as the historical context of the decision and the

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118 But see supra notes [xxx] and [xxx] (describing, respectively, class of one litigation and litigation against the President’s executive orders on immigration).
119 Of course, individual members’ stated feelings may still be probative of that institutional intent. See, e.g., Moreno [cite]; Windsor [cite] (both quoting legislative history as evidence of congressional intent to act based on animus).
120 See supra. note 119.
extent to which the burden the challenged law places falls predominantly on an identifiable group. But we can go farther than this. We can reconceptualize animus in a way that makes it more amenable to objective evidence, without doing violence to the usual understanding of the term “animus.” Part V takes up this work, when it seeks to contextualize animus within the American constitutional tradition disfavoring so-called “class legislation.”

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

So far, Part IV has attempted to create a workable animus doctrine and has begun considering the moral significance of an animus finding. This sub-part contextualizes this newly-created animus structure within the broader scope of equal protection law. In so doing it responds both to Katie Eyer’s critique of animus and Dale Carpenter’s comparison of animus to intentional race classification. The goal here is to go beyond the structure of animus doctrine, and to begin contextualizing it within equal protection jurisprudence more generally.

1. Animus and Rationality Review

Katie Eyer’s critique, discussed above, provides the opportunity to consider the relationship of animus to rational basis review. To be sure, Eyer’s main critique of animus is limited, though still important. Her main concern appears to be that identifying the canonical animus cases as, in fact, animus cases tells a misleading story about constitutional change. At one level, this critique sounds only in pedagogy: that is, she worries that today’s students, when they become tomorrow’s social movement litigators, will be dissuaded from making rational basis 

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121 See infra. Part V.
122 See supra. Part IV (A)
123 See supra. Part IV (B); see also infra. Part V [xx] (expanding on this analysis).
124 See supra. Part [xxx].
125 See supra. Part [xxx] (recounting her critique).
claims if they believe (wrongly so, in Eyer’s view) that rational basis review is inevitably toothless and thus not worth the effort. Rather, she argues, courts sometimes do find that challenged government action fails rational basis review. Just as importantly, such rational basis victories—and even defeats\textsuperscript{126}—can trigger an evolutionary process in which courts and the political system eventually come to accept the equality claims, either by courts ultimately bestowing suspect class status to the claim or legislatures repealing discriminatory legislation. Eyer worries that excising the animus cases (in which plaintiffs prevail) from the rational basis canon sends a false signal to future lawyers that rational basis argumentation fails to yield benefits.

On a deeper level, though, Eyer’s concerns go beyond the straightforward, though important, question of what we teach our students.\textsuperscript{127} Identifying a given case, for example Cleburne, as a rational basis case, or alternatively, as an animus case matters for the stories scholars, litigators, and judges tell themselves about the development of the law.\textsuperscript{128} In turn, those stories matter for the width and shape of the path lawyers and judges feel is open to them as they move the law. Thus, they matter when a lawyer or a judge decides which arguments can be respectably made or vindicated, and which are, to use Jack Balkin’s term, “off the wall.”\textsuperscript{129}

At one level, Eyer’s questioning of how to understand “the animus cases”—that is, as about animus or about conventional rational basis review—can never receive a conclusive answer.

\textsuperscript{126} See Douglas NeJaime, “Winning Through Losing,” 96 Iowa L. Rev. 941 (2011) (considering how litigation losses suffered by social movements can ultimately redound to their benefit, either by mobilizing the movement’s members, triggering more favorable political action, or even persuading future courts to rule in their favor). See also [cite Eyer teaching materials, the notes after Goodridge]

\textsuperscript{127} Cf. Katie Eyer, [cite the teaching materials]

\textsuperscript{128} Cf. William D. Araiza, “Was Cleburne An Accident?,” [cite and pinpoint] (noting a similar dynamic in the context of the narrative scholars and judges derive from the text of a case, without regard to the underlying court dynamics that produced that text).

\textsuperscript{129} See Jack Balkin, “Framework Originalism and the Living Constitution,” 103 Nw. L. Rev. 549, 577 (2009) (“Constitutional revolutions are changes in expectations about what constitutional provisions mean and how they are likely to be applied; changes in what kinds of positions are thought reasonable and unreasonable, ‘off-the-wall’ and ‘on-the-wall.’”).
Those cases can be framed either way. Indeed, Eyer probably does not disagree, given that her point is *not* that the *Moreno* line of cases “are” “animus cases,” but rather, that characterizing them in that way harms some external value. Eyer argues that characterizing them in that way causes such a harm by removing them as exemplars of meaningful rational basis review, and thus as precedents for future cases where an animus argument might be difficult to make.

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

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

131 Cf. United States v. Windsor, 133 S.Ct. 2675, 2711, 2716 (2013) (Alito, J., dissenting) (“The modern tiers of scrutiny . . . are a heuristic to help judges determine when classifications have that fair and substantial relation to the object of the legislation [required by equal protection].”). In turn, the idea of reasonable classification, which finds expression in the “fair and substantial relation” formula Justice Alito recited, can be traced to courts’ deference to legislative judgments toward the end of the class legislation period. See Nourse & Maguire, *supra*. note [xxx] at 982.
One fascinating, but barely known, equal protection doctrine may help clarify this idea. The class of one doctrine, endorsed by the Court in Village of Willowbrook v. Olech, holds that a person may be the victim of an equal protection violation when she is discriminated against, not on the basis of an identity attribute such as race or sex, but simply on the basis of her own identity. In Olech, the Court unanimously held that the plaintiffs—homeowners who were required to provide a greater easement in exchange for city water service than other residents receiving the same service—had stated valid equal protection claim. However, Justice Breyer concurred only in the judgment, to express his disagreement with the per curiam opinion’s conclusion that “ill will” or “illegitimate animus” was not a necessary part of a valid class of one claim. Justice Breyer worried that, without that requirement, “many ordinary violations of city or state law” would be transformed into constitutional violations, if they lacked a rational basis.

