# ANIMUS TROUBLE

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Animus doctrine is having its moment in the sun. Once rarely mentioned, the law review literature is today teeming with scholarly work describing the doctrine's role in Equal Protection law.[1] Prominent scholarly accounts have situated the doctrine as the key to success for plaintiffs outside of the heightened tiers—the core showing that can allow plaintiffs to prevail over otherwise ultra-deferential rational basis review.[2] Increasingly, this account—of animus as the way "out" of deferential rational basis

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1. By way of illustration, during the 1970s and 1980s—the decades during which two of the cases today considered to be "canonical" animus cases were decided—only seven law review articles mentioned animus in close proximity (/100 words) to "rational basis." Between 1990 and 2010, 613 law review articles did so. In the last eight years (less than half the number of years of the two prior time frames surveyed), already 485 law review articles have used the term in close proximity to "rational basis." Search conducted in Westlaw Secondary Sources database (animus /100 "rational basis") on August 1, 2018.

2. For the leading modern scholarly accounts of animus doctrine, see generally William D. Araiza, *Animus and its Discontents*, FLA. L. REV. (forthcoming 2019) (Brooklyn Law School, Legal Studies Paper No. 563, 2008) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225974 [hereinafter Araiza, *Animus and its Discontents*] (addressing criticism of the animus doctrine); WILLIAM ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017) [hereinafter ARAIZA, ANIMUS] (exploring the rationale and constitutional basis for the animus doctrine); Dale Carpenter, Windsor *Products: Equal Protection From Animus*, 2013 SUP. CT. REV. 183 (2013) (explaining the basis of the animus doctrine, and defending its application in *United States v. Windsor*); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012) (defining animus and proposing a standard for the doctrine's application). For the specific point made here, see *infra* notes 64–67 and accompanying text.

review—has gained adherents as the canonical "common sense" of how and when plaintiffs outside the heightened tiers can succeed.[3]

This Article argues against this scholarly project. While animus doctrine has been critiqued from the right, this Article suggests that recent scholarly efforts to systematize it ought to be deeply concerning to progressives as well.[4] During the last fifty years, rational basis review (or more accurately, "minimum tier review"[5]) has provided one of the primary mechanisms through which progressive social movements have created space for constitutional change.[6] And those victories—both in and outside of

3. *See infra* notes 89–91 (describing the Supreme Court's decision in *Trump v. Hawaii*); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1356 n.176 (2018) [hereinafter Eyer, *The Canon*] (describing how this issue is addressed in leading casebooks). The Author, in presenting her work over the course of the last five years, has also regularly encountered this view in legal academia.

4. The most well-known critiques from the right of animus doctrine have focused on its disparaging connotations for those on the losing end of cases so resolved. *See generally* Steven Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675 (2014) (criticizing the animus doctrine as an attack on others' motives). It is also the case that some right/libertarian scholars and practitioners have advanced a broader and more complicated view of where rational basis review can succeed, including in domains unconnected to animus. *See, e.g.,* Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 400 (2016) (arguing that "[c]ourts are uncomfortable with governmental purposes that engage in favoritism, either economic or social" and that "even with legitimate government purposes, if the law can be shown under the statutes or facts not to achieve its purposes, it can fail the rational-basis test"). Note that although this Article is primarily directed at progressives—and focuses primarily on progressive social movements—libertarians and conservatives who see a significant role for rational basis review have similar reasons for caution in embracing the scholarly animus project. *See generally id.* at 392–99 (article by the Litigation Director of the libertarian Institute for Justice, describing IJ litigation victories on rational basis review—victories that were not founded in, and likely would not have been successful under, animus doctrine). Thus, this—a meaningful standard of rational basis review unconstrained by a required animus showing—ought to be an area of common ground for those of differing ideological orientations. *But cf.* Suzanna Sherry, *Selective Judicial Activism: Defending* Carolene Products, 14 GEO. J.L. & PUB. POL'Y 559 (2016) (defending the courts' current approach to rational basis review as reflecting the rough contours of the *Carolene Products* framework, and arguing against expanding meaningful review to economic legislation and regulation).

5. Because of the variety of ways that courts have approached the Equal Protection inquiry outside the heightened tiers, it is more accurate to refer to such review—as Justice Rehnquist once did—as "minimum scrutiny" or, the term I prefer, "minimum tier review." *See, e.g.*, Memorandum from Justice William H. Rehnquist to Justice Lewis F. Powell, *No. 74-1044 - Massachusetts Board of Retirement v. Murgia* 5 (May 25, 1976) (on file with the Washington and Lee School of Law in Lewis F. Powell Papers) (using the term "minimum scrutiny"). Because the term "rational basis review" is more familiar to most readers, I use this term as well herein. References to the two are used interchangeably.

6. *See infra* pt. II. *See generally* Eyer, *The Canon*, *supra* note 3 (extensively describing the ways that modern social movements have relied on rational basis review); Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975 (2017) [hereinafter Eyer, *Protected Class Rational Basis*] (same); Katie R. Eyer, *Constitutional Crossroads and the*

the Supreme Court—have been limited neither to nor by so-called "animus" doctrine.[7]

Rather, rational basis victories have continued to be messy affairs. In the lower and state courts, where most of the initial work of creating constitutional change is done, judges have rarely relied on a showing of animus.[8] Instead, such courts—when finding for rational basis plaintiffs—have typically situated the defect in the lack of a rational justification for the law instead.[9] And even in the Supreme Court—where some of the most prominent recent rational basis victories *have* included "animus" language—animus has continued to play an ill-defined and ambiguous role.[10]

This Article suggests that this messiness—while an anathema to scholars—is likely critical to the success that social movements have seen in relying on rational basis review. Unlike the heightened tiers, whose protections are largely inaccessible due to the gatekeeping device of "discriminatory intent," meaningful rational basis review currently requires no clear threshold showing to invoke it.[11] Because the case law is messy, ill-defined, and inconsistent, any group can—provided it can otherwise persuade—convince a court to invoke meaningful rational basis review on its behalf.[12] Thus, the very ambiguity that scholars seek to remedy has allowed social movements to persuade judges to find in their favor—often years before most people might be prepared to characterize discrimination against these groups as animus.[13]

The remainder of this Article proceeds in three Parts. Part I makes the case that rational basis review has indeed been valuable to modern social movements and that the ways it has been valuable to social movements have been limited neither to nor by so-called "animus" doctrine. Part II describes the reasons why parts of the accounts of modern animus scholars—if taken seriously as doctrine—would likely pose serious obstacles to social movements' continued use of rational basis review as a vehicle for

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*Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014) [hereinafter Eyer, *Constitutional Crossroads*] (same).

7. *See infra* pt. II.

8. *Id.*

9. *Id.*

10. *Id.*

11. *See, e.g.*, Eyer, *The Canon*, *supra* note 3, at 1358–64, 1366 (demonstrating that the courts have not "demanded any predictable threshold showing for escaping deferential rational basis review").

12. *Id.* at 1366.

