Regents: Resurrecting Animus/Renewing Discriminatory Intent

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The Supreme Court's decision in Department of Homeland Security v. Regents of the University of California, invalidating the Trump Administration's rescission of the Obama-era Deferred Action for Childhood Arrivals (DACA) program, focused mainly on administrative law requirements of reasoned decision-making. Commentary on the case has also focused on that aspect of the decision. But a sleeper issue in the case is the Court's rejection of the plaintiffs' equal protection animus claim. Perhaps counter-intuitively, that rejection may well portend a revival of the animus concept that many had speculated the Court would abandon after its primary proponent, Justice Anthony Kennedy, left the Court.

This Article considers what Regents' treatment of the animus claim means for that concept. Part II provides the necessary background, tracing the Court's engagement with animus from its early appearance in equal protection cases to its borrowing (by Justice Kennedy) into Free Exercise Clause cases, and, with Regents, its return to equal protection. Part III argues that the Court's very act of engaging the animus issue in Regents is significant and establishes the viability of animus claims going forward.

Part IV turns to the substance of the Court's engagement with animus. It examines how Regents deployed the Court's discriminatory intent jurisprudence in its treatment of the animus claim. It concludes that the Court's connection of animus and discriminatory intent jurisprudence recalls the Court's early understanding of the intent idea, before it rigidified into the familiar classification exercise we know today.

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Part V considers the implications of this new connection. For animus doctrine, a new, explicit connection to discriminatory intent methodology places the animus concept on a sturdier doctrinal foundation. The influence of this connection on intent doctrine itself is more mixed but intriguing. If intent ends up being further suffused with notions of subjective ill will, a new connection with animus may make it harder for equality advocates to prove discriminatory intent. On the other hand, if the connection with animus results in a more holistic, less rigid intent inquiry, the way might be open for successful defenses of remedial race-conscious government action, especially when that action employs formally race-neutral means.

The connection Regents has drawn between animus and intent raises the prospect of renewing both concepts. Nevertheless, risks attend this doctrinal evolution, which requires careful monitoring of the use litigants and courts make of these renewed doctrinal tools.

I. INTRODUCTION

The Supreme Court's 2020 decision in *Department of Homeland Security v. Regents of the University of California*[1] focused mainly on administrative law requirements of reasoned decision-making when it struck down the Trump Administration's decision to rescind the Obama-era Deferred Action for Childhood Arrivals (DACA) program. Preliminary commentary on the case has also focused on the reasoned decision-making issue.[2] But in a part of his opinion that spoke only for four Justices, Chief Justice Roberts rejected the plaintiffs' constitutional argument that the Administration's rescission of DACA reflected unconstitutional animus against Latinos. While he and three liberal Justices rejected the argument that the plaintiffs had pled a plausible claim of unconstitutional animus,[3] what is noteworthy is that he reached the animus issue at all and how he deployed discriminatory intent doctrine to examine the closely related, but not identical, concept of animus.

Those two aspects of his analysis reveal, respectively, that animus remains a live concept at the Court despite the departure of Justice Kennedy, its longtime champion, and that animus contains with it a generative potential for equal protection law more generally. Both of these conclusions have implications for the future path of equality law. To quote Justice Scalia from a different context, "[w]e will be sorting out the consequences of [the animus analysis in *Regents*] for years to come."[4]

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

[2] *See, e.g.*, *Special Feature: Symposium on the Court's Ruling in* DHS v. Regents of the University of California*,* Trump v. NAACP *and* Wolf v. Vidal, SCOTUSBLOG, https://www.scotusblog.com/category/special-features/symposia-on-rulings-from-october-term-2019/symposium-on-the-courts-ruling-in-dhs-v-regents-of-the-university-of-california (online symposium on *Regents*, with all of the commentators focusing exclusively on the administrative law aspects of the case).