Class of one doctrine, and its relation to core equal protection commitments, presents a fascinating but intricate issue, the full presentation of which extends far beyond the scope of this article. For our purposes, the important point is that, shorn of the animus or ill-will requirement, class of one litigation devolves into unhelpful and unprincipled discussions of how irrational a challenged government action has to be. In turn, those discussions trigger subsidiary, and equally unhelpful, arguments about courts’ ability to indulge in extravagant speculation in order both to identify a legitimate purpose underlying the discrimination and to find a connection between that

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133 See 528 U.S. at 565 (Breyer, J., concurring in the result).
134 Ibid. In a rational basis case, Nordlinger v. Hahn, 505 U.S. 1 (1992), Justice Thomas criticized the majority opinion for seeming to read an earlier rational basis case as standing for the same proposition that concerned Justice Breyer in Olech: namely, that unequal state treatment of an individual based in the state’s misapplication of state law converts that state law violation into an equal protection violation as well. See 505 U.S. at 18, 25-28 (Thomas, J., concurring in the judgment).
135 For discussions of this doctrine, see, e.g., William D. Araiza, “Flunking the Class of One/Failing Equal Protection,” 55 Wm & Mary L. Rev. 435 (2013).
purpose and the personalized discrimination.\footnote{For an analysis of this issue, see, e.g., Sanders, infra. note 187 (analyzing the proper scope for judicial hypothesizing of a government interest for purposes of rational basis review).} By contrast, requiring that government singling-out of an individual for burdensome treatment must be not merely irrational, but grounded in animus or ill-will, more firmly plants equal protection law in its anti-class legislation foundation.

To be sure, in some historically-inflected contexts, most notably racial discrimination, “mere irrationality” may indicate a reflexive lack of concern for a subordinated group’s welfare. In such cases, a lack of fit may well be damning from the perspective of the amendment’s goal of preventing government from subordinating a group. But class of one claims present situations shorn of such historical baggage, and, indeed, shorn of any confounding factors related to the status of a particular group, such as its immutability. Instead, such cases present questions of pure discrimination. As such, they present in the starkest possible light the question whether simple irrationality is enough to condemn such discrimination, or instead, whether more is required.

By requiring ill-will, animus, or at least some level of intentionality in class of one cases, courts would honor equal protection’s core commitment that government act in pursuit of a public purpose.\footnote{Of course, it must be admitted that the Olech Court did not impose this type of requirement on class of one claims. See text accompanying supra. note 132. But it is striking that many lower courts after Olech continued to insist that plaintiffs plead such bad intent. See William D. Araiza, “Constitutional Rules and Institutional Roles: The The Fate of the Equal Protection Class of One and What it Means for Congressional Power to Enforce Individual Rights,” 62 SMU L. Rev. 27, 53-54 (2009) (describing this lower court pushback). While some of this pushback might have been based on a practical desire to cut back on the otherwise-expansive potential of class of one claims after Olech, some of it may have derived from an instinct that class of one claims, to be conceptually coherent, needed to feature some degree of government intent or ill-will.} Note that the commitment is \textit{not} that government must succeed in promoting that interest. Government makes mistakes all the time. But if the underlying goal of equal protection is that government not act simply with the goal of burdening any person or any group, then, in the context of such “pure” discrimination it makes sense to insist on some degree of intentionality with
regard to the discrimination, rather than simply asking whether government did a bad job (i.e., acted irrationally) in attempting to promote a legitimate public purpose.

If all this is true—if the core of equal protection’s aspiration is to condemn action taken with an intent to burden a group not in the course of pursuing a legitimate interest but simply in order to accomplish that burdening—an simply asking whether government did a bad job (i.e., acted irrationally) in attempting to promote a legitimate public purpose.

2. Animus and Heightened Scrutiny

As noted in Part III, Dale Carpenter’s inquiry into how courts should search for animus relies heavily on the Court’s discriminatory intent jurisprudence. An earlier section of Part IV explained how Carpenter’s transfer of that jurisprudence into the animus context, while fundamentally sound, nevertheless reflects a mistaken equivalency between a finding of animus and a finding of intentional racial discrimination. The gist of that explanation was simply that, while a finding of intentional racial discrimination surely places the challenged government action in serious jeopardy, as a formal (and a practical) matter it does not doom it. By contrast, a finding of animus does doom the challenged action.

As that discussion in Part IV explained, this difference between race (and other types of constitutionally suspect) discrimination and animus matters when we attempt to construct an appropriate doctrinal structure for animus. But it also matters more broadly. In particular, the

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138 See, e.g., Romer, 517 U.S. at 635 (describing Amendment 2 as “a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit”). Tellingly, in the next sentence Justice Kennedy quoted a Nineteenth century case’s statement that “[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment.” Ibid. (quoting The Civil Rights Cases, 109 U.S. 3, 24 (1883)).
139 See infra. Part III.
140 See infra. Part IV(A).
distinction between the consequences of a finding of intentional race (or other type of suspect) discrimination and the consequences of an animus finding matters for our understanding of animus and how it fits within the broader scope of equal protection law. Recall again that distinction: a finding of intentional discrimination triggers, not an automatic strike-down of the challenged law, but the application of the relevant level of scrutiny, while a finding of animus does (or at least should) trigger such an automatic strike-down. To be sure, a finding of intentional discrimination on a suspect ground surely makes a strike-down more likely, but this remains a likelihood and not a certainty. This is not the case with animus.

