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Abandoning Animus

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ABANDONING ANIMUS

Robert L. Tsai

Abstract

This Essay presents a preliminary set of arguments against the legal concept of animus grounded in actual practice. After considering the major reasons advanced in support of the animus approach as well as the main objections, I argue that the end of animus may come once we confront the limits of judicial capacity. First, judges have not been willing or able to resort to the animus rationale to call out bigotry where the evidence of hostility is robust. These failures suggest that projects founded upon judicial review to reduce hateful motivations may be overly optimistic. Second, on the occasions the Supreme Court has actually employed the anti-animus idea, it has done so haphazardly and problematically. Thus, the evidence of judicial use of the concept is not encouraging. Third, judges might not need the concept of animus to do the work of equality. Existing animus cases can be easily reimagined to emphasize the key principles and concerns of equality. Fourth, incentivizing litigants and policymakers to make animus-based arguments may distract from core considerations, including the nature of the social good at stake and the material effects of unequal policies. If some or all of these observations are correct, it may be time to abandon animus.

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ABANDONING ANIMUS

*Robert L. Tsai**

INTRODUCTION

The concept of animus—whether defined as “animosity,”¹ “disgust,”² or “a bare . . . desire to harm”³—offers a potent moral discourse. Employing language that centers equality as an organizing principle of utmost importance, fellow citizens can identify actions, policies, or individuals that have violated a community’s basic ideals.⁴ But if all egalitarian discourses are judgmental in some sense, the rhetoric of bigotry goes quite a bit further than other approaches: it marks violators for opprobrium, reformation, or ostracism if a change in attitude is not possible or refused.

A case for openly deploring bigotry can easily be made in the realm of democratic politics, where it may matter to a citizen’s vote to learn that a candidate supports forced births out of misogynistic beliefs or seeks to halt immigration from non-European countries because he thinks people from such places are subhuman.⁵ In the political domain, we are tolerant of the byproducts of a moral discourse that prioritizes the eradication of hatred, including the possibility of wrongly branding a person or group as bigoted or elevating one concern over all the rest during the charges and counter-charges that will surely ensue. We are more accepting of caustic exchanges in that domain, where ideologies and associations are openly contested and disparaged in order to promote robust debate and with the hope of identifying threats to fundamental

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1. *Romer v. Evans*, 517 U.S. 620, 634 (1996); see also *United States v. Windsor*, 570 U.S. 744, 775 (2013) (holding that the Defense of Marriage Act (DOMA) has no legitimate purpose except to “disparage and to injure”).

2. MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 15–16 (2010); William D Araiza, *Disgust and Guns: Conduct, Identity, and Second Amendment Animus*, 116 NW. U. L. REV. 1365, 1381–92 (2022).

3. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (quoting *id.*).

4. As Dale Carpenter notes, “Animus is inconsistent with the premises of a well-functioning representative democracy” Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 221.

5. In this respect, I differ from Steven Smith, who collapses both domains into a single one and treats political discourse as to bigotry and legal efforts to identify animus as part of the same “discourse of denigration.” Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 678 (2014). I do not think the search for animus is simply “name-calling” and “exaggeration.” *Id.*

values such as democracy, equality, or dignity.⁶ In the realm of science, too, it makes sense to give a wide berth to researchers so that we may continue to learn from them why both individual prejudice and the politics of hate persist despite inroads made in terms of improved economic status and political equality.⁷

But how much do we really need animus *as a legal concept* to do the work of equality in the courtroom? As Benjamin Cardozo once observed, “[T]he social value of a rule has become a test of growing power and importance.”⁸ In the spirit of testing the ongoing utility of the doctrine, this Essay will tentatively explore the possibility that the idea of animus has *less* social value than it is often given credit for, and that the law of equality can do an excellent job of remedying meaningful forms of inequality in other ways. If this is right, then perhaps we could learn to get along without it. Getting rid of the doctrinal construct, along with its associated rhetorical infrastructure, could even help judges focus on the things that matter most. And the things that matter the most are the tangible, material differences in social experience when the state treats some people favorably and other people less favorably. There is certainly a symbolic injury that comes from being treated differently, but taking offense alone generally cannot be sufficient, or else judges would be roving about vindicating complaints of dignitary harm in the absence of material deprivation.

A few words of clarification. By animus as a legal concept, I mean the method of resolving an equality dispute by inferring that a person (typically a state actor) has treated someone else differently because they were motivated by hatred or disgust. I want to distinguish “animus” as it has emerged haltingly in the case law from the differential treatment of someone out of “bias” (in the sense of partiality) or merely on the basis of a protected category such as race, religion, or sex/gender. According to these latter approaches, it is essential that someone is intentionally treated differently, but the notion that the person acted *out of bigotry* is not a necessary component of the claim. It is enough that someone had a duty to treat people with equal respect, and that a choice was made not to do so. Whether that decision was borne of evil thoughts, overlaps with troubling ideologies, or is a belief associated with disfavored communities would be largely irrelevant to the legal inquiry.

6. Of course, a wide-open free speech approach would work only if the amount of false speech does not overwhelm, confuse, or otherwise impair the capacity of ordinary citizens to discern what is true. See SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* (2014). The same would be true of the libertarian approach to free speech when it comes to so-called “hate speech”: the citizen would be no worse off in being able to discern the difference between racist and non-racist policies and behaviors, or the difference between pluralist and religion-dominated reasons.

7. Compare Willa Michener, *The Individual Psychology of Group Hate*, 10 J. HATE STUD. 15, 39 (2012) (arguing that human beings may have “a special propensity for learning hatreds from others”), with Robert Lanning, *Irrationalism: The Foundation of Hate Propaganda*, 10 J. HATE STUD. 49, 51 (2012) (treating hatred as a form of irrationalism and ideology that rejects a “scientific attitude”).

8. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 73 (1921).

Animus has emerged as a separate doctrinal construct, sometimes used alone and sometimes used in combination with other methods of dispute resolution. It is not compelled by the text of the Fourteenth Amendment or even originalist readings of history,⁹ but rather something that judges from time to time have found useful. The question for us, then, is whether the introduction of animus-based rhetoric continues to add any value to the work of promoting legal equality.

What follows is not a comprehensive takedown of the concept of animus,¹⁰ but rather an exploration of what we gain and what we lose by keeping it around for lawyers and judges to use and occasionally abuse. I make no case whatsoever for the elimination of animus-based inquiries in politics, philosophy, or the sciences, where very different considerations obtain.

But we are getting ahead of ourselves. I will first consider the arguments often presented to defend the concept of animus, suggesting that the very things that make animus formidable as an approach (principally its condemnatory dimension) also make it extremely hard to deploy in practice—especially within a legal system that is built upon pluralism, collaboration, and multiple layers of review. I will take judges as we generally find them: flawed human beings who come to their position from a variety of backgrounds and predispositions who act in good faith.¹¹ Taking judges as we find them also means that we have to be modest about their capabilities. These structural features of the adjudicative process, which will not be changing anytime soon, render jurisprudence as a practice unlike a faculty workshop of a leading sociology department. And if it is already hard enough to get people to agree on a concept of equality to govern us, how much more difficult is it when the more judgmental language of animus is a part of the equation?

Of course, we have certainly seen the animus approach deployed to help decide a handful of cases, from older controversies involving despised groups, such as Chinese migrants, to newer groups that have felt the sting of unequal

9. Of course, the historical record is replete with legislative concern about racial hostility against freedmen on the part of former slaveholding states and territorial communities. My point is simply that while inquiring into the existence of hostile motivations might be compatible with the record, there is also plenty of evidence that “equal protection of the laws” has a more formalistic meaning. *See* RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* (2021); KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877* (1st ed. 1988); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

10. If it turns out that the animus approach in its current form has outlived its usefulness, we would have to decide if it is possible to build it out and reduce its flaws or better to strike the notion of animus entirely from equal protection jurisprudence.