[3] Chief Justice Roberts's opinion on the animus point was joined by Justices Ginsberg, Breyer, and Kagan. *See Regents*, 140 S. Ct. at 1899, 1915–16. Justice Sotomayor dissented on this point, although, as set forth later, she employed the same approach as the plurality. *See id.* at 1916–18 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part). Thus, the components of the Chief Justice's analysis relevant to this Article command the assent of a majority. The four conservative Justices merely concurred in the result rejecting the animus claim, without speaking to the plurality's analytical approach. *See id.* at 1919 n.1 (Thomas, J., joined by Alito and Gorsuch, J., concurring in the judgment in part and dissenting in part); *id.* at 1932 (Kavanaugh, J., concurring in the judgment in part and dissenting in part). Note that the Thomas and Kavanaugh opinions are styled as concurrences in the judgment, rather than simple concurrences. Since the only part of the decision with which those Justices agreed was the equal protection component, their failure to concur in the opinion suggests a refusal to sign on to the Chief Justice's animus analysis.

[4] United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

This Article commences that sorting out. Part II begins by summarizing equal protection animus,[5] its borrowing into Free Exercise and Establishment Clause jurisprudence,[6] and, finally, the plurality's reasoning in *Regents*.[7] That summary provides the background for the analysis in Parts III–V. After Section III.A introduces the relationship between animus and discriminatory intent, Section III.B considers the significance of the fact that the plurality chose even to address the animus issue. Despite the plurality's rejection of the plaintiffs' animus claim, it remains striking that the plurality chose to address it at all, given that it had already decided the case on a narrower, nonconstitutional ground that quite arguably mooted the animus issue. The plurality's decision nevertheless to engage the animus argument was thus significant, especially given the animus idea's close association with Justice Anthony Kennedy, who left the Court in 2018. Its decision to do so solidifies the status of animus as an option for future equality litigators.

Beyond its bare decision to engage it, the *Regents* Court's actual analysis of the animus issue is also noteworthy. As Part II explains,[8] *Regents*' animus analysis relied heavily on the Court's methodology for identifying discriminatory intent—that is, the well-known discriminatory intent factors from *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[9] This reliance might not seem surprising, since the animus inquiry might appear closely related to the intent inquiry for which the *Arlington Heights* factors were developed. But as Section III.A explains, the two inquiries are not identical under current doctrine.

Even though the animus and intent concepts are not identical, Part IV reveals intriguing connections between them. Section IV.A builds the foundation for that claim by revealing how the *Arlington Heights* intent factors came to be deployed in a subtly different way via their borrowing into Religion Clause cases. That borrowing had the effect of moving those factors away from a single-minded focus on intent to classify and toward an inquiry into ultimate invidiousness. It also explains how *Regents* borrowed those subtly transformed factors back into equal protection analysis.

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5 *See infra* Section II,A.

6 *See infra* Section II.B.

7 *See infra* Section II.C.

8 *See infra* Section II.C.

9 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

Section IV.B explains how the Court's move more firmly connected the animus and intent inquiries. Section IV.B.1 begins by recounting, in highly abbreviated form, the evolution of the Court's intent jurisprudence away from its early focus on ultimate invidiousness and toward its current focus on classificatory intent as a threshold inquiry to the heightened scrutiny performed any time a law was deemed to have classified. Section IV.B.2 explains how *Regents*' use of the *Arlington Heights* discriminatory intent factors to establish animus creates an analytical structure that mirrors that used by the Court in its early applications of intent doctrine.

Part V considers the implications, for both animus and discriminatory intent analysis, of *Regents*' creation of this connection. With regard to the former, Section V.A explains that the importation of the *Arlington Heights* inquiry into animus analysis brings structure and stability to what heretofore has been a remarkably ad hoc inquiry. When combined with the brute fact that the Court has now at least entertained an animus argument in the post-Kennedy era, the agreement among five Justices on a doctrinal structure for such claims provides not just an invitation to litigators to make such arguments but also a coherent roadmap for how to present them. As Section V.A explains, this is a positive development, given the potential for animus to supplement the Court's traditional but rapidly obsolescing tiered-scrutiny-based equal protection structure.

With regard to *Regents*' impact on discriminatory intent doctrine, Section V.B explains that the picture is mixed but nevertheless intriguing. One troubling possible result from *Regents* is that the concept of discriminatory intent will become even more closely associated with subjective ill will—the common understanding of "animus." In many scholars' views, discriminatory intent is already too focused on such subjective ill will;[10] thus, a more explicit association with the concept of animus would simply raise the hurdle equality litigators currently must surmount when challenging facially neutral government action that has disparate sex or racial effects. This is a real risk.