This distinction matters because it reveals the nature of animus as a core concern of equal protection. The fact that an animus finding should necessarily doom a challenged government action reflects the fact that animus characterizes at least a subset of the sort of caste legislation that the Fourteenth Amendment sought to prohibit. Of course, other types of discrimination can also create caste-like inequality, as the first Justice Harlan recognized when he characterized Jim Crow as creating such a structure. For better or for worse, modern doctrine accounts for this risk by insisting on more careful scrutiny of all laws that are based on criteria the Court has deemed to be suspect. But, recognizing that those types of discrimination may in fact be justified by important

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141 Indeed, to the extent the intentional discrimination is grounded not on race but on some other suspect ground, such as sex, there may be even more reason to reject the idea that such discrimination is the formal (or even the de facto) equivalent of a ruling for the plaintiff. [cite cases where the court found intentional sex discrimination but nevertheless upheld it]

142 See Plessey v. Ferguson, [cite] (Harlan, J., dissenting) [quote?]. Indeed, Jim Crow legislation itself is certainly susceptible to an allegation of animus, to the extent it was justified simply by a view that races should not mix. And, as Justice Harlan recognized via his “there is no caste here” language, it would be even more susceptible to such an allegation to the extent such laws were justified by the desires of white persons not to associate with particular types of other people—that is, black people.

143 See, e.g., Croson, 488 U.S. at 493 (explaining that strict scrutiny is necessary for all race classifications, in order to “smoke out” illegitimate uses of race).
government interests, that doctrine at least ostensibly—and, to some degree, actually—offers a willingness to listen to the government’s argument before condemning its conduct.\footnote{See, e.g., Grutter v. Bollinger, [cite] (upholding the use of race, for limited purposes, in university admissions decisions).}

This combination—a necessary strike-down of any government action found to be grounded in animus, and heightened scrutiny but not automatic strike-downs in cases of particular types of discrimination—reveals that animus is qualitatively different from other types of discrimination. An animus finding should justify a strike-down without any further analysis—as Susannah Pollvogt describes it, animus should serve as a “doctrinal silver bullet.”\footnote{Pollvogt, \textit{supra}. note [xxx] at [xxx].} Other types of discrimination—paradigmatically race—are surely highly problematic as a constitutional matter, whether viewed through the lens of modern suspect class doctrine or the aspirations of the drafters of the Fourteenth Amendment. But through either of those lenses, race is not a strictly forbidden ground of classification: modern doctrine recognizes the permissibility of at least limited uses of race,\footnote{See \textit{supra}. note 144.} while the Reconstruction Congress enacted race-conscious legislation.\footnote{See \cite examples.}

So understood, animus functions as a doctrinal short-cut, cutting through presumptions and heuristics such as tiered scrutiny analysis to home in directly on the ultimate conclusion that other doctrinal paths reach only indirectly. To be sure, this conclusion does not mean that animus properly supplants those other paths. Applying the anti-animus principle presents courts with difficult challenges. Indeed, courts apply heuristics such as tiered scrutiny analysis exactly because more direct inquiries into a law’s constitutionality tax their abilities.\footnote{See \textit{supra}. note 131.} But heuristics can also fail or be abandoned—as tiered scrutiny appears to have been abandoned by the Court.\footnote{See, e.g., Kenji Yoshino, “The New Equal Protection,” 124 \textit{Harv. L. Rev.} 747, 757 (2011) (concluding that “[a]t least with respect to federal equal protection jurisprudence, th[e] canon [of suspect class analysis] has closed”).} At
such times, a reconfigured return to first principles—here, to animus as the modern instantiation of the Fourteenth Amendment’s anti-class legislation idea—can help refocus equal protection law on its first principles.

IV.

Animus Contextualized

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

The basic argument in favor of this proposition is straightforward: just like its class legislation ancestor, animus doctrine tasks courts with ferreting out laws that are enacted for no legitimate government purpose, and which are thus fundamentally arbitrary. To be sure, “arbitrariness” fails to capture fully the essence of the constitutional problem with either class legislation or legislation infected with animus. For example, Nineteenth century commentators frequently described class legislation using adjectives that suggested defectiveness, impurity, and corruption, words that suggest more than what one might call “innocent irrationality” or cases

\[150\] Consider, for example, the definitions of “vicious,” an adjective commonly used to describe class legislation. See, e.g., 2 An American Dictionary of the English Language 882 (S. Converse, 1828) (defining “vicious” as
of simple bad fit.  These more critical descriptions distantly echo this article’s earlier arguments that considerations of fit, while important to equal protection law, should play a secondary role in equal protection analysis—secondary, that is, to considerations of more troubling, if not downright nefarious, motivations.

But beyond this straightforward comparison, difficult questions arise when evaluating whether animus-grounded legislation can be understood as the modern equivalent of class legislation. The jurisprudential world of 1866 is vastly different from ours; thus, drawing anything more than a superficial connection between animus and class legislation requires that we revisit some basic assumptions about equal protection and constitutional rights in general.

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“1. Defective; imperfect; as a system of government vicious and unsound; 2. Addicted to vice; corrupt in principles or conduct; depraved; wicked; habitually transgressing the moral law; as a vicious race of men; vicious parents; vicious children; 3. Corrupt; contrary to moral principles or to rectitude; as vicious examples; vicious conduct; 4. Corrupt; in a physical sense; foul; impure; insalubrious; as vicious air.; 5. Corrupt; not genuine or pure; as vicious language; vicious idioms; 6. Unruly; refractory; not well tamed or broken; as a vicious horse.”); Webster’s Complete Dictionary of the English Language 886 (George Bell 1886) (defining “vicious” as “1. Characterized by vice or defects; defective; imperfect. “The title of these lords was vicious in its origin.”; 2. Addicted to vice; corrupt in principles or conduct; depraved; wicked; habitually transgressing the moral law; as a vicious race of men; vicious children; vicious examples; vicious conduct.; 3. Lacking purity; foul; bad; ns, vicious air, water, weather, and the like.; 4. Not genuine or pure; as, vicious language; vicious idioms; 5. Not well tamed or broken; given to bad tricks; unruly; refractory; as, a vicious horse.”) (emphases in originals).