13. *Id.* at 1358–64.

constitutional change. Finally, Part III discusses the Supreme Court's recent decision in *Trump v. Hawaii*,[14] and it describes the reasons why the decision should be viewed as a cautionary tale for contemporary efforts to situate animus doctrine as the key to success outside of the heightened tiers.

## *I. BEYOND ANIMUS: THE ROLE OF RATIONAL BASIS REVIEW IN MODERN SOCIAL MOVEMENTS' SUCCESS*

As many scholars have observed, the doctrines of heightened scrutiny have long been broken. The "test" that is supposed to determine which groups receive heightened scrutiny—while occasionally invoked in the lower courts—plays essentially no role in the Supreme Court's jurisprudence.[15] Even those groups that are, in theory, "protected" virtually never persuade the courts to apply strict or intermediate scrutiny due to the nearly insurmountable barrier of proving discriminatory intent.[16] For many years it has almost exclusively been government programs like affirmative action—which explicitly use race to *benefit* minorities—that are the subject of "heightened scrutiny" review.[17]

From the earliest days of tiered review, social movements have relied on rational basis review as a way around these limitations

14. 138 S. Ct. 2392 (2018).

15. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756–57 (2011) (arguing with respect to the recognition of new suspect classes under the federal Equal Protection Clause that "this canon has closed"); *see also* Eyer, *The Canon*, *supra* note 3, at 1324–34 (demonstrating that a "test" for heightened scrutiny has never been the way that groups have obtained heightened scrutiny—rather it has been rational basis review that has paved the way). *But cf.* Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012) (finding that gays and lesbians are a quasi-suspect class based on the canonical test).

16. *See, e.g.*, Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1783 (2012) (arguing that since the emergence of a malice-focused version of the discriminatory intent test in 1979, the standard has never been found to be met).

17. *See, e.g.*, *id.* at 1783–84 (describing the contemporary constitutional racial justice regime, under which programs like affirmative action are regularly subjected to strict scrutiny, while laws burdening minorities are almost never found to warrant such scrutiny); Reva Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 4–5 (2013) (contrasting the scrutiny applied to affirmative action cases against that applied to minority claims of racial profiling). As I have noted in prior work, the importance of a group obtaining protected class status may nevertheless be significant, as its expressive significance and deterrent impact may afford groups important protections, even if it does not successfully eradicate all discrimination against the group. *See* Katie Eyer, Brown, *Not* Loving: Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L.J. F. 1, 7–11 (2015) (arguing that formal equality is an important goal for the LGBT rights movement).

of the heightened tiers.[18] The sex discrimination movement—when unable to persuade a majority of the Supreme Court to afford it heightened scrutiny via the "test" for heightened review—continued to use rational basis review to chip away the edifice of sex discriminatory laws (and ultimately, through the accumulation of rational basis victories, persuaded the Court to finally grant formally heightened review).[19] The civil rights movement—already bumping up against the limitations of the new heightened scrutiny protections for race in the 1960s—used rational basis review to strike down racially impactful standardized tests and to invalidate welfare and employment restrictions targeting poor unmarried

18. *See infra* notes 19–21 and accompanying text. Note that the tiered system of review—taken for granted today—was only solidified in the aftermath of *Brown v. Board of Education*, as way of systematizing the Court's race doctrine. *See, e.g.*, Eyer, *Protected Class Rational Basis*, *supra* note 6, at 994–95 (noting that it was unclear in the immediate aftermath of *Brown* what form the "new equal protection" would take, and that the Court only solidified around a tiered system in the late 1960s). The tiered review system underwent further development in the 1970s and 1980s, after the Court eventually characterized its treatment of sex and illegitimacy discrimination as subject to "intermediate scrutiny." *See* Eyer, *Constitutional Crossroads*, *supra* note 6, at 562–63 (describing the turn towards characterizing sex and illegitimacy discrimination as subject to intermediate scrutiny). As described *infra*, already in the early years of the tiered system, even protected groups were relying on rational basis review to sidestep the limitations of the heightened tiers. *See infra* note 20 and accompanying text (describing the successful use of rational basis review by racial justice advocates in the 1960s and 1970s); *see generally* Eyer, *Protected Class Rational Basis*, *supra* note 6, at 994–1021, 1034–49 (extensively describing the racial justice movement's use of rational basis review in the 1960s and 1970s).

19. *See generally* Reed v. Reed, 404 U.S. 71 (1971) (striking down a sex discriminatory law on rational basis review pre-*Frontiero*); Stanton v. Stanton, 421 U.S. 7 (1975) (striking down a sex discriminatory law on rational basis review post-*Frontiero*); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (same). *But cf.* Frontiero v. Richardson, 411 U.S. 677 (1973) (falling short by one vote of the votes needed to secure suspect class status). Even *Craig v. Boren*, which is today conceptualized as the turning point to formal heightened scrutiny for sex, nowhere so describes its standard of review, and indeed two of the six Justices to join the majority concurred separately to disclaim such a reading of the opinion. *See* Craig v. Boren, 429 U.S. 190, 210 n.*, 211 (1976) (Powell, J., concurring) (noting that he "would not endorse" the characterization of *Craig* as a case involving "middle tier" scrutiny, and applying the "fair and substantial relation" test—derived from the rational basis case of *Reed v. Reed*, 404 U.S. 71, 76 (1971)); *id.* at 211–12 (Stevens, J., concurring) (noting that "[t]here is only one Equal Protection Clause," and "[i]t does not direct the courts to apply one standard of review in some cases and a different standard in other cases"); *see also id.* at 214–15 (Stewart, J., concurring in the judgment) (declining to join the majority and instead applying *Reed* and finding the classification "irrational[]"). For a more extended discussion of this history, and the role of rational basis review in the iterative process that led to heightened scrutiny for sex discrimination, see, e.g., Eyer, *Constitutional Crossroads*, *supra* note 6, at 537–64 (describing the important role of rational basis review in the history of how sex discrimination came to be subject to intermediate scrutiny); Eyer, *The Canon*, *supra* note 3, at 1326–31 (same).