[10] *See, e.g.*, Barbara Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 959 (1993) (recognizing a structural aspect of white supremacy that is not accounted for by an understanding of discrimination as a purely subjective phenomenon); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1082 (1998) (concluding that the Supreme Court's discriminatory intent jurisprudence requires "a specific desire to harm the affected group," a standard "that can be fairly equated with malice").

On the positive side of the ledger, an inquiry focused more holistically on invidiousness might protect from judicial invalidation of race-neutral but nevertheless race-conscious government action. More distantly (and speculatively), the connection between animus and discriminatory intent carries the potential to destabilize the Court's rigid insistence on treating all racial classifications the same, regardless of their segregative or remedial motivations. These developments, to the extent they materialize, would flow from an understanding of discriminatory intent that hearkens back to its 1970s roots as a search for invidious government action.

Regents offers the potential—if still distant and speculative—to return the concept of discriminatory intent to that original, more holistic understanding. It thus offers the potential for doing more than simply resurrecting the animus concept from the doctrinal discard pile to which Justice Kennedy's departure might have been thought to consign it. Rather, *Regents* also holds the potential to renew the discriminatory intent idea to which animus has now been explicitly connected. Part VI concludes.

II. THE EVOLUTION OF ANIMUS

The progression of animus doctrine at the Supreme Court is well-known and has been thoroughly recounted by scholars.[11] This Part begins by briefly summarizing the equal protection "animus quadrilogy":[12] *Department of Agriculture v. Moreno*,[13] *City of Cleburne v. Cleburne Living Center*,[14] *Romer v. Evans*,[15] and *United States v. Windsor*.[16] It then examines how animus-related reasoning migrated into the religion clauses. It begins that examination with Free Exercise Clause doctrine, starting in the 1993 case *Church of the Lukumi Babalu Aye v. City of Hialeah*[17] and continuing, a quarter-century later, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[18] before examining the Court's Establishment Clause analysis in *Trump v.*

[11] *See, e.g.*, WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (NYU Press 2017); Dale Carpenter, *Windsor Products: Equal Protection From Animus*, 2013 SUP. CT. REV. 183 (2014); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

[12] Carpenter, *supra* note 11, at 183.

[13] United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

[14] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

[15] Romer v. Evans, 517 U.S. 620 (1996).

[16] United States v. Windsor, 570 U.S. 744 (2013).

[17] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

[18] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

Hawaii.[19] Part II concludes by considering the plurality's discussion of animus in *Regents*.[20] This brief tour sets the stage for considering the current state of animus doctrine and its potential future evolution.[21]

A. *The Quadrilogy*

Equal protection animus doctrine[22] originated in 1973 in *Department of Agriculture v. Moreno*.[23] In *Moreno*, the Court struck down an amendment to the federal food stamp law that denied food stamp benefits to unrelated persons living as a unit.[24] Writing for the Court, Justice Brennan found no rational connection between the benefit cutoff and the overall goals of the food stamp law to stimulate agricultural demand and combat hunger.[25] Turning to the amendment itself, he identified a legislator's statement in the sparse legislative history stating that the amendment was designed to cut off benefits to "hippies" and "hippie communes."[26] Justice Brennan found that justification inadmissible, using language that became foundational to animus doctrine:

> The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.[27]

The Court's rejection of the anti-hippie explanation did not end its analysis. Rather, the Court pressed on, considering other justifications

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

20 *See infra* Section II.C.

21 For more detailed examinations of these cases, *see* ARAIZA, *supra* note 11, chs. 2–5 (discussing *Moreno*, *Cleburne*, *Romer* and *Windsor*); Carpenter, *supra* note 11, at 204–15 (discussing *Moreno*, *Cleburne*, and *Romer* in more detail); *id.* at 215–21 (discussing *Windsor*); Pollvogt, *supra* note 11, at 901–15 (discussing *Moreno, Cleburne*, and *Romer*, as well as *Palmore v. Sidoti*, one of the "progenitors of the animus doctrine relied on in subsequent animus decisions like *Cleburne* and *Romer*").