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151 See William D. Araiza, “Irrationality and Animus in Class-of-One Equal Protection Cases,” 34 Ecology L.Q. 493, 509 (2007) (discussing the differences between animus and “pure irrationality” in the context of class of one equal protection cases); see also H. Jefferson Powell, “Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law,” 86 Wash. U. L. Rev. 217 (2011). This more precise focus of the animus idea also effectively brackets the doctrinal question of hypothesized, rather than actual, government purposes, cf. Sanders, infra. note 187 (discussing the proper scope of judicial hypothesizing of governmental purposes in constitutional litigation), although one understanding of animus doctrine provides guideposts for courts considering claimed government justifications for laws alleged to be grounded in animus. See Araiza, Animus, supra. note [xxx] at [xxx].

152 To repeat a point made earlier, such troubling motivations could also include omissions, such as failures to give conscious consideration to the interests of particular groups whose concerns have historically been ignored. See Karst, supra. note Error! Bookmark not defined. (offering such an understanding of equal protection as a response and partial rebuttal to the imposition of a generally-applicable discriminatory intent requirement).

153 Cf. Nourse and Maguire, infra. note 154 at 996 (“analogizing class legislation to modern political theories carries risks of presentism”). The same could be said about analogizing class legislation jurisprudence to modern judicial doctrine.

154 Cf. Victoria Nourse and Sarah Maguire, “The Lost History of Governance and Equal Protection,” 58 Duke L.J. 955 (2009) (calling for a reconceptualization of equality law as principles guiding governance so as to ensure that minority interests are accounted for in the legislative process).
Still, some tantalizing if necessarily highly tentative parallels exist between the class legislation idea and the anti-animus principle.

A. Class Legislation as Legislation Lacking a Public Purpose

First, consider the core of the class legislation idea. As stated by Melissa Saunders, the class legislation prohibition condemns laws that single out particular groups for burdens or benefits without a corresponding public purpose.\(^{155}\) Saunders continued that modern suspect class analysis functions as “an evidentiary device, designed to facilitate judicial identification of special treatment that lacks an adequate public purpose justification.”\(^{156}\) Saunders offers a thin but broad definition of class legislation, one that raises the prospect of encompassing within it laws that reflect not just oppressive intent, but also laws that reflect “mere” government irrationality or private party rent-seeking behavior.\(^{157}\)

This broad definition of class legislation helps us get a handle on the proper meaning and role of animus in constitutional law, but it does not do the entire job. Exactly because this broad


\(^{156}\) Saunders, supra. note 155 at 307.

\(^{157}\) Saunders disclaims any interest in linking the class legislation idea to any conception of bad government intent. See Saunders, supra. note 155 at [xxx]. Her disinterest in the existence vel non of such intent suggests that a class law’s failure to promote any public purpose must either flow from the law’s sheer irrationality or its purpose to promote one group’s private interest without any intent to also promote the public interest. The question of a law’s sheer, but “innocent,” irrationality is an interesting one. See [Powell and my Berkeley ELJ article]. The other possibility—that class legislation reflects nothing but rent-seeking by an interest group—should also be excluded from animus’s domain, given that rent-seeking laws generally reflect “mere” personal wealth maximization, rather than aiming at the social subordination of a group. See, e.g., Steven Calabresi & Julia Rickert, “Originalism and Sex Discrimination,” 90 Texas L. Rev. 1, 4 n. 15 (2011) (describing Saunders’ definition of class legislation as including rent-seeking legislation, even if, according to the authors, such laws do not impose the “social stigmatization” that marks caste-creating legislation). See also Steven Calabresi and Larissa Leibowitz, “Monopolies and the Constitution: A History of Crony Capitalism,” 36 Harv. J. of L. & Pub. Policy 983 (2013).
definition encompasses laws that cannot fairly be described as grounded in animus,\textsuperscript{158} it cannot provide us with a precise historical context for a properly understood animus doctrine. Rather, animus should be understood as a particular type of class legislation. While the class legislation concept, as defined by Saunders, refers to legislation that \textit{lacks} a rational connection to a public-regarding purpose, animus should be understood as a subset of that category—namely, as a label for laws that affirmatively \textit{promote} a non-public-regarding purpose.

**B. Animus as Caste Enforcement**

The last sentence above offers the prospect of narrowing our understanding of animus to a subset of class legislation, to that focusing on the establishment or reinforcement of castes.\textsuperscript{159} Scholars have shown that the idea of caste resonated with the drafters of the Fourteenth Amendment.\textsuperscript{160} In rejecting earlier drafts of the amendment that focused explicitly on racial equality, the members of the 39\textsuperscript{th} Congress expressed a broader concern with ensuring equal fundamental rights for all Americans, and a corresponding antipathy to legislation that kept any group of Americans in a subservient social position, such as the Black Codes that provided the impetus for both the Amendment and the Civil Rights Act of 1866.\textsuperscript{161} Members of the 39\textsuperscript{th} Congress used evocative examples from foreign cultures suggesting that they understood caste legislation as legislation that imposed status-based burdens creating or reinforcing a rigid social