11. For instance, projects to educate jurists to reflect on their attitudes about the role of identity upon decision making may be laudable, but their efficacy is uncertain. Cultural projects of this sort, even when they do work, tend to take time.

laws, such as non-conformists and same-sex couples.¹² But I will try to show that animus was either not essential to these rulings or that, even if it were, the outcomes can rest comfortably on other grounds.

I. WHAT IF JUDGES REFUSE TO USE THE RATIONALE WHEN EVIDENCE OF BIGOTRY IS PLENTIFUL?

There are three reasons often given to justify a need for the concept of animus. First, it is said that judges have a moral–democratic role to play in helping ferret out illiberal or invidious beliefs that erode the polity’s commitments.¹³ Thus, judges should call out bigotry early and often. Second, it is urged that we should distinguish between harmful purposes and benign ones.¹⁴ Animus gives us one way to do just that. Third, even if we concede that animus has been deployed problematically in the past, nevertheless, the availability of an undertheorized concept may facilitate compromise.¹⁵ It may also generate egalitarian outcomes we would not otherwise have had.

On the other hand, in reply to the first defense of the animus approach, one might observe that judges do not play the same role in a democracy as other political actors. Their comparative advantage is they have a deep knowledge of the law, speak on behalf of legal norms, and husband their resources so they might intervene persuasively. When judges talk and fight like politicians or social activists, they could lose that edge and their claim to what makes their activity distinctive. Their utterances would then begin to lose the qualities we associate with law. Moreover, when judges sweep too broadly in their moral judgments, they start to encroach upon liberty: specifically, the right to live according to unauthorized values and engage in unorthodox practices. Even when those in power do not issue orders to try and shut down dissenting ways of life, overheated rhetoric by judges may still inspire others to do so privately.

In response to the second defense of the animus inquiry, one might say that it is possible to distinguish between helpful and harmful policies without resorting to the specific language of hostility. Intent and purpose would still matter, but subjective notions of hatred are unnecessary and perhaps distracting.¹⁶ If animus is to be a concept with social value as doctrine, it must be more than a cudgel judges wield against cultural dissenters or a device that merely disguises the exercise of brute power (say, five votes over four).

12. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Windsor*, 570 U.S. 744 (2013).

13. See Carpenter, *supra* note 4, at 185–86.

14. See *id.* at 186.

15. See *id.* at 234–35.

16. See, e.g., James E. Fleming, *The Unnecessary and Unfortunate Focus on “Animus,” “Bare Desire to Harm,” and “Bigotry” in Analyzing Opposition to Gay and Lesbian Rights*, 99 B.U. L. REV. 2671, 2674 (2019) (calling Justice Kennedy’s language “an unfortunate distraction”); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1359 (2018).

As to the third justification for animus, one might reply that the malleability of the approach produces a net negative social utility.¹⁷ If a judge gives reasons that are opaque or poorly sourced, then problems of notice and uniformity rear their heads. Interventions in politically controversial matters are already risky because judges have incomplete access to information and often overestimate their ability to control subsequent events.¹⁸ In clarifying legal limits, judges may generate a strong political rebuke that ends up shifting those limits and undermining judicial priorities. Overly judgmental rhetoric introduces an additional layer of unpredictability.

Without coming down firmly on any of these abstract positions, I am going to take the view that much depends on the actual evidence of judicial practice. Having turned the question from an idealistic assumption about what judges should do into an empirical one of judicial capability, I then draw some inferences from that record of judges deploying the concept, which bears on all three justifications for animus inquiry.¹⁹

Surely, a mark in the negative side of the ledger are the instances when animus is not presented as the basis for a decision but the entire world expects it to be. It is striking that judges have shied away from bigotry as a rationale in situations where evidence of racial or religious animosity is plentiful. We might call these “easy cases” from the standpoint of the quality or quantity of the evidence of animus in the record, even if the situations are complicated for other reasons—say, because government officials have asserted national security.

In *Korematsu v. United States*,²⁰ the Supreme Court upheld race-based exclusion orders aimed at people of Japanese ancestry and no other group of people with which the United States was at war. *Korematsu*’s explosive charge of anti-Asian bigotry prompted Justice Black to retreat to formalism: a cursory and somewhat defensive denial that racism has anything to do with the relocation of thousands of people with Japanese ancestry and a resolution of the dispute on the formal basis that *some* plausible national security interest was sufficient to uphold the military orders.²¹ “To cast this case into outlines of

17. See, e.g., Araiza, *supra* note 2, at 1381 (refusing to exclude the possibility that some regulations of guns may express animus).

18. See, e.g., Robert L. Tsai, After *McCleskey*, 96 SO. CAL. L. REV. (2023) (demonstrating how death penalty lawyers both used and subverted a precedent that made it exceedingly difficult to bring structural inequality claims against the criminal justice system).

19. Given constraints of time and space, I deal only with the well-known universe of animus cases that landed in the U.S. Supreme Court. To truly test these claims of judicial capability, one might aim to collect all of the disputes in the federal courts in which some litigant asserted that a law, policy, or prosecution might be put to one side simply because of expressed hostility on some ground.

20. *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). For a discussion of the Supreme Court’s apparent overturning of this case in *Trump v. Hawaii*, see Jack M. Balkin, *Korematsu as the Tribute That Vice Pays to Virtue*, 74 ARK. L. REV. 255 (2021); Darrell A.H. Miller, *Tainted Precedent*, 74 ARK. L. REV. 291 (2021); and Robert L. Tsai, *A Proper Burial*, 74 ARK. L. REV. 307 (2021).

21. *Korematsu*, 323 U.S. at 223.

racial prejudice . . . merely confuses the issue,” Justice Black insisted.²² “Korematsu was not excluded from the Military Area because of hostility to him or his race”; rather, he was excluded “because we are at war with the Japanese Empire.”²³ It was not altogether clear whether the Court rejected the evidence of racial hatred as *factually insufficient*, in the sense that Korematsu was not able to satisfy his burden of proof that hostility towards his race actually motivated his exclusion, or as *legally irrelevant* in the sense that the plausible assertion of national security can interrupt the ordinary operation of the animus doctrine even if some official was, in fact, clearly motivated by race. Both readings of Justice Black’s treatment of the animus point are possible.

Either way, Justice Black refused to grapple openly with the evidence of racial hostility;²⁴ we must consult the dissents to get a glimpse of this. As Justice Murphy pointed out, military officials considered all people with Japanese blood members of “an enemy race,” regardless of citizenship or length of residence, relying upon sociological evidence of relative assimilation and employing eugenic reasoning in lieu of actual evidence of disloyalty.²⁵ Two other factors strengthened Korematsu’s claim that racial antipathy played a role: a movement to expel people of Asian ancestry from the West Coast predated Japan’s attack on Pearl Harbor, and even in Hawaii where the attack occurred, mass roundups were not deemed necessary to protect national security.²⁶

Likewise, in *Trump v. Hawaii*,²⁷ the Supreme Court ignored ample evidence of President Trump’s personal animosity towards Muslim people and his repeated promises to impose “a Muslim ban” on entry into the country as a way of demonstrating that such people do not belong in America due to their lack of “assimilation” and belief in “sharia law.”²⁸ President Trump never once walked back his comments that Muslim people are dangerous or unwanted.²⁹ Unlike the exclusion orders in the internment cases, government lawyers were smart enough not to use religion explicitly but instead made policy based on

22. *Id.*

23. *Id.*

24. Which is not to say that he did not consider such evidence, but simply that it had no bearing on how he and others decided to justify their ruling.

25. *Korematsu*, 323 U.S. at 236–37 (Murphy, J., dissenting). By contrast, Justices Roberts and Jackson, who both dissented, avoided the explicit charge of bigotry. For Justice Roberts, it was enough that the federal government had convicted Korematsu “solely because of his ancestry, without evidence or inquiry” into any particular person’s loyalty or dangerousness. *Id.* at 226 (Roberts, J., dissenting). For Justice Jackson, it was important to draw a line between minor emergency measures based on race, like a curfew, and more sweeping programs for “deporting and detaining these citizens of Japanese extraction” for consequentialist reasons: fear of licensing further departs from constitutional principles. *Id.* at 245 (Jackson, J., dissenting).