African American women.[20] Pregnancy advocates regularly persuaded lower court judges to strike down pregnancy discrimination on rational basis review—both before and after the Supreme Court's decision in *Geduldig v. Aiello*.[21]

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20. *See generally* Andrews v. Drew Mun. Separate Sch. Dist., 507 F.2d 611 (5th Cir. 1975) (striking down a school district rule that precluded the hiring of unmarried parents as teachers' aides—a rule that exclusively affected African American women—under rational basis review); United States v. Chesterfield Cty. Sch. Dist., 484 F.2d 70 (4th Cir. 1973) (applying rational basis review, invalidating school district decision to terminate nine African American teachers, ostensibly based on their score on the National Teacher's Exam); Armstead v. Starkville Mun. Separate Sch. Dist., 461 F.2d 276 (5th Cir. 1972) (applying rational basis review to strike down school district's requirement of minimum standardized test score for teachers, a policy with a substantial racial impact); Chance v. Bd. of Exam'rs, 458 F.2d 1167 (2d Cir. 1972) (applying rational basis to strike down city board's examination for candidates seeking licenses for appointment to school supervisory roles, an exam with a substantial racially disparate impact); Ga. Ass'n of Educators v. Nix, 407 F. Supp. 1102 (N.D. Ga. 1976) (applying rational basis review to strike down a minimum standardized test score requirement for six-year teacher certificates, a policy with a substantial racially disparate impact); United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975) (applying rational basis review to strike down a minimum standardized test score requirement for teacher certificates, a policy with a substantial racially disparate impact); United States v. City of Chicago, 385 F. Supp. 543 (N.D. Ill. 1974) (concluding that even minimum tier review required the city to show that its selection procedures for police hiring and promotion were job-related, and concluding that several of such procedures—which had a disparate impact based on race, national origin, and sex—did not meet this standard); Butts v. Nichols, 381 F. Supp. 573 (S.D. Iowa 1974) (invalidating a ban on felon civil service employment, alleged to have a racial disparate impact, on rational basis review); Harper v. Mayor & City Council of Balt., 359 F. Supp. 1187 (D. Md. 1973), *aff'd on other grounds* 486 F.2d 1134 (4th Cir. 1973) (holding that Baltimore City Fire Department deprived black firefighters of equal protection under rational basis review); Arrington v. Mass. Bay Transp. Auth., 306 F. Supp. 1355 (D. Mass. 1969) (concluding that selection procedure having a disparate impact on black and Spanish-speaking applicants was "arbitrary" and "unreasonable" and thus invalid, where it lacked a demonstrated relationship to the ability to do the job); Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967), *aff'd on other grounds* 392 U.S. 309 (1968) (striking down a state regulation—with an extremely differential impact on African American women—under which a dependent child could be denied state assistance on rational basis review because of the mother's conduct); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd on other grounds,* 408 F.2d 175 (D.C. Cir. 1969) (finding that a system of ability tracking that had a significant adverse racial impact violated rational basis review); *see also* United States v. Nansemond Cty. Sch. Bd., 351 F. Supp. 196 (E.D. Va. 1972) (applying *Griggs*-like standards on rational basis review, but ultimately denying relief), *re'vd,* 492 F.2d 919 (4th Cir. 1974). For an extended discussion of this history, see Eyer, *Protected Class Rational Basis*, *supra* note 6, at 994–1021, 1034–49 (extensively describing the racial justice movement's use of rational basis review in the 1960s and 1970s).

21. Geduldig v. Aiello, 417 U.S. 484 (1974). *See generally* Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978) (post-*Geduldig*) (striking down regulation that required resignation of pregnant Naval officers under rational basis review); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1975) (post-*Geduldig*) (striking down a military regulation requiring the resignation of pregnant Marines under rational basis review); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973) (pre-*Geduldig*) (determining that town board's requirement that teacher take maternity leave without pay violated Equal Protection Clause under rational basis test); Suarez v. Ill. Valley Cmty. Coll., 688 F. Supp. 376 (N.D. Ill. 1988) (post-*Geduldig*)

So too in the modern era, social movements have continued to rely on rational basis review as a way around the limitations of the heightened tiers' protections. Most prominently, the LGBT rights movement—while yet to be designated by the Supreme Court as receiving heightened scrutiny—has relied on rational basis review to generate a profound shift in the constitutional jurisprudence of sexual orientation equality over the course of the last twenty-five years.[22] Other social movement groups—such as the modern racial and immigrant justice movements—have relied on rational basis review to generate piecemeal victories in areas like bail reform, the crack/cocaine disparity, and anti-immigrant laws.[23] Other groups

(denying motion for summary judgment in pregnancy discrimination case brought partly under the Equal Protection Clause, and noting that a decision to terminate an employee simply because of their pregnancy would fail rational basis review); Scott v. Opelika City Sch., 63 F.R.D. 144, 147 (M.D. Ala. 1974) (pre-*Geduldig*) (applying rational basis test to strike down mandatory leave policy for pregnant teachers); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972) (pre-*Geduldig*) (striking down mandatory resignation policy for pregnant teachers under rational basis review). For a much more extended discussion of this history, see Eyer, *Protected Class Rational Basis*, *supra* note 6, at 1021–34, 1049–51 (describing the use of rational basis review by sex equality advocates).

22. *See generally* United States v. Windsor, 570 U.S. 744 (2013) (striking down Defense of Marriage Act's federal definition of "marriage" and "spouse" as only including the union of "one man and one woman" under minimum tier review); Romer v. Evans, 517 U.S. 620 (1996) (applying rational basis review to strike down Colorado constitutional amendment that prohibited government entities from taking action to prevent or redress discrimination based on sexual orientation); Scarbrough v. Morgan Cty. Bd. of Educ., 470 F.3d 250, 260–61 (6th Cir. 2006) (applying rational basis test in holding that county school board discriminated against former superintendent based on his association with a predominantly LGBT church); Stemler v. City of Florence, 126 F.3d 856, 874 (6th Cir. 1997) (finding on rational basis review that arrest and prosecution based on perceived sexual orientation would violate the "venerable rule under the Equal Protection Clause that the state may not choose to enforce even facially neutral laws differently against different portions of the citizenry solely out of an arbitrary desire to discriminate against one group"); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (holding on rational basis review that student was denied equal protection by school's failure to protect him from harassment based on his sexual orientation); Lathrop v. City of St. Cloud, No. 10–2361 (DWF/LIB), 2012 WL 185780, at *7 (D. Minn. Jan. 23, 2012) (denying motion for summary judgment because a reasonable fact finder could find that workplace discrimination based on sexual orientation violated rational basis review); Miguel v. Guess, 51 P.3d 89, 97 (Wash. App. 2002) (finding that termination of hospital employee based on her sexual orientation violated Equal Protection Clause under rational basis test); *see also* Eyer, *The Canon*, *supra* note 3, at 1344–46 (further describing the role of rational basis review in the LGBT rights movement's success, including its use in same-sex marriage cases litigated in the state and lower federal courts).

23. *See generally* Plyler v. Doe, 457 U.S. 202 (1982) (striking down state statute denying education funding for undocumented children on minimum tier review); Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053 (9th Cir. 2014) (finding Arizona policy denying DACA recipients drivers' licenses was not rationally related to a legitimate state interest); State v. Blake, 642 So. 2d 959 (Ala. 1994) (partially invalidating bail scheme on rational basis review); State v. Russell, 477 N.W.2d 866 (Minn. 1991) (invalidating Minnesota's crack/cocaine disparity on rational basis review); Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003) (applying a form of rational basis review to invalidate statute disqualifying those

too—locked out of the tiers' protections—have nevertheless succeeded in bringing modern rational basis claims.[24] Thus, while rational basis victories are not common, they are—due to the limitations of the heightened tiers—one of the primary sources of Equal Protection victories for social movements today.[25]

Some of these victories—such as *Moreno*,[26] *Cleburne*,[27] *Romer*,[28] and *Windsor*[29]—are well-known to scholars, but many are not. Partially, this lack of awareness reflects the Supreme Court-centric focus of the canon—a focus that ignores the vast majority of social movement litigation, which takes place in the state and lower federal courts.[30] But it is also true that scholars have—despite recognizing the limitations of the heightened tiers—often recharacterized rational basis cases in which the plaintiff

with certain criminal records from employment in facilities catering to the disabled and older adults). For more discussion of this, see Eyer, *The Canon*, *supra* note 3, at 1346–51 (describing the use of rational basis review in furthering racial justice); Eyer, *Protected Class Rational Basis supra* note 6, at 1053–63 (same).