\textsuperscript{158} See \textit{supra}. note 157.  
\textsuperscript{159} Indeed, some scholars define class legislation in this more narrow way. \textit{See, e.g.}, Jack Balkin, “How New Genetic Technologies Will Transform \textit{Roe v. Wade},” 56 Emory L.J. 843, 852 (2007) (defining class legislation as “legislation that imposes special burdens on a social group and tends to perpetuate their subordinate status”). Whether or not this narrower definition of class legislation is more accurate is not a crucial part of the analysis.  
\textsuperscript{160} See Calabresi and Rickert, \textit{supra}. note [xxx] at [xxx];  
\textsuperscript{161} These ideas of equality focused on treating all members of a given class equally, a fact that opened up significant room for discrimination that modern Americans might find unjustifiable, if, at the time, the discriminated-against group was thought to be relevantly different from the favored group. \textit{See, e.g.}, Calabresi and Rickert, \textit{supra}. note [xxx] at [xxx] (recounting members of the 39\textsuperscript{th} Congress stating or assuming that men and women were often different and thus that sex discrimination often did not amount to class legislation).
hierarchy. This understanding of what the Reconstruction Congress sought to prohibit explains Justice Harlan’s use of the term “caste” in his Plessy v. Ferguson dissent as an apt label for laws, like the Louisiana streetcar segregation law, that were motivated by a belief that blacks were not fit to associate with whites.

The caste idea has distinct parallels with the modern animus cases. First, all of those cases concerned discrimination based on identity. To be sure, in Moreno the identity wasn’t of the type that standard equal protection doctrine would recognize as immutable. Nevertheless, even in that case the “bare congressional desire to harm” targeted a group based on its living choices, rather than more contingent or less fundamental identity attributes such as occupation or geographic location. Other parallels also exist, especially with regard to caste’s focus on creating physical and social distance between groups that in turn reinforces social hierarchy. Cleburne involved a decision to prohibit the disfavored group from taking up residence in a particular neighborhood, a context that distinctly, if admittedly distantly, echoes Justice Harlan’s critique of Jim Crow legislation as reflecting the majority’s distaste for associating with the burdened group. In Romer, Justice Kennedy described Amendment 2 in ways that suggested a similar social distancing. In Romer, the distancing was more metaphorical than physical, as the Court concluded that Amendment 2 walled off the burdened group from the very status of enjoying the protection of the laws. But that metaphorical distancing still resonates in terms of

162 [cite the analogies to the Jewish ghetto laws and Indian caste norms].
163 See Plessey v. Ferguson, [cite] (Harlan, J., dissenting) (reference to caste); id. at [xxx] (Harlan, J., dissenting) (setting forth his view of the underlying motivation for Jim Crow laws).
164 [cite]
165 See supra. note 163 (Plessy dissent); Aziz Huq, “Judging Discriminatory Intent,” 103 Cornell L. Rev. ___ (forthcoming 2018), at MS 23 (citing Cleburne as an example of a majority’s desire to create a physical distance between it and the burdened group). Professor Huq likens this phenomenon to the idea of “taste based discrimination” pioneered by Gary Becker, which Professor Huq identifies as one manifestation of animus. See id. at MS 22 (citing Gary Becker, The Economics of Discrimination 14-15 (2nd ed. 1971)).
166 See Romer, 517 U.S. at 631 (describing the protections Amendment 2 withdrew as “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society”).
social or civic exclusion: consider that the last substantive statement of the opinion described Amendment 2 as “deem[ing] a class of persons a stranger to its laws.” And, of course, he began his opinion with a reference to Justice Harlan’s rejection of caste in *Plessy*.168

Admittedly, *Windsor* is a tougher fit with the caste idea. Still, in that case Justice Kennedy at least alluded to caste. He noted how Section 3 of DOMA effected an across-the-board denial of a legal status that states, the traditional providers of that status, has chosen to give same-sex couples.169 In addition, repeating the emphasis on dignity that he placed in his opinion in *Lawrence v. Texas*,170 he stressed the stigma DOMA imposed, describing the law as “undermin[ing] both the public and private significance” of their state-sanctioned marriages, “plac[ing] same sex couples in an unstable position of being in a second tier marriage” which “demeans the couple,” and “humiliat[ing]” their children.171 These descriptions all suggest the public subordination of a class of relationships relative to relationships of the same type172 that, at least conceptually, reflects caste-like status.173

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168 *See Romer*, 517 U.S. at 623; *see also* Amar, *infra*. note 171 (arguing that Amendment 2 was the equivalent of an unconstitutional bill of attainder).

169 *See Windsor*, 133 S.Ct. at [xxx].

170 *Cite parts about dignity*


172 *See Windsor*, 133 S.Ct. at [xxx] (observing that DOMA created inequality within the class of marriages recognized by states, the institutions that traditionally bestow marital status); *see also* Obergefell v. Hodges, [cite] (establishing that same-sex marriages further the same societal goals for which marital status is created to begin with).

173 *Cf.* Martha Nussbaum, “A Right to Marry?,” 98 Cal. L. Rev. 667, 683 (2010) (drawing a connection between majoritarian views that extending marriage rights to same-sex couples will sully traditional marriage and notions of disgust and contamination that are heavily caste-inflected).
The animus cases’ focus on identity-based physical or social separation enacted in the service of preserving the purity or wholesomeness of the majoritarian polity\footnote{See supra. notes 167 & 173.} suggests an intuitive parallel with our understanding of caste. As such, they suggest that animus doctrine may fit neatly within the subset of laws condemned as class legislation, a subset which is further condemned as legislation that creates a caste regime.