26. See ROBERT L. TSAI, PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION 125–26 (2019).

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

28. *Id.* at 2436, 2438 (Sotomayor, J., dissenting).

29. See Jeremy Diamond, *Trump Says ‘There’s No Reason to Apologize’ for His Muslim Ban Call*, CNN (Apr. 30, 2018, 3:03 PM), <https://www.cnn.com/2018/04/30/politics/trump-immigration-laws/index.html>.

country of origin.³⁰ They hoped judges would revert to formalism and not ask why travelers from the countries deemed national security risks just happened to be 95–97% Muslim.³¹

In his 5–4 ruling for the majority, Chief Justice Roberts indeed refused to conduct “a searching inquiry into the persuasiveness of the President’s justifications.”³² He also sidestepped the evidence of a nefarious motive, simply by saying that “the issue . . . is not whether to denounce” these sentiments.³³ Without definitively saying one way or another whether the travel restriction was motivated by religious hostility, Chief Justice Roberts cast doubt upon some of the evidence (Trump’s campaign speeches were not close in time to the creation of the presidential order while the proclamation was facially neutral and applied only to a fraction of Muslim people around the world)³⁴ and ultimately concluded it was beside the point (the government could assert some “legitimate grounding in national security concerns, quite apart from any religious hostility”).³⁵

On the issue of animus, the opinion plainly obscures more than it instructs. Intriguing questions about the passage of time and the role of multiple succeeding orders were never answered to any degree of satisfaction.³⁶ The opinion offered little guidance for future allegations of improper motivation beyond the apparent resort to legal formalism when presidential action is involved. There is also no mention of the fact that some presidential aides involved in constructing the executive orders shared the President’s antipathy towards Muslim people and that they, along with the President, wanted to take political credit for fulfilling a campaign promise, even incompletely.³⁷

In dissent, Justice Sotomayor accused the majority of “blindly . . . sanction[ing] a discriminatory policy motivated by animosity toward a disfavored group.”³⁸ Among other things, she cited *Romer*³⁹ and *Cleburne*⁴⁰ for the principle of non-hostility.⁴¹ Justice Sotomayor also alleged inconsistency, noting that the majority found animus against a Christian baker in *Masterpiece* but “completely set[] aside the President’s charged statements about Muslims as irrelevant.”⁴²

30. See Exec. Order No. 13,769, 3 C.F.R. 272 (2018).

31. See TSAI, *supra* note 26, at 1–4, 73–78.

32. *Trump*, 138 S. Ct. at 2409.

33. *Id.* at 2418.

34. *Id.* at 2417–18.

35. *Id.* at 2421.

36. See W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1193 (2022) (observing that “the Supreme Court’s answer resembles a shrug”).

37. See generally Brief for Respondents at 7–9, *Trump*, 138 S. Ct. 2392 (No. 17-965).

38. *Trump*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

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

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

41. *Trump*, 138 S. Ct. at 2441–42 (Sotomayor, J., dissenting).

42. *Id.* at 2447.

But her animus-based analysis was apparently too strident for her colleagues, most of whom chose not to join her (only Justice Ginsburg did). Instead, Justices Breyer and Kagan preferred to say tentatively that there was enough evidence of “antireligious bias” in the record to justify further litigation.⁴³ And Justice Kennedy, usually an enthusiastic proponent of animus analysis, instead wrote to “join the Court’s opinion in full.”⁴⁴ He cited *Romer* for the proposition that the animus principle encompasses “animosity to . . . religion” and tepidly invited a deferential search for animus on remand.⁴⁵ No one else joined his statement. At this point, we can only speculate as to why his concurring opinion was displeasing to all, but perhaps it was because he also noted that “[t]here are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention.”⁴⁶ This curious statement seemed to separate any kind of legal consequence from the rhetorical benefit of the animus concept, approving the ban but reminding government officials of the oath they take to uphold the Constitution even when judges do nothing.⁴⁷ This would seem deeply unsatisfying to any Justice—liberal or conservative—who might wish to deploy animus in future cases.

What are we to make of these two resolutions? There may be answers beyond the possibility that everyone involved in the case are bigots. One explanation arises from the very nature of judicial authority. Because judicial power exists only to the extent it can persuade others, decision makers’ own perceptions about how certain rationales might be received naturally influences the choice of rationales they settle upon. Some judges might avoid the animus rationale out of fear it may be especially antagonizing or cast aspersions on elected officials or their supporters. They may worry that others will resist their interpretations rather than internalize them. Such concerns would not be about individual reputations but about the efficacy of their pronouncements.

Two other explanations concern the operation of a court as an institution. Within a multimember body, morally judgmental rationales can fracture an existing alliance or stymie efforts to build consensus. One does not have to go quite as far as Justice Scalia to acknowledge that insult and resentment can block productive outcomes.⁴⁸ And if jurists will gravitate towards other modes when they could call out bigotry, that is some evidence that it can be hard to do so under the best of circumstances.

A third reason for hesitation may be that some judges themselves feel they are not especially good at ferreting out subjective motivations or ascertaining

43. *Id.* at 2433 (Breyer, J., dissenting).

44. *Id.* at 2423 (Kennedy, J., concurring).

45. *Id.* at 2423–24.

46. *Id.* at 2424.

47. *Id.*

48. See Autumn Fox & Stephen R. McAllister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia*, 19 CAMPBELL L. REV. 223, 223 (1997).

when an action objectively communicates a stigmatizing message. According to defenders of animus doctrine, judges must accurately discern not only the difference between generic moral disapproval and unconstitutional disgust but also between different kinds of disgust reactions based on subject matter, sourcing, and message.⁴⁹

Outrage is a clue something might be off, that injustice may be afoot, but it is also possible to have visceral reactions to all manner of policies with which we disagree. For that reason, it is an uncertain basis for actually resolving claims of injustice. Despite confident pronouncements about sociological jurisprudence in the heyday of legal realism,⁵⁰ judges have in fact shown themselves to be rather poor students of other disciplines. Whether it is economics, history, literature, or sociology, judges have not shown interest or diligence in absorbing other disciplines and consistently applying them.⁵¹ Rather, they selectively use such methods when it suits them, and when they do so, it is rarely up to the standards demanded by true experts.⁵²

An invitation to ruminate on the subjective motivations of state actors in politically charged cases might very well lead judges instead to throw up their hands and double down on other methods, as in *Trump v. Hawaii*, or to issue somewhat unbelievable denials of racism, as in *Korematsu*. Of course, neither of these reactions ameliorates material inequality or characterizes the stakes in their most meaningful form. For instance, lost amid the charges of racial animosity or Judeo-Christian supremacy and the vociferous denials of bigotry are the harms of suddenly disrupted lives: loss of educational and economic opportunities, foreclosed homes and businesses, and psychological damage to a community that must live in a state of legal limbo.

Just as important, the kind of responses given in these two cases undermine another rationale sometimes offered in defense of vague norms or legal standards, i.e., that they encourage democratic participation and deliberation. Seana Shiffrin, for instance, has championed the “haziness” of standards for “stimulat[ing] moral thinking and dialogue” when used in the right circumstances.⁵³

49. Araiza, *supra* note 2, at 1388.

50. See, for example, CARDOZO, *supra* note 8, at 65–66, who declared, “From history and philosophy and custom, we pass, therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology.”

51. See THE ROLE OF ECONOMIC ANALYSIS IN JUDICIAL DECISIONS, NOTE BY THE UNITED STATES ¶¶ 9–12 (2008), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oced-and-other-international-competition-fora/economicanalysis.pdf>.