24. *See generally* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (people with disabilities); Winston v. City of Syracuse, 887 F.3d 553 (2d Cir. 2018) (low income renters); Bush v. Utica, 558 F. App'x. 131, 134 (2d Cir. 2014) (low income community); Mason v. Granholm, No. 05-73943, 2007 WL 201008 (E.D. Mich. Jan. 23, 2007) *quoted in* Does 1-7 v. Dep't of Corrections, 878 N.W.2d 293 (Mich. Ct. App. 2015) (prisoners); Rodriguez v. Brand West Dairy, 378 P.3d 13 (N.M. 2016) (farm workers); Mont. Cannabis Indus. Ass'n v. State, 386 P.3d 1131 (Mont. 2016) (cannabis industry); *see also infra* notes 32–51 (discussing various cases). Libertarian organizations have also had significant success challenging burdensome licensing laws on behalf of a variety of would-be entrepreneurs on rational basis review. *See generally* St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013) (Catholic monks); Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008) (non-pesticide pest control business and association); Craigmiles v. Giles, 312 F.3d 220, 224–29 (6th Cir. 2002) (funeral casket sellers).

25. *See supra* notes 18–24 and accompanying text, and *infra* notes 26–51 and accompanying text. For a much more extended discussion of these issues, see generally Eyer, *The Canon*, *supra* note 3 (extensively describing the ways that modern social movements have relied on rational basis review); Eyer, *Protected Class Rational Basis*, *supra* note 6 (same); Eyer, *Constitutional Crossroads*, *supra* note 6 (same).

26. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (applying rational basis review to invalidate a provision of federal law denying food stamps to households with unrelated individuals cohabiting).

27. *Cleburne*, 473 U.S. at 446–47 (applying rational basis review to invalidate the denial of a group home permit to people with intellectual disabilities).

28. Romer v. Evans, 517 U.S. 620, 632 (1996) (applying rational basis review to invalidate a state constitutional provision that precluded anti-discrimination protections for the LGB community).

29. United States v. Windsor, 570 U.S. 744, 775 (2013) (invalidating the Defense of Marriage Act, based on complicated reasoning, but not deploying formal heightened scrutiny).

30. Eyer, *The Canon*, *supra* note 3, at 1341–56.

prevailed as not "real" rational basis cases.[31] Thus, even the numerous modern rational basis victories at the Supreme Court—cases like *Reed v. Reed*,[32] *Weinberger v. Wiesenfeld*,[33] *Stanton v. Stanton*,[34] *Levy v. Louisiana*,[35] *Glona v. American Guarantee & Liability Insurance Co.*,[36] *Weber v. Aetna*,[37] *Richardson v. Griffin*,[38] *Richardson v. Davis*,[39] *Jiminez v. Weinberger*,[40] *Weinberger v. Beaty*,[41] *Eisenstadt v. Baird*,[42] *Village of Willowbrook v. Olech*,[43] *Papasan v. Allain*,[44] *Plyler v. Doe*,[45] *Allegheny Pittsburgh Coal Co. v. County Commission*,[46] *Zobel v. Williams*,[47] *Hooper v. Bernalillo County Assessor*,[48] *Lindsey v. Normet*,[49] *Logan v. Zimmerman*

31. *Id.* at 1335–41. This is true even of canonical rational basis cases such as *Romer* and *Cleburne*. *Id.* at 1338–40.

32. 404 U.S. 71, 75–76 (1971) (striking down sex discriminatory law on rational basis review).

33. 420 U.S. 636, 653 (1975) (striking down a sex discriminatory law on rational basis review).

34. 421 U.S. 7, 14 (1975) (striking down a sex discriminatory law on rational basis review).

35. 391 U.S. 68, 71–72 (1968) (striking down a law discriminating against non-marital children on rational basis review).

36. 391 U.S. 73, 75 (1968) (striking down a law discriminating against non-marital children on rational basis review).

37. 406 U.S. 164, 176 (1972) (striking down a law discriminating against non-marital children on rational basis review).

38. 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226, 1234, 1237 (D. Md. 1972) (striking down a law discriminating against non-marital children on rational basis review).

39. 409 U.S. 1069 (1972), *aff'g* 342 F. Supp. 588, 593 (D. Conn. 1972) (striking down a law discriminating against non-marital children on rational basis review).

40. 417 U.S. 628, 636 (1974) (striking down a law discriminating against non-marital children on rational basis review).

41. 418 U.S. 901 (1974), *aff'g* 478 F.2d 300, 308 (5th Cir. 1973) (striking down a law discriminating against non-marital children on rational basis review).

42. 405 U.S. 438, 447 (1972) (striking down state law distinguishing between married and unmarried people in access to contraception on rational basis review).

43. 528 U.S. 562, 565 (2000) (finding homeowner who alleged that she was irrationally treated differently from others seeking municipal services stated a claim on rational basis review).

44. 478 U.S. 265, 289 (1986) (declining to dismiss a rational basis challenge to a school funding scheme and remanding).

45. 457 U.S. 202, 230 (1982) (striking down state statute denying education funding for undocumented children on minimum tier review).

46. 488 U.S. 336, 346 (1989) (striking down county tax assessment procedure on rational basis review).

47. 457 U.S. 55, 65 (1982) (striking down Alaska dividend distribution program on rational basis review).

48. 472 U.S. 612, 621–22 (1985) (invalidating state tax exemption for Vietnam veteran resident in state prior to May 8, 1976 on rational basis review).

49. 405 U.S. 56, 79 (1972) (striking down "double bond" provision applicable only to landlord/tenant disputes on rational basis review).

*Brush Co.*,[50] and *Rinaldi v. Yeager*[51]—are either largely forgotten, or re-remembered as "really" about heightened review.[52]

Animus doctrine—to the extent it has been referenced at all—has mostly been only a bit player in these forgotten or misremembered rational basis victories.[53] Many of the rational basis victories that social movements have secured during the last fifty years have not mentioned animus doctrine at all.[54] Even those opinions that have mentioned animus have rarely situated animus as a critical component of their reasoning, typically relying instead on a more back end focused review (finding no rational relationship between the discrimination at issue and a legitimate government purpose).[55] Like their better-known counterparts (discussed *infra*), these opinions affirming rational basis victories have often tended to be muddy and ill-defined, not clearly explaining their reasons for (or indeed, not even acknowledging) their departure from canonical ultra-deferential rational basis review.[56]

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50. 455 U.S. 422, 442–44 (1982) (Blackmun, J., concurring & Powell, J., concurring) (expressing the view of a majority of the Justices that denying an employment discrimination plaintiff the right to have his claim heard because the state fair practices agency did not process his claim within 120 days violated rational basis review).