Of course, animus is not the only equal protection doctrine that features these parallels to concerns about caste. Indeed, given that the anti-caste imperative provided at least some of the motivation for the Fourteenth Amendment,\footnote{See supra. note [xxx].} it is not surprising that many scholars have insisted that caste-like social subordination should constitute the main focus of equal protection law.\footnote{See, e.g., Ruth Colker, “Antisubordination Above All: Sex, Race, and Equal Protection,” 61 N.Y.U. L. Rev. 1003 (1986).} The great variety of discrimination that might be thought to raise colorable equal protection claims, and in particular the historical legacy of certain types of discrimination, suggest that an anti-caste/anti-subordination theory of equal protection should be flexible enough to encompass a variety of doctrinal mechanisms. With regard to race, for example, it should—or at least could—be flexible enough to allow lesser reliance on the intent requirement, on the theory that the historical embeddeness of racism in American society risks leaving much of it unremedied if a plaintiff is required to affirmatively prove that a facially neutral law with a racially disparate impact “really” constitutes “discrimination” on the basis of race.\footnote{See, e.g., Karst, supra. note Error! Bookmark not defined..} One could make a similar observation about sex discrimination, in light of deeply embedded and often unacknowledged
assumptions about the relative capabilities of, and appropriate social roles for, men and women.\textsuperscript{178}

For other types of discrimination, however, broad statements about the likely existence of either out-and-out prejudice or “merely” stereotyped thinking that necessarily limits a group’s social and life opportunities either become less persuasive or, at the very least, encounter obstacles to effective judicial implementation. For example, distinguishing caste-creating discrimination from appropriate differential treatment may be difficult in the context of disability discrimination.\textsuperscript{179} In the context of transgender rights, the still-evolving nature of public opinion may make some judges nervous about issuing blanket condemnations of such discrimination—a phenomenon that some would even continue to ascribe to the context of gay and lesbian rights.\textsuperscript{180} And, of course, some axes of discrimination have yet to arise, or yet to command significant public and judicial attention.\textsuperscript{181} Indeed, to the extent social subordination can be successfully imposed based on the lifestyle choices of the burdened group,\textsuperscript{182} the constantly-evolving nature

\textsuperscript{178} See, e.g., Cary Franklin, “The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law,” 85 N.Y.U. L. Rev. 83, 136 (2010) (noting Justice Blackmun’s apparently startled reaction to Justice Brennan’s suggestion in his draft opinion in Weinberger v. Weisenfeld, [cite], that the male widower-father in the case might have chosen to stay at home with the couple’s child even if his wife had not died). For statements about the caste-like status of gender relations in the United States at the time of the Fourteenth Amendment’s enactment, see Calabresi & Rickert, supra. note [xxx] at [xxx].

\textsuperscript{179} See, e.g., Cleburne, 473 U.S. at [xxx] (observing that some disability differentiation may in fact redound to the benefit of disabled persons, and expressing doubt about courts’ ability to distinguish between beneficial and detrimental treatment).

\textsuperscript{180} Cf. Obergefell, [cite] (addressing the argument that more public debate was necessary on the question of same-sex marriage); see also, e.g., John Finnis, “Legal Enforcement of Duties to Oneself: Kantians v. Neo-Kantians,” 87 Colum. L. Rev. 433, 437 (1987) (arguing that anti-gay legislation may reflect not contempt, but good faith beliefs about the constituent parts of human dignity and beliefs that prohibitions on or disapprovals of same-sex conduct attempt to limit conduct that degrades that dignity even among the persons whose conduct is subject to prohibition or disapproval).


\textsuperscript{182} See text accompanying supra. note 164 (discussing legislators’ hostility to the lifestyle choices of hippies).
of such choices means that new axes of subordination can be expected to arise with the new living choices made by every generation. Even assuming that all such emerging discrimination eventually becomes generally condemned, the process by which that condemnation develops takes time and proceeds in stages.\textsuperscript{183}

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

The outline of an animus doctrine provided earlier in this article\textsuperscript{184} furnishes guideposts for that inquiry. Its focus on legislation that imposes unusually-targeted burdens that deviate from normal governmental practices and procedures, and does so against a background that suggests that these effects were intended rather than mere by-products of legislative attempts to pursue other, more legitimate, goals,\textsuperscript{185} channels the inquiry toward laws that raise suspicion that they were enacted simply to legislate inequality.\textsuperscript{186} To be sure, such suspicion does not equate to proof. But, as that outline explains, it justifies reversing the normal presumption of constitutionality accorded government action, and requires the government to demonstrate that the law was in fact motivated by a legitimate purpose.

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{183} [cite Eskridge article re the path of social groups’ progress, from medicalization to tolerance to full acceptance]
\item\textsuperscript{184} See supra. Part [xxx].
\item\textsuperscript{185} [historical background; specific sequence; legislative/administrative history]
\item\textsuperscript{186} Cf. Romer, 517 U.S. at [xxx] (using similar language).
\end{itemize}
\end{footnotesize}
Unlike formally heightened scrutiny, this burden shifting does not require the government to demonstrate an unusually good fit between the law and that legitimate purpose. Given that the inquiry’s goal is into the government’s ultimate motivation, and given that, by definition, the discrimination in question is not across-the-board suspicious, it demands only a reasonable fit. But it must be a fit with the government’s actual goal. This insistence on identifying that actual goal responds to the underlying concern animus doctrine has with the government’s motivation. If it fails that test then, literally, we know what was really motivating the government. And it isn’t good.

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

*Obergefell Hodges* brings us to the most recent gay rights victory at the Court—and, more importantly, to the most recent significant individual rights claim that cannot be fully explained by standard equal protection or due process doctrine. As such, it provides clues to animus doctrine’s possible evolution and, in particular, its relationship to both equality and liberty.

With regard to that relationship: Late Nineteenth and early Twentieth century judges and scholars frequently commented on the overlap between the Due Process and Equal Protection clauses. That overlap manifested in the prohibition on class legislation, which Nineteenth century courts often described as contrary to the Fourteenth Amendment without bothering to

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188 See Araiza, *Animus*, supra. note [xxx] at 139-143.