22 This "equal protection" qualifier is necessary because a variety of federal civil rights statutes have been interpreted to require some level or type of animus on the part of the alleged violator. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (considering the type of animus necessary to state a claim under 42 U.S.C. § 1985(3)). Moreover, a strain of animus-related reasoning has migrated into Religion Clause cases. *See infra* Section II.B (discussing that migration).

23 United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

24 *Id.* at 529.

25 *Id.* at 535–38.

26 *Id.* at 534.

27 *Id.* (emphasis in original).

the government offered for the law.[28] But its analysis (and rejection) of those latter justifications was more searching than is normally the case under the typical, extraordinarily deferential approach to rational basis review that by 1973 had become the norm in cases not dealing with race or any other suspect class.[29]

A dozen years later, in *City of Cleburne v. Cleburne Living Center*, the Court relied on *Moreno* to strike down a city council's denial of a permit allowing the establishment, in a residential neighborhood, of a group home for intellectually disabled persons.[30] The Court began its analysis by rejecting the lower court's conclusion that intellectual disability was a quasi-suspect classification.[31] Nevertheless, it then warned, quoting *Moreno*, that "some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests."[32] It made good on that warning when it concluded that the city's decision rested on nearby residents' illegitimate fear and dislike of intellectually disabled persons.[33] Again following *Moreno*'s template, the Court then considered and rejected the government's more legitimate explanations for its permit refusal, scrutinizing those explanations more carefully than is normally the case under rational basis review.[34]

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[28] *See id.* at 535–38.

[29] *See id.* at 545–46 (Rehnquist, J., dissenting) (pointing out the Court's deviation from standard rational basis review). For a canonical example of such extraordinarily deferential rational basis review, see *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949). To be sure, by 1973, the Court had already begun reviewing legitimacy classifications with a skepticism that could only be described as more searching than traditional *Railway Express*-style review. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968). Nevertheless, legitimacy, soon to be joined by several other characteristics, was elevated to quasi-suspect status and accorded explicitly heightened review. By contrast, the cases that flowered from *Moreno* never featured explicitly heightened scrutiny. *But see* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) (suggesting that the animus cases flowering from *Moreno* did in fact feature a heightened form of rational basis review).

[30] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–48 (1985).

[31] *Id.* at 435, 442.

[32] *Id.* at 446–47 (quoting *Moreno*, 413 U.S. at 534).

[33] *Id.* at 448–49.

[34] *See id.* at 455–60 (Marshall, J., concurring in part and dissenting in part) (identifying the unusual stringency of the Court's rational basis scrutiny). Justice Marshall nevertheless agreed with the decision to strike down the city's decision but did so on the ground that intellectual disability should be considered a suspect classification that in this case operated to deprive persons of the important interest in establishing a home. *See id.* at 473 (Marshall, J., concurring in part and dissenting in part).

After nearly a dozen more years, the Court again returned to the animus concept in *Romer v. Evans*.[35] In *Romer*, the Court struck down Amendment 2 to the Colorado Constitution, a voter-enacted initiative that prohibited any state entity from taking any action protecting against discrimination on the basis of being lesbian, gay, or bisexual ("LGB"). Without pausing to consider whether sexual orientation should be a suspect classification, the Court, speaking through Justice Kennedy, struck the law down. The Court first concluded that the law failed traditional rational basis review, given the disconnect between its imposition of a broad disability on LGB persons across every aspect of social life and any possible legitimate justification. Justice Kennedy then concluded that that disconnect left animus against LGB persons as the only explanation for Amendment 2.[36]

The last equal protection case decided on an animus grounds before *Regents* was *United States v. Windsor*,[37] decided in 2013.[38] In *Windsor*, the Court, again speaking through Justice Kennedy, struck down Section 3 of the federal Defense of Marriage Act (DOMA), which defined marriage for federal purposes as a union between one man and one woman. Justice Kennedy began his discussion of the merits[39] by observing that states, not the federal government, normally defined marriage.[40] The federal intrusion into that decision-making realm provided the backdrop for the Court's argument that Congress's goal in enacting Section 3 was to demean the existence of LGB persons by refusing federal recognition of marriages that states had seen fit to recognize. Relying on DOMA's effects, its legislative history, and even the statute's title, Justice Kennedy concluded that "interference with the equal dignity of same-sex marriages, conferred by the States in the

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

36 *See id.* at 634–35.