51. 384 U.S. 305, 310 (1966) (striking down requirement that imprisoned criminal defendants—but not those who received a suspended sentence or fine—pay a transcript fee if their appeal was unsuccessful on rational basis review).

52. *See* Eyer, *The Canon*, *supra* note 3, at 1335–41 (describing the various ways that rational basis victories have been marginalized or excluded from canonical accounts of rational basis review).

53. *See* sources cited *supra* notes 18–51 (citing numerous rational basis victories for progressive social movements, few of which reference animus doctrine at all, and even fewer of which situate it as a critical component of their reasoning); *see also* Eyer, *The Canon*, *supra* note 3, at 1356–64 (making a similar argument and citing cases supporting the contention that it is descriptively inaccurate to characterize animus doctrine as the exclusive pathway into meaningful rational basis review). Note my point here is that many courts finding for plaintiffs on rational basis review have not relied on animus doctrine explicitly at all—and those that have relied on animus in part, have often not situated it as a critical component of their reasoning. It is certainly possible that in some of those cases, a judge's suspicion that animus against a group undergirds government action might have *motivated* the judge to find in the plaintiffs' favor, even where animus doctrine was not explicitly invoked. But the important point for my purposes here is that, even if such an unannounced judicial motivation may have existed, it is not law, and thus does not constrain current or future plaintiffs. Moreover, as I have written elsewhere, there is no single explanation, including animus, which can fully explain the wide range of contexts in which the courts have found for plaintiffs on rational basis review. *See* KATIE R. EYER, A CASEBOOK COMPANION TO THE CANON OF RATIONAL BASIS REVIEW 15, 23, 25, 31 (2017) https://ssrn.com/abstract=3086830.

54. *See* sources cited *supra* note 53.

55. *Id.*

56. *Id.*

But even the cases that we remember—and that form the core of contemporary animus scholars' accounts—do not support characterizing animus as the gatekeeper to meaningful rational basis review.[57] *Moreno*, *Cleburne*, *Romer*, and *Windsor*—the four cases typically identified as being at the core of the Court's animus jurisprudence—are hardly models of clarity.[58] All abandon the deferential "rules" of rational basis review, and yet none acknowledge doing so.[59] None suggest that a showing of animus was required to obtain a departure from "traditional" rational basis review—and indeed, the reasoning of the cases is circular if such a threshold requirement in fact existed (since all abandon deferential rational basis review standards in order to find

57. *See infra* notes 58–60 and accompanying text (describing why even cases such as *Moreno*, *Cleburne*, *Romer*, and *Windsor* should not be understood as situating animus as the gatekeeper to meaningful rational basis review).

58. Although leading animus scholars have differed somewhat in what cases they feel should be included within the animus canon, all situate these four as residing at the core of the animus canon. *See* ARAIZA, ANIMUS, *supra* note 2, at 29–75 (characterizing *Moreno*, *Cleburne*, *Romer,* and *Windsor*—as well as *Lawrence v. Texas*—as animus cases); Araiza, *Animus and its Discontents*, *supra* note 2, at 10–15 (describing *Moreno*, *Cleburne*, *Romer*, and *Windsor* as animus cases); Carpenter, *supra* note 2, at 204–21 (referencing *Moreno*, *Cleburne*, *Romer*, *Windsor*, and *Lawrence* as animus cases); Pollvogt, *supra* note 2, at 901–15 (writing pre-*Windsor*) (discussing *Cleburne*, *Romer*, and *Moreno*). Regarding the lack of clarity of these decisions, see *infra* notes 58–61 and accompanying text; *see also infra* note 95 (animus scholars themselves acknowledging the ambiguous and unsettled nature of the animus case law).

59. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 769–75 (2013) (searching, in a complicated and confusing decision, for both the "real" reasons and effects of the government's actions, and rejecting the government's arguably rational and legitimate reasons like government efficiency as not the primary reason for the law, but not acknowledging a departure from deferential rational basis review standards); Romer v. Evans, 517 U.S. 620, 631–35 (1996) (apparently searching for the "real reasons" for the government's actions, relying on over-inclusivity as a reason for invalidation and rejecting the government's arguably rationally related reasons, but never acknowledging a departure from deferential rational basis review standards); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447–50 (1985) (apparently searching for the "real reasons" for the government's actions, relying on under-inclusivity as a reason for invalidation, and rejecting the government's arguably rational speculation, but never acknowledging a departure from deferential rational basis review standards); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–38 (1973) (relying on over- and under-inclusiveness and rejecting the government's apparently rational speculation, but not acknowledging a departure from deferential rational basis review standards). *But cf.* Lawrence v. Texas, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring) (explicitly acknowledging that the Court sometimes applies "a more searching form of rational basis review," and tying that form of rational basis review to a showing of "a bare . . . desire to harm a politically unpopular group," i.e., animus). If Justice O'Connor's opinion were the opinion for the Court in *Lawrence*, then there would be far greater clarity to the doctrine of animus. However, Justice O'Connor is alone in explicitly acknowledging a distinctive form of meaningful rational basis review, triggered by a showing of animus. I argue herein that—perhaps counterintuitively—this failure to systematize or clarify rational basis doctrine has been useful to social movements.

animus).[60] In short, while it is clear that animus played some role in the so-called "animus" cases (*Moreno*, *Cleburne*, *Romer*, and *Windsor*), the nature of that role remains far from clear.[61]

Of course, it is exactly this lack of clarity that animus scholars are responding to, attempting to systematize what is currently an extraordinarily muddy and ill-defined body of law. But while this impulse is understandable—and perhaps laudable in other contexts—this Article suggests that here it holds real risks. The following Part turns to the reasons why core aspects of the work of animus scholars—if taken seriously as doctrine—could severely curtail progressive social movements' ability to rely on rational basis review as a mechanism of constitutional change.

## *II. THE TROUBLE WITH ANIMUS GATEKEEPING*

All of the major contemporary scholars of animus doctrine have offered thoughtful accounts of the doctrine's role, and many are interested in using animus doctrine to foster a broader anti-discrimination project.[62] Nevertheless, certain aspects of animus scholars' accounts—which have rapidly become influential—should be, as set out below, very troubling for modern social movements (and others seeking to bring constitutional equality claims).[63] In particular, each of the major scholars of animus doctrine states or implies that a showing of animus is—or should be—the central factor that allows meaningful scrutiny outside the heightened tiers.[64] By largely ignoring the many cases in which

60. *See supra* note 59 and accompanying text.

61. *See supra* notes 58–59 and accompanying text.