189 [cite]
further specify its doctrinal home.\textsuperscript{190} In the last decades before the 1937 revolution the Court began to specify that the Equal Protection Clause provided the strongest protection against the sort of non-public-regarding discrimination that was condemned as class legislation.\textsuperscript{191} Nevertheless, the Court continued to insist that the Due Process Clause, in addition to protecting against deprivations of then-newly-announced rights such as the right to contract and raise a family, also provided at least some protection against arbitrary discrimination.

One can find a trace of this idea in \textit{Obergefell’s} insistence that same-sex couples married for the same reasons as their opposite-sex counterparts. While normally one might expect such an analysis to lead a court to conclude that same-sex marriage bans are simply a bad fit with the underlying reasons government recognized marriages, \textit{Obergefell} draws a different lesson. According to Justice Kenney, his comparison of the reasons opposite-sex and same-sex couples wed led to conclude that same-sex marriage bans “teach[] that gays and lesbians are unequal in important respects” and “demean[] gays and lesbians” by “lock[ing] them out of a central institution of the Nation’s society.”\textsuperscript{192} This is not the language of classification—perhaps unsurprisingly, since the Court rested its conclusion on the Due Process Clause. But what that language is not is less important than what that language is: a conclusion that exclusion of same-sex couples from access to marital status “teaches” inequality, “demeans” its victims, and “locks them out of a central [social] institution.”\textsuperscript{193} Regardless of its grounding in due process rather than equal protection, such effects suggest the kind of oppressive discrimination and exclusion

\textsuperscript{190} See, e.g., Barbier v. Connolly, [cite] (providing a detailed explanation of the constitutional impermissibility of class legislation but failing to specify which Fourteenth Amendment clause condemned such laws).
\textsuperscript{191} See Truax v. Raich [cite and explanation]
\textsuperscript{192} 135 S.Ct. at 2602.
\textsuperscript{193} \textit{Ibid.}
from a desirable status that could legitimately be described, not just as class legislation, but as caste legislation.\textsuperscript{194}

To be sure, \textit{Obergefell}'s interlocking of due process and equal protection\textsuperscript{195} cannot be uncritically equated with the doctrinal promiscuity of Nineteenth century class legislation. Rather, that earlier jurisprudence may flow uniquely from that era’s more general conception of “rights” as the residual liberty that remains after the legitimate scope of government power—what was called the “police power”—ran out.\textsuperscript{196} That understanding of rights at least implied that the precise identification of the right does not matter as much as it does today, when we consider rights as trumps, and thus insist on specifying which right is at issue and how far that right extends. Nevertheless, the thought that the police power does not extend to government actions that impose arbitrary restraints on persons’ residual liberty—that is, actions that further no legitimate government purpose—can be analogized to \textit{Obergefell}'s conclusion that same-sex marriage bans, by excluding from marital status unions that perform the same functions as recognized marriages, do nothing but burden such residual liberty: They “lock out” those relationships from an important status, “demean” their victims, and “teach” inequality. Despite the opinion’s doctrinal foundation in the Due Process Clause, concepts such as “locking out” some (but not other similarly-situated) relationships, “demeaning” persons (presumably, relative to other persons), and “teaching” those persons’ inequality vis-à-vis others all suggest the sort of particularized burdening of a group that makes out a claim of caste imposition.

\textsuperscript{194} It should not be surprising, or particularly problematic, that \textit{Obergefell}'s proto-class legislation conclusion found its doctrinal home in the Due Process Clause rather than the Equal Protection Clause. As judges and scholars from the Nineteenth and early Twentieth centuries recognized, both of these provisions required some level of equality, and both were offended by laws that were exposed as class legislation. [cites] Indeed, Nourse and Maguire argue that at some point in the early Twentieth century [confirm] courts used the presence of a right as trigger for more careful class legislation scrutiny. [cite]

\textsuperscript{195} See, \textit{e.g.}, Laurence Tribe, “Equal Dignity: Speaking Its Name,” [cite].

\textsuperscript{196} [cites]
D. Animus as Ill Will

The idea that animus constitutes the modern incarnation of caste and Obergefell’s unflattering description of same-sex marriage prohibitions return us, for a final time, to the idea that the concept of animus necessarily includes some imputation of ill-will. While an earlier part of this article addressed the idea that animus jurisprudence is, at base, the “jurisprudence of denigration,” Part IV’s comparison between animus and caste require us to return to that issue. It’s unsurprising that the ill-will issue should return as the ultimate challenge facing animus doctrine. Questions of intent—whether it is required, what it signifies, and how it can be identified—have bedeviled the Court’s constitutional rights jurisprudence, not just in equality law but more generally. As scholars such as Professor Smith have observed, the animus idea in particular exacerbates these difficulties, given both the undeniably-freighted nature of the very term “animus,” the reheating of the culture wars of the 1990’s, and the Court’s willingness to venture into that battleground.