52. See *History, the Supreme Court, and Dobbs v. Jackson: Joint Statement from the AHA and the OAH* (July 2022), AM. HIST. ASS'N (July 2022), [https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-\(july-2022\)](https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022)).

53. Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1216 (2010). Shiffrin’s fascinating thesis is most persuasive in helping us understand why clear rules are chosen over standards, i.e., when it is difficult in advance to predict how citizens might react and manifest injustice could arise when people react poorly to legal standards.

Yet, whether a fuzzy legal solution would foster more conversation is ultimately an empirical question.⁵⁴ Some amount of democratic debate naturally follows judicial rulings on important matters, even more so if a dramatic step is taken (e.g., establishing a new right or taking one away, establishing a different approach). How would we know whether you get more robust deliberation following judicial usage of an opaque modality and less when the rationale is more transparent? Furthermore, we ought to care about the quality of the interaction that follows. Are citizens engaging substantively with the tough values choices that are involved? Are citizens not just better informed but also better equipped to reason together collectively toward better resolutions in the future?

If the goal is for judges to empower the citizenry to reflect more deeply on moral–legal questions, then judges might have to watch what they say.⁵⁵ Not only should they sometimes avoid language that increases acrimony and the closing of ears, but they might choose to emphasize rationales and contexts that invite people to step out of their ideological silos. Consider, in this regard, how much more helpful to later justice-based movements it would have been for dissenters to focus on the material deprivations suffered by people of Japanese ancestry or Muslim people at the hands of government officials, cataloging them for the world to see.

Of course, we need more than a handful of disputes to reach firm conclusions about the system-wide effects of the animus approach. And yet a nagging question emerges: if it is already hard enough to get judges of different philosophical orientations to agree to a meaningful concept of equality, and adding animus to the mix makes it that much harder, why do it all?

II. WHAT IF JUDGES ARE MERELY EXPLOITING AN UNDERTHEORIZED CONCEPT?

If it is true that jurists do not need animus in the vast majority of equality disputes before them and will not even use the concept in situations where there is ample evidence of bigotry, then any social gains from the concept comes in the occasional hard cases—a smaller subset of the controversies that come before judges. These controversies are hard for any number of reasons: the legal provisions involved may be open-ended, the historical evidence favoring this or that interpretation is equivocal, the issues might be politically salient for one political party or another, or the outcome could effect a shift in relative power between different parts of government.

54. Andrew Hayashi has also deemed the courts' use of the animus rationale to decide cases "murky," separating difficulties into three categories: definitional, evidentiary, and doctrinal. Andrew T. Hayashi, *The Law and Economics of Animus*, 89 U. CHI. L. REV. 581, 627 (2022).

55. See Robert L. Tsai & Mary Ziegler, *Abortion Politics and Movement Jurists* (unpublished manuscript) (draft on file with authors).

Any social utility gained from the search for hostility in this small group of disputes must also be measured against losses from any counterproductive effects that can be attributed to the construct. The principal virtues of this outrage-oriented discourse, as established earlier, is to identify actions, practices, and people who act beyond the pale.⁵⁶ Negative effects would include any evidence that the approach interferes with sound judicial decisions or stymies productive political engagement with the principles at stake.

A justification often offered in animus's favor is instrumental and internally focused: the concept might be able to operate as a compromise rationale that can facilitate the resolution of controversial moral disputes without having to decide more intractable questions.⁵⁷ For instance, Cass Sunstein has defended *Romer v. Evans*,⁵⁸ precisely on these grounds,⁵⁹ even though that ruling invalidated a direct democracy measure approved by Colorado voters.⁶⁰ He claimed that striking down a state constitutional amendment that forbade rights based on sexual orientation due to animus was a minimalist ruling at the time. The Supreme Court was not prepared to overrule precedent,⁶¹ much less subject such a law to heightened scrutiny.⁶² While some had been gravitating toward treating sexual orientation like gender, nowhere close to a consensus had yet formed.

In such an environment, as between *Option A*—a formalistic application of constitutional rules to affirm a law that harms so many people simply because of who they are—and *Option B*—novel use of a somewhat undertheorized concept—it is easy to see why the latter might be tempting to a decision maker who is interested in expanding rights. Perhaps, too, *pace* Shiffrin, opacity in this context encouraged some amount of deliberation outside of the courts as to the moral worth of gay and lesbian people.⁶³

Still, we should acknowledge criticisms of this sort of justification for animus. It prizes the short-run interest in ending a specific dispute over laying down generalizable principles or even building out an existing concept so as to

56. See *supra* notes 1–4 and accompanying text.

57. William Araiza defends a kind of grab-bag approach to equal protection claims. William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 196–97 (2019).

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

59. Cass R. Sunstein, Foreword, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 62–63 (1996).

60. *Romer*, 517 U.S. 623–24.

61. At the time, *Bowers v. Hardwick*, which found no constitutional right to engage in same-sex intimacy, presented an obstacle to more expansive understandings of the rights of sexual minorities. 478 U.S. 186, 189 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

62. Sunstein, *supra* note 59. Sunstein says that like *Moreno* and *Cleburne*, *Romer* exhibits “decisional minimalism” in that it does not formally subject sexual orientation to a new tier of scrutiny. See *id.* at 63. At the same time, he detects something different going on: a new judgment, however incomplete, that a measure treating gay people differently “is likely to reflect sharp ‘we-they’ distinctions and irrational hatred and fear, directed at who they are as much as what they do.” *Id.* at 62.

63. As Shiffrin has put it, “The uncertainty that standards introduce may spark deliberation and conversation on the ground, redounding to the moral health of both citizens and a democratic polity.” Shiffrin, *supra* note 53, at 1240.

render it more predictably useful. It is possible, of course, that resolutions with fairly clipped analysis can momentarily reduce harms to an aggrieved party with which judges feel some measure of sympathy.⁶⁴ At the same time, we must acknowledge the risk that garbled rationales fused to inflammatory rhetoric will merely encourage opponents of expanded rights to dig in further.

Katie Eyer offers an intriguing externally focused observation.⁶⁵ She contends that if the goal is to empower social movements, the availability of multiple methodologies under the umbrella of rational basis review may be a boon for constitutional litigators at different moments in the life cycle of a social movement.⁶⁶ This is indeed a deliberative rationale. On the other hand, it is not obvious that making animus arguments legally irrelevant in the courtroom will hamper activists' ability to make those types of arguments in the political domain. And the empowerment of activists is just one potential judicial priority.

An occasional one-off that is fuzzy will not shake the legal order to its foundations, but consider the possibility that we end up with a series of animus-based rulings, back and forth, that are morally judgmental in tone but also poorly reasoned or weakly sourced. Recognizing this, William Araiza has advocated treating animus as the "modern instantiation of the Fourteenth Amendment's anti-class legislation idea."⁶⁷ But he would also want the rationale to reach anything that amounts to "socially subordinating discrimination."⁶⁸ Similarly, Dale Carpenter has proposed moving to an objective standard: there would be a constitutional violation anytime animus is said to be a "material influence" in a decision, relying on a five-factor "totality of the evidence" test.⁶⁹

We could certainly try to save animus by making the doctrine more complex as a multi-purpose implement. At the same time, a more sophisticated approach might be counterproductive if our goal is to enhance public deliberation, for increased opacity would render the concept easier for elites to manipulate but harder for regular people to understand or even formulate coherent feelings about.

64. I have even defended such resolutions when gridlock occurs, and it can be said that egalitarian principles are, in some meaningful way, extended by such creative, alternative solutions. *See* TSAI, *supra* note 26.

65. Katie Eyer reminds us that there is some value in maintaining "an array of plausible arguments" for those who represent disfavored groups. Eyer, *supra* note 16, at 1368.

66. *Id.* at 1368–69.

67. Araiza, *supra* note 57, at 199. Insofar as Araiza says that animus is doing some of the work that the concept of arbitrariness already does, the approach is duplicative and possibly unneeded.