62. *See, e.g.*, Araiza, *Animus and its Discontents*, *supra* note 2, at 57–62 (suggesting animus doctrine—and its commonalities with historically disfavored "class legislation"—can provide a foundation for a return to "first principles" in a contemporary Equal Protection doctrine whose current tiered regime has foundered); Carpenter, *supra* note 2, at 284–85 (offering an optimistic account of animus doctrine's potential as a foundation for equality law); Pollvogt, *supra* note 2, at 937 (same). *See generally supra* note 2 (citing to various sources all offering extended and thoughtful accounts of how animus doctrine might be systematized and understood in view of the precedents).

63. *See infra* notes 64–65 and accompanying text.

64. Modern animus scholars vary in the extent to which they state this explicitly, and in the extent to which they characterize it as a descriptive, as opposed to a normative, account. Professor Pollvogt, in her influential 2012 article on animus, is the most direct in explicitly offering this account, and situating it as descriptive account. Pollvogt, *supra* note 2, at 888–89. Professor Pollvogt noted:

> Under contemporary equal protection jurisprudence, nearly all claims are subject to deferential rational basis review. Under rational basis review, the

rational basis victories have been obtained without the courts relying on animus doctrine—and overselling the role that animus played even within the so-called "animus cases"—such scholars create the impression (and have sometimes directly stated) that a showing of animus is *required* in order for claims outside the heightened tiers to prevail.[65]

As set out above, to the extent scholars' characterization of animus as the necessary key to success outside the heightened tiers purports to be a descriptive account, it is inaccurate—many social movement victories outside the heightened tiers have not relied on animus at all, and those that have relied on animus have generally not explained its role.[66] But the characterization of animus as the exclusive way out of deferential rational basis review outside of the heightened tiers continues to gain credence, to the extent that it is approaching the "common sense" of how plaintiffs outside the heightened tiers win.[67] This Part suggests that this understanding—if taken seriously as doctrine by the courts—could radically undermine the traditional ways that social movements have relied on rational basis review to generate constitutional change.

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> plaintiff almost invariably loses. Proving that a law is based on unconstitutional animus is virtually the only way an equal protection plaintiff can prevail under this deferential and increasingly common standard.

*Id.* Professor Araiza has sometimes seemed to endorse this as a descriptive account, but at other times has acknowledged ambiguity—where he does, he favors the animus explanation as a normative matter. *See, e.g.*, ARAIZA, ANIMUS, *supra* note 2, at 3–4, 113–14 (strongly implying that animus is the exclusive alternative to the heightened tiers for succeeding as a matter of Equal Protection doctrine); *id.* at 29–75 (describing *Moreno*, *Cleburne*, *Romer*, and *Windsor* exclusively as animus cases, and situating animus as being critical to the holdings in each); Araiza, *Animus and its Discontents*, *supra* note 2, at 3–4 (characterizing animus doctrine as "largely responsible" for cases like *Cleburne*, *Romer*, and *Windsor*); *id.* at 50–52, 54 (acknowledging that "the animus cases" can be framed either as "about animus or about conventional rational basis review," but arguing from a normative perspective for an animus account). Professor Carpenter's article is probably the least explicit on this front, but it structurally certainly implicitly leaves that impression. *See, e.g.*, Carpenter, *supra* note 2, at 184–92 (situating animus doctrine as responsible for the constitutional revolution around gay rights, as well as for the cases of *Moreno*, *Cleburne*, *Romer*, and *Windsor*—treating it as an important gloss on the tiered structure emerging from *Carolene Products*, and mostly not acknowledging that there might be other ways for litigants outside the heightened tiers to prevail). *But cf. id.* at 184 n.3 (acknowledging that the early marriage cases post-*Windsor* in the lower courts did not rely on animus reasoning, although several did invalidate state same-sex marriage bans on rational basis review).

65. *See supra* note 64 and accompanying text.

66. *See supra* notes 53–56 and accompanying text.

67. *See supra* note 3 and accompanying text.

Indeed, the likely problems with instituting animus as the new gatekeeper to meaningful Equal Protection scrutiny should be readily apparent to progressive advocates and scholars.[68] For decades, progressive scholars have recognized and decried the devastating impact that the gatekeeping features of the heightened tiers (such as the requirement of showing intent and the largely defunct "test" for suspect classes) have had on the ability of progressive social movements to bring claims.[69] With these gatekeepers in place it is, as discussed *supra*, extremely rare for progressive social movements to get past the "gate" and actually receive heightened review.[70] Thus, an ostensibly group-protective doctrinal structure (the *Carolene Products*-based heightened tiers) has resulted in few real protections for the groups it is meant to benefit.[71]

But there is no reason to believe that a systematized animus doctrine—with animus as the new gatekeeper—would fare better. Leading scholars of animus have drawn explicitly on the discriminatory intent doctrine in describing how animus is to be determined.[72] Given the deep problems with contemporary intent doctrine—and courts' overwhelming resistance to making findings of discriminatory intent—this alone should make us wary of the scholarly animus project.[73] But perhaps more importantly, animus is a widely used common sense term, about which judges and juries are sure to have deep intuitions as to its meaning.[74] And in its

68. *See infra* notes 69–76 and accompanying text.

69. *See supra* notes 15–17 and accompanying text.

70. *Id.*

71. *Id.* I do not mean to discount the real changes that were brought about by modern Equal Protection doctrine, which did in fact dismantle the structure of facially discriminatory laws facing racial minorities, women, and non-marital children. Nevertheless, the fact remains that the tiers have proven inadequate to the task of addressing remaining forms of discrimination against those ostensibly within its protections. *E.g.*, Katie R. Eyer, *The New Jim Crow is the Old Jim Crow*, 128 YALE L.J. (forthcoming 2019).

72. *See, e.g.*, ARAIZA, ANIMUS, *supra* note 2, at 89–104 (drawing significantly on the intent doctrine in describing how animus doctrine should be understood); Araiza, *Animus and its Discontents*, *supra* note 2, at 35–41 (same); Carpenter, *supra* note 2, at 243–47 (same).

73. *See supra* notes 16–17 (noting that findings of discriminatory intent are extremely rare).

74. As I have discussed in prior work, there is ample research suggesting that legal constructs that deviate too far from popular understandings are likely to be disregarded or undercut. *See, e.g.*, Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1332–33 (2012) (documenting that reforms deviating too far from popular understandings of what constitutes discrimination are likely to be undercut). *See also* Dan M. Kahan, *Culture, Cognition, and*

common meaning, animus is a serious charge indeed.[75] Thus, while scholars have, with some doctrinal justification, argued that animus should be understood differently—as an objective concept, removed from charges of subjective ill will—it seems highly likely that animus, like its predecessors, will be a gate that will largely remain closed.[76]

The scope of the problem becomes even more apparent when one considers where rational basis review has been most important to social movements: at the front end of generating constitutional change, often in the lower federal and state courts.[77] At this early stage of constitutional change, it is generally the case that the public does not even widely recognize the form of discrimination at issue as wrongful—much less as reflecting animus against the group it affects.[78] While the Supreme Court might feel empowered

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*Consent: Who Perceives What, and Why in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 793–97 (2010) (describing this phenomenon in the criminal law context).