At one level this final consideration of the descriptive accuracy and normative appropriateness of a doctrine called “animus” presents a problem that far exceeds the scope of this article. Indeed, one can plausibly argue that the debate over animus doctrine ultimately implicates the debate over the judiciary’s role in enforcing constitutional rights at all, or at the very least, its enforcement of constitutional rights beyond their thinnest, most textually-incontestable versions. After all, a legal culture that often seems to equate “unconstitutional”

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197 Smith, supra. note [xxx]; see supra. Part [xxx].
198 See, e.g., Huq, supra. note [xxx] (identifying a turn toward requiring intent in equal protection, Free Exercise Clause, and Establishment Clause law); Elena Kagan, [article about intent and content-neutrality] (doing the same in Free Speech Clause law); Employment Div. v. Smith, [cite] (ruling that judicial review under the Free Exercise Clause is triggered only by laws that target religion).
199 See, e.g., Obergefell, 135 S.Ct. at [xxx] (explaining why it was unnecessary and inappropriate for the Court to wait and let political debate about same-sex marriage mature); [Masterpiece Cakeshop], [cite].
with “evil” or “benighted” almost necessarily “denigrates” those associated with conduct that a court—and especially the Court—determines to be unconstitutional. The heroic story we have told ourselves about the Constitution—a story of setbacks and advances, but ultimately a triumphant story of good eventually prevailing over evil—necessarily casts as villains the characters who have ended up on the short side of the Supreme Court vote: the slaveholders, the segregationists, the sexists, the sexual prudes—and now, the homophobes?

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

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201 To be sure, some villainous characters have taken the form of defenders of constitutional rights—in the classic telling, the Lochner-era defenders of a so-called liberty of contract who were, at, base, simply defending the right to exploit. But opponents of that right were ultimately able to cast themselves as the true defenders of constitutional rights, correctly understood. See, e.g., Rebecca Zietlow, Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights (2006) (explaining, in quasi-constitutional terms, the rights of labor unions to organize for better pay and working conditions, and for statutory protections). More recently, Lochner “revisionists” have sought—with some success—to flip the traditional script, and to cast defenders of economic rights as standing in similar, if not the exact same, shoes as the defenders of more traditionally-celebrated constitutional rights. See, e.g., David Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (2011).
202 See Obergefell, 135 S.Ct. at [xxx] (presenting, in very favorable lights, the stories of the plaintiffs in the litigation).
One way is to use doctrinal indirection. For example, had the Obergefell Court concluded that sexual orientation was a suspect classification, then classifications implicating that trait would be subject to more stringent proof requirements that the likely could not have satisfied in the case of marriage. But this effacing of the underlying normative judgment is only skin-deep. As Justice Scalia recognized (and protested) in Romer, a holding that sexual orientation discrimination requires more than the barest public justification “places the prestige of [the Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.”

But Romer did not even involve explicitly heightened scrutiny. Such heightened scrutiny would have made the normative argument against homophobia (and thus, presumably, homophobes) even clearer, given that traditional suspect class analysis inquires into concepts such as the general relevance of the classification trait and the group’s (unfair) political powerlessness. If such a trait was held to be generally irrelevant and a marker for an unfairly politically marginalized group, but yet was employed in a given law, it is hard to avoid the conclusion that the enactors of that law, such as the Coloradans who voted for Amendment 2, must simply have disliked that group, unless the majority was simply woefully uninformed (another form of denigration, to be sure).

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

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

204 See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review [cite] (1980) (conceding that the political powerlessness prong of suspect class analysis had to refer to powerlessness that was in some way “discreditable” or unwarranted); see also Bruce Ackerman, “Beyond Carolene Products, [cite] (making a similar argument, but as part of a critique of standard suspect class criteria).

205 See, e.g., Frontiero v. Richardson, [cite].
thinks strict scrutiny is required to justify the right’s denial to a precociously mature 14 year-old. If the right to marriage extends to same-sex couples because the right is fundamental, it must be because same-sex couples further the purposes of marriage. Of course, this is exactly what Justice Kennedy said in Obergefell. More importantly, it’s what he had to say, lest the fundamental nature of the right to marry therefore mean that it must be extended to children and to polyamorous groupings. As with the heightened equal protection scrutiny route, the due process fundamental rights route requires a validation of the claim that sexual orientation is a morally and practically neutral feature, either generally (in the case of a heightened scrutiny approach) or within the context of the right in question (in the case of a fundamental rights approach). Denying or opposing such rights thus becomes hard to express in terms that allow the opposition to escape taint. Notably, the dissenters in Obergefell declined to take up their cause.

Another approach is to emphasize the distinction between the public and the private realm. Under this approach, the Court purports to withhold judgments about the correctness vel non of moral qualms about homosexuality, and simply decrees, as a matter of jurisprudential housekeeping, that such qualms per se have no place in the public sphere. Thus, as Justice Kennedy concluded in both Lawrence and Obergefell, privately-held moral precepts about sexuality, marriage, and family simply have no place being enacted into law. 206 This approach has the benefit of rendering such qualms legally irrelevant, and thus obviating any need for courts to pass judgment on them. Indeed, it allows even more: as in Obergefell, it allows a court to pay homage to the sincerity and good-will with which those qualms are held and expressed, while nevertheless ruling them out of bounds.

206 See Lawrence, [cite]; Obergefell, 135 S.Ct. at [xxx].
This approach opens the door, if only a crack, to a thin understanding of rights such as the same-sex marriage right. Under this approach, moral disapproval of the right (or of the equality claim) is disallowed as a factor, and drops out of the analysis. This leaves the government to defend the rights deprivation or discrimination on utilitarian grounds—as some states did, unsuccessfully, in the run-up to Obergefell when they offered child welfare and so-called “accidental procreation” arguments as justifications for same-sex marriage bans. Under this approach, the culture-war issues such as same-sex marriage become straightforward questions of a challenged law’s fit with a utilitarian justification.

The problem is that the private realm is not so easily cabined. Florists, photographers, and bakers may all have private views about same-sex marriage, but when those views affect their conduct in the public sphere, their rights to private belief collide with governmental recognition and protection of the other side’s public conduct in the marketplace. This, of course, is where we find ourselves today. Whether the Court can find a satisfactory dividing line between the public and the private realms is a matter of much doubt.

V.

Conclusion: Animus and Its Discontents

[to be concluded]