68. *Id.* at 206. Araiza is doubtful "whether it is possible to find a doctrinal vocabulary that allows for advances in human freedom without necessarily casting aspersions on those who stand in the way." *Id.* at 211. We part ways on this point, even though we agree that the availability of an array of approaches can be useful for the project of freedom. To suggest that all legal language is equally judgmental, as Araiza does, is to deny the possibility of decisional and rhetorical nuance, or else that judges should simply ignore their connections to others within the political community.

69. Carpenter, *supra* note 4, at 245–46.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,⁷⁰ for instance, Justice Kennedy found that religious animus infected the decision by the Colorado Civil Rights Commission to punish a Christian baker for refusing to make a cake for a same-sex wedding.⁷¹ For that reason, the baker was excused from the obligation to comply with state public accommodations laws that required equal respect regardless of sexual orientation.⁷²

Delving into the discussions of the civil rights commission, Justice Kennedy found the language used by one member of the seven-member commission not merely hyperbolic or offensive, but proof of hatred of Christians.⁷³ That person called religion “one of the most despicable pieces of rhetoric that people can use . . . to hurt others” and likened it to religious defenses of slavery.⁷⁴ Justice Kennedy also treated the fact that the commission had allowed some religious business owners exceptions, but not this particular baker, as additional proof of animus rather than evidence that undercuts any general hostility against religion.⁷⁵ It certainly was not the “stark” pattern demanded before evidence of a neutral law’s enforcement could give rise to an inference of racial animus in other situations.⁷⁶ To say that the Court stretched the record to infer hostility against devout Christians on the part of the commission is an understatement—certainly when compared to other situations when the Court has refused to call out apparent bigotry.

What is more, animus arguably played a different role in the litigation than in the past. First, unlike earlier controversies which involved only a credible allegation of a nefarious motivation on the part of a state actor, charges of bigotry were now flung in both directions. The same-sex couple refused service felt that the business owner was a religious bigot.⁷⁷ In turn, the baker claimed that state actors enforcing the law acted out of hostility to his religious beliefs.⁷⁸

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

71. *Id.* at 1732.

72. *Id.*

73. *Id.* at 1729–30.

74. *Id.* at 1729. “It cannot be constitutionally prohibited animus for public officials to observe that religious believers have made discriminatory claims in the past and that contemporary justifications for violating civil rights might take similar form . . .” Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 142 (2018).

75. Justice Gorsuch, in his concurrence, goes on at length about how the commission’s handling of different requests for a religious exemption reflects inconsistency. *See Masterpiece Cakeshop*, 138 S. Ct. at 1736–40 (Gorsuch, J., concurring). While evidence of inconsistency is not necessarily proof of hostility, he is right that if we required a strictly neutral principle for treating religious exemptions differently, then there might not be a meaningful difference to draw between cakes with words and cakes without words. Note that this reason for invalidating the enforcement action against this baker would not rest on animus (Justice Gorsuch himself still joined Justice Kennedy’s opinion “in full,” as did Justice Alito). *Id.* at 1734.

76. *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987); *see also, e.g., United States v. Armstrong*, 517 U.S. 456, 468 (1996); *Gomillion v. Lightfoot*, 364 U.S. 339, 341–42 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

77. *See Masterpiece Cakeshop*, 138 S. Ct. at 1725.

78. *Id.* at 1730.

Second, there were tricky tensions between the egalitarian logic of antidiscrimination law intended to aid disfavored minorities and the logic of religious liberty, which can be utilized by powerful majorities and economic interests. Third, the allegations of religious bigotry were leveled at one set of actors in a complex enforcement system. As Justice Ginsburg observed in her dissent, in seizing upon a few remarks by commission members, the majority glides over the fact that enforcement of the antidiscrimination law was the product of many motivations: Before the commission acted, someone had to find probable cause that the law had been violated and an administrative law judge also heard the case.⁷⁹ After the commission's deliberations, the case was reviewed by the Colorado Court of Appeals⁸⁰—presumably without any hint of religious hostility.

Although the Court might have clarified how competing allegations of illicit motivations might matter in a complex setting, the opinion did none of these things. At the same time, Justice Kennedy's opinion gestured toward another animus-based pitfall, not even presented in the case itself, by asserting in dicta that private signage declaring a business's religious reasons for refusing to provide goods or services for gay marriages “would impose a serious stigma on gay persons.”⁸¹

Let us think about this for a moment. It is true that such signage would persuade some consumers to spend their money elsewhere, either outraged on their own behalf or in solidarity with those excluded. And yet permitting (or requiring) overt articulations of policy would encourage principled acts of conscience and reduce the possibility of confusion with prospective customers, while giving detractors a clear target at which to mobilize political outrage over perceived prejudice.⁸² In other words, such an approach (whether required or merely encouraged) would also foster political deliberation. But Justice Kennedy's position would ironically insist upon less transparency for the sake of avoiding seemingly animus-laden messages even when there may be a non-discriminatory motivation and neutral justification for such a course of action. Once again, it is not apparent what social goals animus doctrine is seeking to fulfill.

Ultimately, *Masterpiece Cakeshop* throws the door open to animus-based legal challenges by religious believers who object to egalitarian norms. If a despicable motivation is identified somewhere during debate over a law's creation or its enforcement, judicial action may disrupt the normal operation of the law and possibly undermine its policy objectives. The decision repeats the evidentiary

79. *Id.* at 1751 (Ginsburg, J., dissenting).

80. *Id.*

81. *Id.* at 1729 (majority opinion).

82. Justice Kennedy may have had in his mind images of “Whites only” signs in businesses during Jim Crow. But if he genuinely believed that religious beliefs rendered analogies between race and sexual orientation inapt, then it is at least possible that such signs would be on different footing.

mistake in *Moreno*, where stray remarks in the legislative record were exploited by the Justices to declare a law motivated by “a bare congressional desire” to disadvantage hippies.⁸³

This underscores another facet of the juridical search for illicit motivations as sufficient proof of inequality, one whose effects are not limited to race or religion. To see the problem, consider that once policy is made, it is best understood as not only inevitably disadvantaging *someone*, but also as the product of many motivations.⁸⁴ To permit the unraveling of such a policy simply because a handful of participants in the debate harbored illiberal beliefs arguably mischaracterizes the true nature of a law or policy.

Lost among the competing allegations of religious hatred, however, were the possible consequences of businesses who refuse service to customers for one or another religious or conscience-based reason. If a significant number of producers or sellers refuse to engage in economic transactions for such reasons, replacement costs for goods and services go up.⁸⁵ At the same time, there is a very real question about the proper role of faith in the marketplace. In the end, all we got was a nod to the idea that religious believers need not shed their values when they enter the workforce, rather than a framework that can help resolve future conflicts involving religion, equality, and commerce. If this represents the future of animus doctrine, it is not one that inspires confidence that these sensitive matters will be handled with care and foresight.

III. WHAT IF JUDGES DO NOT NEED ANIMUS TO PROMOTE EQUALITY?

In one of the oldest cases that called out local officials for racial bigotry and xenophobia, the Supreme Court held that the enforcement of a race-neutral ordinance almost exclusively against Chinese laundromat operators violated the Equal Protection Clause.⁸⁶ Justice Matthews’s opinion in *Yick Wo v. Hopkins* found that municipal officials in San Francisco had applied the ordinance “with an evil eye and an unequal hand,” taking advantage of a law that afforded “unusual discretion” to reject business permits to Chinese applicants.⁸⁷ Berating city officials for their unexplained pattern of behavior, the Court declared their true motivation for this pattern of unequal enforcement to be “hostility to the race and nationality to which the petitioners belong.”⁸⁸ While the law itself was

83. U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973). The federal statute itself, which restricted access to benefits based on cohabitation rules, plainly applied to more than just hippies or people who lived in communes and did not even use such terms. *Id.* at 529–30.