75. *See, e.g.*, *Animus*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/animus (last visited Dec. 15, 2018) (defining animus as "a usually prejudiced and often spiteful or malevolent ill will"). Even as defined expressly in the case law, the formulation is hardly less damning. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (stating, in the passage commonly understood as providing the foundation for modern animus doctrine, that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"). Of course, as scholars have rightly pointed out, the Court itself does not seem to follow this formulation literally in its so-called "animus" cases, relying on considerations that do not always seem trained at the "bare desire to harm" formulation, and striking down government action that may not plausibly be characterized as motivated by a "bare desire to harm" the group. *See infra* note 76 and accompanying text.

76. On this front, animus scholars have, perhaps understandably in light of the case law, been less than entirely clear, sometimes seemingly characterizing animus as an inquiry into subjective ill will (as where, for example, defending the doctrine as justified), while simultaneously characterizing the inquiry as an objective one, not focused on subjective ill will. *Compare* ARAIZA, ANIMUS, *supra* note 2, at 2 (describing animus as "the public's simple dislike of a particular group"); Carpenter, *supra* note 2, at 186 (characterizing animus as "the simple desire to harm . . . one group of people"), *with* Araiza, *Animus and its Discontents*, *supra* note 2, at 46–48 (suggesting that animus doctrine is or should be conceptualized as an objective inquiry); Carpenter, *supra* note 2, at 189–90 (same). Regardless of which of these accounts one endorses, and which are supportable from the case law, both experience and research suggest that many adjudicators will be reluctant to make findings of animus where it departs from the common understanding of the term. *See supra* note 74 and accompanying text.

77. *See, e.g.*, Eyer, *The Canon*, *supra* note 3, at 1341–56 (describing a variety of ways that social movements have successfully made rational basis arguments in the state and lower federal courts, thus creating space for constitutional change, and suggesting that our skewed understanding of rational basis review arises in part from ignoring the state and lower federal courts).

78. *See, e.g.*, *id.* at 1358–63 (describing this problem, and suggesting that the animus construct is problematic for this reason); Suzanne Goldberg, *Constitutional Tipping Points:*

to nevertheless rely on animus reasoning, it seems very unlikely that the lower (and, to a lesser extent, state) courts will feel it is appropriate to do so (and indeed, they have traditionally done so only rarely).[79] Thus, at the very juncture where rational basis review has been most useful to social movements—generating the initial space for constitutional change—a required finding of animus would likely be the most damaging.

Finally, even at the Supreme Court level itself, there are few reasons to believe that animus doctrine—the favored argument of retired Justice Anthony Kennedy—will retain a central role in future social movement victories.[80] Indeed, as set out in the following Part, there are substantial reasons to believe that *Trump v. Hawaii*—which takes initial steps toward vitiating the potential of animus doctrine—provides a window into what is likely to come. The following Part suggests that progressive scholars ought to heed *Trump v. Hawaii* as a warning and embrace more accurate descriptive accounts of the diverse and unsettled ways that current doctrine permits plaintiffs to prevail outside of the heightened tiers.

## *III. HEEDING THE WARNING OF* TRUMP V. HAWAII

*Trump v. Hawaii* (the "travel ban" case) held great promise for proponents of animus doctrine.[81] Although brought under the Establishment Clause rather than the Equal Protection Clause, the lower courts recognized the importance of anti-Muslim animus in striking down the various iterations of President Trump's "travel ban."[82] Numerous prominent scholars argued to the

*Civil Rights, Social Change and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1965–76 (2006) (describing the stages of social movement driven constitutional change and the role that "thick" facts can play in making distinctions based on class status appear to be natural and non-discriminatory).

79. *See, e.g.*, Carpenter, *supra* note 2, at 184 (acknowledging that the "decisions of lower courts have been wary of relying on animus"); *see also supra* notes 53–56 and accompanying text.

80. *See, e.g.*, Araiza, *Animus and its Discontents*, *supra* note 2, at 4 n.9 (noting that it is unsurprising that one might find animus themes percolating under the surface in *Obergefell*, given that Justice Kennedy wrote *Romer*, *Windsor*, and *Obergefell*, three of the major cases that Professor Araiza identifies as relevant to animus doctrine).

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

82. *See, e.g.*, Int'l Refugee Assistance Program v. Trump, 883 F.3d 233, 256–57 (4th Cir. 2018) ("IRAP II") (finding that the travel ban was "unconstitutionally tainted with animus toward Islam"); Int'l Refugee Assistance Program v. Trump, 857 F.3d 554, 601, 603–04 (4th

Supreme Court as amici that President Trump's anti-Muslim animus should doom the ban.[83] Drawing connections to the Equal Protection doctrine, they argued that anti-religious animus, where a primary or essential motive, must result in the constitutional invalidation of a law.[84]

But the Court, while accepting the invitation to situate its opinion within the rubric of animus, offered an account of animus with none of the equality-promoting potential that scholars of animus doctrine have envisioned.[85] Rather, the Court appeared to adopt only the thinnest view of how animus should affect the analysis: that it cannot, itself, serve as the "legitimate" government interest furthered by a law.[86] But the Court otherwise seemed to treat evidence of animus as largely irrelevant, asking—without meaningful consideration of that animus evidence—only whether the government's non-animus explanation was "plausibly related" to the ban on entry (something that the Court easily concluded was the case).[87] Thus, in the *Trump* majority's

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Cir. 2017) ("IRAP I") (finding the travel ban unconstitutional in part because it arose out of religious animus).

83. *See* Brief of Const. Law Scholars as Amici Curiae in Support of Respondents at 19–30, *Trump v. Hawaii*, 2018 WL 1605664 (U.S. Mar. 30, 2018) (No. 17-965) (arguing that the travel ban should be struck down, given that it arose from religious animus); Brief of Amici Curiae Immigration, Family, and Constitutional Law Professors in Support of Respondents at 13–14, 20–21, *Trump v. Hawaii*, 2018 WL 1585891 (U.S. Mar. 30, 2018) (No. 17-965) (drawing on animus doctrine in arguing that the travel ban should be found unconstitutional).

84. *See* Brief of Constitutional Law Scholars, *supra* note 83, at 16–18, 28–29 (drawing on Equal Protection doctrine in arguing that anti-religious animus, where a primary or essential motive, must result in a law's constitutional invalidation).

85. *See infra* notes 87–92 and accompanying text.