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

38 In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court employed substantive due process to strike down Texas's law criminalizing same-sex sex. Justice O'Connor, who had joined the Court's 1986 decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), upholding a sodomy law against a due process challenge, declined to join the majority's opinion overruling *Bowers*. She concurred, however, on equal protection grounds, concluding that Texas's singling out of same-sex sodomy for prohibition reflected animus against LGB persons. *See* Lawrence v. Texas, 539 U.S. 558, 579, 581 (2003) (O'Connor, J., concurring in the judgment). Notably, she cited *Moreno*, *Cleburne*, and *Romer*, and explained them as standing for the proposition that "[w]hen a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Id.* at 580.

39 The Court began its analysis by considering whether it had jurisdiction to reach the merits and concluded that it did. *See Windsor*, 570 U.S. at 757.

40 *Id.* at 764.

exercise of their sovereign power, was more than an incidental effect of [DOMA]," but rather was "its essence."[41] In the last substantive paragraph of the majority opinion, the Court referred quickly and obliquely to the rational basis standard, encasing that reference in statements about the federal government's "disparage[ment]" of and "injur[y]" to the same-sex couples DOMA affected: "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[42]

This brief summary reveals several features of animus analysis. First, the Court has applied that doctrine when traditional, explicitly heightened scrutiny is, for whatever reason, unavailable or remains unmentioned. The Court in *Cleburne* employed animus only after it rejected heightened scrutiny for the intellectually disabled, it failed to even mention the possibility of heightened scrutiny for sexual orientation in *Romer* and *Windsor*, and few people would have found plausible any argument for heightened scrutiny for hippies in *Moreno*. Second, the doctrine is deeply under-theorized. These cases left unanswered basic questions such as the methodology for uncovering animus[43] and the effect of an animus conclusion.[44]

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41 *Id.* at 770.

42 *Id.* at 775.

43 The evidence seemingly relied on by the Court in these cases ranges from explicit legislative statements (*Moreno* and *Windsor*) to legislative acquiescence to constituent pressure (*Cleburne*) to the unusually broad disability the challenged law imposed (*Romer*).

44 Note that in *Moreno* and *Cleburne*, the Court, after acknowledging the animus-based justifications for the laws challenged in those cases, nevertheless continued on to review the government's more legitimate justifications, albeit with a more skeptical eye. *See supra* notes 28, 34 and accompanying text. This approach suggests that an animus conclusion is not necessarily fatal to the law's constitutionality, creating the odd possibility that a law grounded in part in animus might nevertheless be constitutional. *See* ARAIZA, *supra* note 11, at ch. 8 (noting this oddity). *But see* Pollvogt, *supra* note 11, at 930 (concluding that an animus finding causes the Court to reject more legitimate justifications for a challenged law, and thus concluding that such a finding acts as "a doctrinal silver bullet"). In her concurring opinion in *Lawrence v. Texas*, Justice O'Connor artfully elided the question of the effect of an animus finding when she stated that "[w]hen a law exhibits . . . a [bare] desire to harm a politically unpopular group, we have [in earlier cases] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment). Justice O'Connor's careful writing left unanswered the question whether, in those earlier cases (*Moreno*, *Cleburne*, and *Romer*), the strike down occurred more or less automatically as a result of the animus finding, or whether instead further judicial examination was required before the Court struck them down.

The third characteristic is that Justice Kennedy was the centerpiece of the animus cases decided while he was on the Court.[45] He was the key fifth vote in *Windsor*. He wrote the opinions in both *Romer* and *Windsor*.[46] Moreover, he wrote two important opinions in Religion Clause cases that imported animus-type reasoning into the First Amendment, while explicitly linking that reasoning to elements of the Court's discriminatory intent jurisprudence.[47] The next section considers those two cases, as well as a third religion case that also employed such reasoning.