84. For a general discussion of the problem, see Mark Tushnet, *A Government of Laws That Is a Government of Men and Women*, 74 ARK. L. REV. 323 (2021).

85. JOHN LYNHAM, PRINCIPLES OF MICROECONOMICS – HAWAII EDITION § 8.3 (2018).

86. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

87. *Id.* at 366, 373–74.

88. *Id.* at 374.

fishy, the Court showed appropriate restraint in not striking it down merely on the belief that racial hatred lurked behind it; rather, the Justices relied on evidence of race-based enforcement to brush back city officials.

An economic downturn had exacerbated economic and cultural tensions, turning many citizens against America's latest immigrants.⁸⁹ For these reasons, something could be said about a judicial statement acknowledging that historical fact. We should not, however, romanticize or overestimate the ability of judges to shape debate. Battles over political belonging are complex, and the typical legal dispute has only a small prospect of influencing the ebb and flow of such conversations. In fact, despite *Yick Wo's* resounding denunciation of racial hostility and xenophobia, soon thereafter, some towns, one after another, began expelling Chinese residents.⁹⁰ Whether such judicial rebukes were rhetorically beneficial to allies of these embattled migrants or seen by populist movements as more evidence of out-of-touch elites would tell us whether that aspect of the Justices' intervention was socially useful in their own time.⁹¹

Certainly left unsaid was the difficulty of discerning when vigorous policy disagreements that affect a subset of the community ripen into cognizable hatred for purposes of Fourteenth Amendment claims. Moreover, what exactly is animus? Is it about an unconstitutional motivation or a problematic message sent to the world about unequal status? If it is about motivation, then we are in the realm of trying to discern subjective bad thoughts from good ones, with all of the evidentiary complications that such inquiries pose. If animus is mostly about the symbolism inherent in an action or policy, then we have a very different kind of question, albeit a more objective one: Is it a sociological inquiry into how citizens perceive actions taken by people in power?

These are all questions concerning how to operationalize the concept of animus, or what we might describe as second-order questions related to enforcement. But for now, I want to draw attention to something else entirely: alternative rationales embedded in the analysis itself. Notice that while *Yick Wo* certainly mentioned status-based hostility, by no means was that statement indispensable to the outcome. First, as Justice Matthews notes right off the bat, there existed a valid "most favored nation" treaty between China and the United States.⁹² That treaty ensured that "the Government of the United States will exert all its power to . . . secure to [the Chinese] the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects" of

89. See BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* 34–36 (2018).

90. See *id.* at 214–31; ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 228–37 (2003).

91. See Robert L. Tsai, *Racial Purges*, 118 MICH. L. REV. 1127, 1135–37 (2020) (book review).

92. *Yick Wo*, 118 U.S. at 369.

the United States.⁹³ Because treaties are part of federal law,⁹⁴ and this particular treaty imposed a specific duty to protect “Chinese laborers, or Chinese of any other class” when they “meet with ill treatment at the hands of any other persons,”⁹⁵ the federal courts could have intervened merely on the ground that they are enforcing treaty obligations.⁹⁶

Second, there was a vital property interest involved in the dispute, namely that of the business owner whose ability to continue to pursue his trade and feed his family had been infringed.⁹⁷ Such an interest is protected by the plain language of the Fourteenth Amendment. In fact, Justice Matthews noted that even municipal laws may not infringe upon “the liberty of the subject, or the rights of private property.”⁹⁸ He then cited to an Ohio case in which a city ordinance was set aside for being “passed in bad faith” or “fixing an unreasonable price” to be charged for gas.⁹⁹ A second precedent cited by Justice Matthews came from Maryland, where “partiality and oppression” from enforcement of a permit condition involving a steam engine was judicially enjoined for “bring[ing] ruin to the business of those against whom they are directed.”¹⁰⁰

Third, while the Court had already noted the strange quality of the ordinance under challenge, which distinguished between laundromats in buildings made of brick and those made of wood, it was the actual exercise of discretion against the Chinese that provided decisive proof of the city’s intent to treat them unfavorably as a group.¹⁰¹ In other words, the decision could stand for the proposition that once there is proof of a strong and suspicious pattern of enforcement, the failure of the government to offer a plausible explanation is the end of the matter.

To sum up, any of these rationales would have provided a sound justification for setting aside the city’s systematic denial of business permits to Chinese people. We would have the same outcome if animus played no role whatsoever. If *Yick Wo* were remembered as a treaty case, then it enforced an agreement that promised treatment of rights “equally with those of the

93. Treaty Regulating Immigration from China, China-U.S., art. III, Nov. 17, 1880, 22 Stat. 826.

94. See U.S. CONST. art. VI, cl. 2.

95. *Yick Wo*, 118 U.S. at 368.

96. Indeed, Jack Chin has shown that before *Brown v. Board of Education*, 347 U.S. 483 (1954), *Yick Wo* was most often invoked by judges as a treaty case or a property rights case. Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359, 1376–85. Chin has cautioned that the decision was not, for most of its history, treated as stating that race generally limited criminal enforcement decisions. *Id.* at 1376. My analysis would not require that judges going forward hew to any of this parsimonious history.

97. *Yick Wo*, 118 U.S. at 368.

98. *Id.* at 371.

99. *Id.*

100. *Id.* at 373.

101. *Id.* at 374.

strangers and aliens” among us.¹⁰² If, instead, the case was remembered for vindicating the property rights of even non-citizens against arbitrary or biased enforcement policies, it would go a long way in attracting broader support and usage as precedent. Finally, *Yick Wo* could be understood primarily for giving valuable answers about second-order questions such as the kind of proof that is acceptable to establish intent (statistical evidence of enforcement may be sufficient) or when an inference of intentional use of a disfavored criteria to harm someone may be drawn in the absence of a valid explanation (prima facie case of an equality violation). If any of these options were the proper understanding of *Yick Wo*, it need not be about animus at all.

Romer, too, could not merely survive but positively flourish without its dependence on the animus rationale. There, the Court struck down a ballot initiative approved by voters to amend the state constitution to deprive Colorado residents of legal protections based on sexual orientation.¹⁰³ But according to Justice Kennedy, this act of direct democracy was “born of animosity toward the class of persons affected.”¹⁰⁴

Justice Kennedy’s inference that hatred motivated Amendment 2’s supporters came entirely from the projected consequences of the law. Yet the effects were more complicated than what he portrayed. Amendment 2 did not deny the law’s protection to anyone who identified on the basis of sexual orientation.¹⁰⁵ The law almost certainly nullified existing state and local antidiscrimination laws that included sexual orientation, but according to plausible majoritarian accounts of democracy, Amendment 2 was a legitimate superior democratic action to defeat local laws (and therefore entirely fair game within our system). Its anticipated effects on state court jurisprudence were somewhat less certain, and the measure would have no effect at all on what protections, if any, federal courts or Congress decided to extend on the basis of sexual orientation. So, Amendment 2 did not completely “deem a class of persons a stranger to its laws.”¹⁰⁶

Whatever the full effects of the measure would have been, the animus rationale utilized to repudiate the people’s decision opened the door to angry retorts by Justice Scalia and others that the Court was “verbally disparaging as bigotry adherence to traditional attitudes” and “tak[ing] sides in this culture war” rather than interpreting the Constitution in good faith.¹⁰⁷

Could *Romer* stand on some ground other than a finding that the measure approved directly by voters expressed hatred toward sexual minorities? Absolutely. First, the Court could now answer the question bypassed back then,

102. *Id.* at 369.

103. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

104. *Id.* at 634.

105. *Id.* at 627.

106. *Id.* at 635.

107. *Id.* at 652 (Scalia, J., dissenting).

and indeed, tabled for decades: Is sexual orientation sufficiently like sex or gender and thus deserving of similar scrutiny? If the answer were yes, that alone would offer more lasting protection to sexual minorities by requiring states to give better explanations for treating people unequally.