86. Trump v. Hawaii, 138 S. Ct. 2392, 2419–22 (2018). Note that the *Trump* majority decision does repeat some of the language from prior cases like *Romer* suggesting that where a decision is "inexplicable by anything but animus" or where it is "impossible to 'discern a relationship to legitimate state interests'" it must be struck down. *Id.* at 2420–21. But its opinion follows none of the analytic moves made in those prior cases, ignoring the explicit evidence of anti-Muslim animus, and simply asking whether the Trump administration's stated national security justification was "plausibly related" to the entry policy. *Id.* at 2420. While this might be a slightly more vigorous standard than traditional deferential rational basis review, it is not the search for actual motives that prior animus cases have entailed, nor does the majority appear to treat the two issues as interconnected in the sense that evidence of animus might "taint" other facially neutral justifications. Note that Justice Kennedy's concurrence suggests that he might consider further inquiry on remand—and thus a more meaningful assessment of animus—but it does not seem likely that this concurrence will prove influential given Kennedy's departure from the Court, and his brief and non-substantive reasoning. *Id.* at 2423–24 (Kennedy, J., concurring).

87. *Id.* at 2419–22 (finding that the government's non-animus justification was "plausibly related" to the travel ban, and not meaningfully considering the ample evidence of religious animus as a part of that assessment).

accounting, animus is an impermissible government interest, but not one that justifies departing from traditional standards of deference in evaluating whatever other justifications the government can devise.[88]

Concerningly, language in the Court's opinion suggested that the Court, too, is beginning to adopt the new, descriptively inaccurate, account of animus as the exclusive vehicle to rational basis success.[89] In describing rational basis review, the Court noted that

> it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group."[90]

Thus, the Court situated animus as the exclusive basis on which the Court has invalidated government action on rational basis review—a false, but potentially self-engendering, statement.[91]

*Trump v. Hawaii* was not an Equal Protection decision, and there are many contextual peculiarities—such as the extreme deference afforded the President in immigration and national security—that are likely to render it distinguishable.[92] But it should be seen as a warning to those who care about the future of equality law. Adopting the animus account offered by scholars comes with real risks of undermining a robust and long-standing way in which social movements have sought constitutional

88. *Id.* at 2420 (citing to a deferential rational basis case, and asking whether the policy was "plausibly" related to the Government's stated non-animus objective, not whether that stated objective actually motivated the Government); *id.* (noting that "the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny"); *id.* at 2420–21 (chiding the dissent for "refusing to apply anything resembling rational basis review"); *see generally supra* note 86 (discussing this issue further).

89. *See infra* notes 90–91 and accompanying text.

90. *Trump*, 138 S. Ct. at 2420. This "bare desire to harm" language—drawn from the case of *United States Department of Agriculture v. Moreno*—is commonly treated as the signal of the courts' invocation of animus doctrine. *See, e.g.*, Araiza, *Animus and its Discontents*, *supra* note 2, at 3 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).

91. *Trump*, 138 S. Ct. at 2420; *cf. supra* pt. I (demonstrating that rational basis review victories have not been restricted to the animus context).

92. *See, e.g.*, *Trump*, 138 S. Ct. at 2421–22 (emphasizing the national security context of the case); *id.* at 2418–19 (emphasizing the immigration context of the case).

change.[93] And, ultimately, we may find ourselves with nothing more than a new gatekeeping doctrine, barring the way to the last remaining accessible form of meaningful Equal Protection review.[94]

## *IV. CONCLUSION*

Animus scholars have, to varying degrees, acknowledged that the current role of animus in Equal Protection doctrine is messy and ill-defined.[95] This Article has suggested that it may be best left so. For it is precisely the messy, unsettled nature of the Court's rational basis precedents (of which the so-called "animus" cases comprise a part) that has allowed social movements to use rational basis review to generate constitutional change.[96] Systematizing animus doctrine—and in particular making animus the new gatekeeper to meaningful Equal Protection review—thus carries with it real risks of closing off one of the last remaining avenues to constitutional equality change.

Such a doctrinal turn toward animus as the new gatekeeper is not compelled by precedent, but it is one that could easily emerge from the present zeitgeist if we are not careful to reclaim a descriptively accurate accounting of rational basis review. Today, it is common to hear animus characterized as the exclusive path to victory for those outside the heightened tiers. This characterization is not currently true, but it could become a reality to the extent it is re-articulated by scholars, taught to students,

93. *See supra* notes 18–51 and accompanying text.

94. In this way animus doctrine may prove to be strikingly similar to intent doctrine. Although it is often forgotten today, intent doctrine was originally advocated by progressive Justices and civil rights advocates as a permissive way of winning Equal Protection claims—designed to address Southern states' obstruction post-*Brown*—but quickly became a mandatory showing which impeded civil rights litigation. *See, e.g.*, Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 3–7 (2016) (describing the progressive origins of intent doctrine, and its re-purposing as an obstacle to civil rights litigation).

95. *See, e.g.*, ARAIZA, ANIMUS, *supra* note 2, at 6 (acknowledging that the Court has not constructed a clear animus doctrine); Carpenter, *supra* note 2, at 184 (acknowledging that "[t]here is little consensus about what animus is; about whether, why, and when it is constitutionally problematic; or about what the appropriate role of courts, if any, should be in policing it"); Pollvogt, *supra* note 2, at 914, 929 (explaining the Court has been unclear in defining the doctrinal significance of animus).

96. *See, e.g.*, Eyer, *The Canon*, *supra* note 3, at 1366 (describing the reasons why a messy, unsettled rational basis doctrine may be better for social movements, especially at the front end of constitutional change).

argued by advocates—and, most concerningly, stated by judges or justices as doctrine.

*Trump v. Hawaii* provides a window into what such a future animus-centric Equal Protection doctrine could look like. Rational basis review would no longer provide unfettered access to the potential of meaningful review, but would result in failure except where the "laws at issue lack any purpose other than a 'bare . . . desire to harm a politically unpopular group.'"[97] Evidence of animus against a group could be overwhelming, evidence of pretext strong, and yet the existence of any relationship between the government's actions and "legitimate state interests" would suffice to save the law.[98] The Supreme Court would parrot the language of *Moreno* as a prelude to upholding blatantly biased laws, while the lower courts—finding themselves constrained by a requirement of finding of animus—would be stripped of their role as laboratories of equality.[99]

Such a future is surely not the role for animus doctrine that animus scholars envision—and yet, it may well be the role that a Supreme Court trending rightward is most likely to adopt.[100] We, as scholars, have a role in deciding whether this future comes to pass. But the time is now—to reclaim rational basis review's full, inconsistent, and messy potential—before we are left decrying yet another roadblock to meaningful Equal Protection review.

97. *Trump*, 138 S. Ct. at 2420 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

98. *Id.* at 2420–21.

99. *Id.* at 2420–23; *see also supra* notes 72–79 (describing the reasons why it is likely that lower courts would only very rarely make findings for Equal Protection plaintiffs if they were required to find animus).

100. With the departure of Justice Anthony Kennedy, and his replacement with a more conservative Justice Kavanaugh by President Trump, it seems highly likely that the Court will drift farther to the right in upcoming terms. *See, e.g.*, Adam Liptak & Alicia Parlapiano, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html (analyzing the voting pattern of Supreme Court justices and predicting an ideological shift to the right).