Second, *Romer* could stand for the proposition that efforts to distort the ordinary operation of the political process pose grave problems for democracy. The unusual measure, which singled out sexual orientation for a wide array of legal consequences, did not merely repeal existing antidiscrimination laws but entrenched that group-based restriction in the state constitution. That step seemed to stymie future political activism by sexual minorities to protect themselves.¹⁰⁸ No state actor, down to municipalities and school districts, could “enact, adopt or enforce” any policy or “claim of discrimination.”¹⁰⁹

Imagine, for a moment, an identical measure that elaborately prevented the recognition or enforcement of even the smallest policy or legal claim on the basis of race or religion. It would surely not be permitted to stand—not because race and sexual orientation are necessarily equivalent, but because such a sweeping obstruction of the possible fruits of political and legal advocacy would be intolerable. Indeed, this was the reason the Colorado Supreme Court gave for striking the provision down,¹¹⁰ but Justice Kennedy’s opinion completely ignored this rationale on its way to animus.

Given the polarized nature of the electorate and the clever ways that political parties try to entrench power unfairly, either re-reading of *Romer* would put that decision on more stable footing and offer better democracy-enhancing principles for the future. As we shall see in a moment, that perspective on the ruling could also connect the importance of political agency to economic status and power—something missing in the Court’s narrow obsession with trying to eradicate hateful sentiment.¹¹¹

108. Even John Hart Ely, who believed that judicial review existed in tension with deliberative democracy, felt that distortions of the political process justified judicial intervention. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

109. *Romer*, 517 U.S. at 624 (citing COLO. CONST. art. II, § 30b).

110. *Evans v. Romer*, 882 P.2d 1335, 1342–49 (Colo. 1994), *aff’d*, 517 U.S. 620 (1996).

111. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court similarly called into question laws that exhibit “even slight suspicion” of “animosity to religion or distrust of its practices.” 508 U.S. 520, 547 (1993). But that was an unnecessary part of the analysis, for the law there plainly singled out sacrificial practices and was not religion neutral. *Id.* at 540–42. Justice Scalia did not join that aspect of the opinion, finding that consideration of “the subjective motivation of the lawmakers” not only “virtually impossible” but also generally irrelevant. *Id.* at 558 (Scalia, J., concurring) (emphasis omitted). As he points out, it should not matter “that a legislature consists entirely of the pure-hearted, if the law it enacts . . . singles out a religious practice for special burdens.” *Id.* at 559.

IV. WHAT IF ANIMUS DISTRACTS FROM MORE IMPORTANT CONCERNS?

While the feeling that hate underlies everyday inequality seems to line up with intuitions, intuition can be wrong. For many questions of law, motivation simply does not matter. Take criminal law, for instance, where unless a statute provides otherwise, one's subjective reasons for pursuing a course of action are irrelevant to whether a law has been broken.¹¹² A person might be motivated by a laudable goal to break into a store, such as a desire to feed the homeless, but what is actually legally salient is whether the individual intended to enter someone else's place and, without permission, make off with property that does not belong to them. Motivation might be relevant to an appropriate sentence but not relevant to whether a person is legally responsible.¹¹³ A lawyer's presentations and a jury's instructions during the trial must be organized around the insight that evidence of motivation distracts from the main issues at hand.

If an inquiry into illiberal motivations is unnecessary and potentially unproductive, then which considerations should be centered instead? The goal is not a singular answer but better focus.

In a legal world without animus, we might spend most of our time discussing the *telos* of the social good as to which a complainant has been denied. In a well-ordered society, every object, including every political institution or individual right, has a purpose or function. Without rummaging the record in search of bigoted thoughts or speculating about the communicative message of a policy, we can cut to the chase and have a serious conversation about the nature and importance of the social good at stake.¹¹⁴

We would ask: what is the nature and social value of the ability to migrate or visit another country in the age of terror, live free from arbitrary constraint during a time of war, marry who you love, make choices as to when to beget children, or work productively?

Doing so would also train attention on whether access should be extended in the manner that a litigant demands. Would doing so fulfill that function, be merely compatible with it, or destroy it?¹¹⁵ If opening up access risks altering an institution or undermining it in a major way, can egalitarian concerns be accommodated in some other fashion?

112. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 88 (2d ed. 1960); CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* 22 (Richard Bellamy ed., Richard Davies & Virginia Cox trans., 1995).

113. See Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 90 (2006).

114. We would then have to decide whether the nature of the social good at stake should be evaluated largely as a moral-philosophical question, as some have advocated, or whether it ought to be done in a more deferential and historically contextualized fashion, which I have proposed elsewhere. But what it surely does not involve is simply jerry-rigging a bunch of cases together.

115. See *Eisenstadt v. Baird*, 405 U.S. 438, 447-49 (1972).

This, in fact, was the approach in any number of landmark cases vindicating the principle of equality, from *Strauder v. West Virginia*¹¹⁶ (jury service) to *Brown v. Board of Education*¹¹⁷ (public education). Neither case turned on a finding of racial animosity. Even the anti-miscegenation case, *Loving v. Virginia*,¹¹⁸ which concluded that the state's goal was to maintain "white supremacy," initially confirmed the value of marriage as a "fundamental right" before concluding that barring access to that institution in the name of preserving only white bloodlines from being diluted could not be justified.¹¹⁹ Racial hatred as such was not the rationale in *Loving*, any more than it was in *Strauder* or *Brown*.

Here, we might learn an important lesson from the sex equality cases, which are not consumed by the search for misogyny lurking behind a law. Instead, they ask whether sex or gender is intentionally being used to allocate a valuable social good and, if so, whether the justifications for doing so are strong enough.¹²⁰ On top of these analytical features of sex equality jurisprudence, there is an accuracy with which social change is treated as a natural feature of legal change and a recognition that text-bound techniques distort the efficacy of law in our own time.

In *United States v. Windsor*,¹²¹ Justice Kennedy started solidly by considering the purpose of marriage before wandering into loose language about bigoted attitudes. There, a same-sex couple was deemed lawfully married under New York law, but a federal law enacted in 1996 (DOMA) prohibited the recognition of same-sex marriages for purposes of taxes and other federal benefits.¹²² Justice Kennedy did an admirable job of pointing out the significant unequal economic consequences experienced by the families of married same-sex couples.

This case would have been the perfect vehicle for a jurisprudential course correction, and yet Justice Kennedy nevertheless found the rhetoric of disparagement too tempting. He went on to invoke the leading animus decisions and concluded that the politicians who enacted the law had "no legitimate purpose" and intended merely "to disparage and to injure" same-sex couples¹²³—glossing over the fact that the federal law was enacted a decade before the first state had established the institution.¹²⁴ Moreover, this aspect of

116. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

117. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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

119. *Id.* at 11.

120. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996).

121. *United States v. Windsor*, 570 U.S. 744, 769–770 (2013).

122. *Id.* at 753.

123. *Id.* at 775.

124. *See Factbox: List of States that Legalized Gay Marriage*, REUTERS (June 26, 2013, 12:08 AM), <https://www.reuters.com/article/us-usa-court-gaymarriage-states/factbox-list-of-states-that-legalized-gay-marriage-idUSBRE95P07A20130626> ("In 2003, Massachusetts became the first state to allow gay marriage

Justice Kennedy's reasoning rendered the opinion vulnerable to the charge that the Court had reduced traditionalist understandings of marriage and family to an irrational and repugnant belief system. And Justice Kennedy's accusation that the law "humiliates tens of thousands of children" also seemed over the top,¹²⁵ given how unlikely it would be for children to know the intricacies of federal tax law. When elected officials quote the opinion to stoke fear of a war on people of faith, they tend to invoke these passages.¹²⁶

Justice Kennedy did better in *Obergefell*,¹²⁷ which directly confronted the question bypassed in *Windsor*—namely, whether the Court ought to recognize a constitutional right to same-sex marriage. Most of his opinion focused on the function of marriage and the harms of exclusion, and he went out of his way to note that traditionalists act out of "sincere conviction that, by divine precepts, same-sex marriage should not be condoned."¹²⁸

Still, query whether this fancy two-step of first decrying bigotry followed by a decision based on fundamental rights was the best way to handle the controversial subject.¹²⁹ The Court obviously chose to manipulate appearances by trying to separate the equality question from the substantive question over same-sex marriage, but most people would see that even the first question involved a substantive judgment as to the social good at stake. The Court no doubt wanted to convey the appearance of incrementalism, but it is worth wondering whether leading with the rhetoric of bigotry in *Windsor* wiped out any deliberative gains from acting sequentially. Maybe not, since the Justices had delayed answering the question long enough that the political winds were already at their back. On the other hand, perhaps a unified, less morally judgmental ruling at the outset extolling the value of marriage in modern society would help to consolidate public opinion even further. We may never know unless support for same-sex marriage dips again and enough Justices wake up to the view that the internal logic of traditionalist interpretive methods calls for another look at the issue.¹³⁰

after its highest court ruled the state's ban violated the constitutional rights of same-sex couples."); see also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

125. *Windsor*, 570 U.S. at 772.

126. See generally Joan Biskupic, *In U.S. Gay Marriage Cases, Children Emerge in the Limelight*, REUTERS (July 20, 2014, 12:15 AM), <https://www.reuters.com/article/uk-usa-courts-gaymarriage-insight/in-u-s-gay-marriage-cases-children-emerge-in-the-limelight-idUKKBN0FP02W20140720>.

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

128. *Id.* at 679; see LINDA C. MCCLAIN, WHO'S THE BIGOT?: LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW 156 (2020); Fleming, *supra* note 16, at 2681; Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. Rev. 639, 649 (2016).

129. Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1244-45 (2018) (observing that the duo of *Windsor* and *Obergefell* fail to establish "the perimeter of the 'animus' form of discriminatory intent" because objections to same-sex marriage may sound in "disgust" toward the couples themselves or a general moral disapproval like that accepted for other practices rejected by a political community).

130. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); Robert L. Tsai, *What Rights Could Unravel Next*, POLITICO (May 3, 2022, 12:52 PM),

A second salutary effect might come from avoiding a strident effort to uncover bigoted thoughts or dictate social meaning: we could start to see racism and sex/gender inequality not as some free-floating, mostly individualistic phenomena, but rather as aspects of a political economy organized to produce haves and have nots. That political and economic order, which already churns in certain predictable ways, can be further exploited to stoke perceived differences in identity and culture. Constitutional doctrine could then be better calibrated to identify and remedy the accumulated harms when that occurs. The principle of equality would then be a more effective instrument not for the project of reforming the mind but instead to prevent permanent underclasses from forming, clearing away unnecessary obstacles to self-improvement and communal relations, and ensuring that basic needs are met.

Along these same lines, the missing ingredient in a decision like *Yick Wo* is the civic and economic context necessary for citizens to appreciate that the forms of inequality at stake go well beyond any expression of racial hatred. That reading of the case comes off as a denunciation of individual bureaucrats who just happened to be prejudiced (something easily ameliorated if someone else made the decisions but reached similar outcomes), but that is too simple by half. Instead, it is part of a concerted effort to push one group of unwanted residents out of an entire industry—and even the city itself.

Indeed, it was the lower court judge who better appreciated the material inequalities for what they were: the natural fallout from a racial purge of the local economy. Circuit Judge Sawyer deemed the race-based enforcement of the ordinance an effective “prohibition, as to the Chinese”¹³¹ by ingeniously “compel[ling] their owners to pull down their present buildings and reconstruct of brick or stone; or to drive them outside the city and county of San Francisco . . . beyond the convenient reach of customers.”¹³² Whatever the individual effects of the law, its usage amounted to an “absolute confiscation” of the monies “for a long time, invested in these occupations.”¹³³

Clarifying the problems of inequality in these structural and materialist terms would allow the drawing of a direct line from the strategies of economic displacement in *Yick Wo* to the absent language of lost education and opportunity in *Brown*,¹³⁴ to the forgotten usage of interracial marriage bans to effectuate the banishment of unwanted families in *Loving*, and finally to the risk of a permanent underclass of marriages visibly raised in *Windsor*. Relieved momentarily from the politics of animus, citizens would be invited through the

<https://www.politico.com/news/magazine/2022/05/03/supreme-court-abortion-draft-other-precedents-00029625>.

131. *In re Wo Lee*, 26 F. 471, 475 (C.C.D. Cal. 1886), *rev'd sub nom.* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

132. *Id.* at 474.

133. *Id.*

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

law to reflect upon principles, projects, economic opportunities, and social structure rather than just identity and insult.

In this respect, we might see the risk of the animus approach as an extension of the problematic minimalism of *Brown*, rather than a jurist riffing on his own past writings. In *Brown*, the Supreme Court stressed psychological harm to Black children denied the chance to attend public schools reserved for White children, rather than the intergenerational harm of lost economic opportunity and self-improvement that flowed naturally from the systematic denial of a valuable social good.¹³⁵ The Warren Court may have wisely focused on the effects of unequal treatment rather than hateful motivations of ordinary segregationists. Yet the Justices ultimately identified only a tiny slice of non-material effects of racism. To the extent some might be tempted to rescue the animus approach by emphasizing social meaning rather than nefarious motives, they might be unwittingly doing something similar: obscuring the more serious economic and political dynamics that create, and even worsen, material inequality.

CONCLUSION

In this Essay, I have gathered some previously expressed concerns about animus as a rationale for resolving disputes over the principle of equality. Although more investigation will help us to answer this question, I have suggested that the approach may not be as useful as proponents say and that we might be better off dispensing with it entirely. We should take our cues for ensuring that the jurisprudence of equality remains vital from the evidence of actual practice rather than based on an overly romantic model of what judges can do.

Most of the leading animus cases could easily be reinterpreted in ways that would enhance the search for equality while regaining a healthy respect for pluralism. Instead of being outlier cases, they would be reintegrated into the canon. Rather than a case about hostility against disabled people, *Cleburne* could stand for the proposition that empirically unsound stereotypes fail the rule of reason. This would make it more consistent with sex-equality decisions such as *United States v. Virginia* and hone it into an even more potent precedent in the long run.

Moreno is more problematic and may need to be overruled. The main difficulty with the idea of “bare . . . desire to harm”¹³⁶ is that every policy hits some part of the citizenry differently, and thus it could always be alleged that one part of the community is being improperly singled out. It is also not apparent why a bare desire to harm is all that different from a situation involving

135. *See id.* at 494.

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

mixed motives, where a motivation to damage the economic prospects of an undesirable social group or restrict its political influence is accompanied by some legitimate justification. From a consequentialist perspective at least, the policies would be the same because the harms would be largely the same. Besides this point, *Moreno* is marred by its concern with anti-hippie sentiment, which might authorize judges to strike down any policy that disapproves lifestyle choices.

If judges were to give up the hunt for pernicious motives, we might all return to our older instincts that what matters most are the function of a social good, the justifications offered for distributing the social good along existing patterns, and the harms and benefits from those allocative choices. Whether the state utilized some presumptively troubling ground for making distributive decisions—such as race or gender or religion—would still be a component of the analysis. But mechanistic reasoning could never substitute for a thorough investigation of the primary questions. Merely identifying some illiberal motivation by someone, somewhere in the deliberative process would not be enough to unravel a democratically enacted policy. Nor would choosing one among several contested social meanings be sufficient justification to take it down.

If we abandoned animus, we might be able to better train attention on the nature of inequality. It is not just about people who have terrible thoughts and values. Rather, it is more often about decent people who make awful decisions whose effects cascade upon an already embattled population. The point is not that social status is irrelevant but that social status rhetoric has become unmoored from material and political conditions. And an accurate and modest account about what judges can do about such problems would be valuable indeed.