B. *The Religion Clause Cases*

In three cases arising under either the Free Exercise or Establishment Clauses, the Court has explicitly or implicitly employed animus-type reasoning. The first two—*Church of the Lukumi Babalu Aye v. City of Hialeah*[48] and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[49]—were written by Justice Kennedy and involved the Free Exercise Clause. The third—*Trump v. Hawaii*[50]—arose under the Establishment Clause. While all three cases focused on invidious singling out—what we might intuit as animus[51]—the most important element of these cases for our purposes is their approach for discerning whether such animus existed.

Begin with the Free Exercise Clause opinions written by Justice Kennedy. Those cases must be understood in the context of the Court's 1990 decision in *Employment Division v. Smith*,[52] where the Court held that generally applicable laws that burden religiously motivated conduct only incidentally do not trigger heightened scrutiny under the Free Exercise Clause. Thus, the plaintiffs in both *Lukumi* and *Masterpiece* argued that the laws they challenged were invalid under *Smith* because the government singled out the plaintiffs' religious conduct.

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45 *See infra* note 105 (citing scholarship recognizing Justice Kennedy's central role in developing the animus idea).

46 *See also* Lawrence v. Texas, 539 U.S. 558, 575 (2003) (Kennedy opinion for five Justices striking down Texas's sodomy law on due process grounds but employing equal protection-style reasoning when speaking of the "stigma" and harm to "dignity" a sodomy conviction imposes on LGB persons).

47 *See infra* Section II.B.

48 Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

49 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

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

51 Indeed, the *Hawaii* Court began its animus analysis with a citation and discussion of the first three animus cases (*Moreno*, *Cleburne*, and *Romer*). *See id.* at 2420.

52 *See* Emp't Div. v. Smith, 494 U.S. 872, 878 (1990).

In agreeing with the plaintiffs in both cases, the Court made liberal use of equal protection concepts.[53] In *Lukumi*, the Court ruled in favor of a religious sect's desire to conduct animal sacrifice rituals, concluding that a city's animal slaughter ordinances were neither neutral nor generally applicable and thus fell outside of *Smith*'s rule essentially abjuring any free exercise scrutiny.[54] In concluding that the ordinance failed the neutrality requirement, Justice Kennedy, joined in this part of his opinion only by Justice Stevens, explicitly borrowed from the Court's equal protection discriminatory intent jurisprudence, employing the factors the Court uses to identify such intent as set forth in the 1977 case *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[55]

A quarter-century later in *Masterpiece*, Justice Kennedy succeeded in assembling a majority for similar borrowing.[56] *Masterpiece* involved a baker's claim that the Colorado Civil Rights Commission violated his free exercise rights when it refused to grant him a religion-based exemption from the state's public accommodations law after he refused to sell a wedding cake to a same-sex couple. Just as in *Lukumi*, a decision that the Commission's action reflected a neutral application of the state's public accommodations statute would not carry the day for the plaintiff's free exercise claim. But again, as in *Lukumi*, the Court ruled that the state actor—here, the Commission—had targeted religiously motivated conduct for unfavorable treatment.

Writing for a six-Justice majority in *Masterpiece*, Justice Kennedy concluded that statements made by one of the members of the Commission reflected a negative view of the baker's beliefs. On that ground, the Court concluded that the full Commission had failed to give "neutral and respectful"[57] consideration to the baker's religiously motivated request for an exemption. The Court found "[a]nother indication of hostility"[58] to the baker's beliefs in what Justice Kennedy characterized as the Commission's more favorable treatment of

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[53] Justice Kennedy's opinion in *Lukumi* made this explicit. *See Lukumi*, 508 U.S. at 540 ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, '[n]eutrality in its application requires an equal protection mode of analysis.'") (citation omitted). This part of Justice Kennedy's opinion spoke only for himself and Justice Stevens. *Id.* at 522.

[54] Instead, the Court applied strict scrutiny, which it concluded the ordinance failed. *Id.* at 546.

[55] *Lukumi*, 508 U.S. at 540–41 (Kennedy, J., joined by Stevens, J.).

[56] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[57] *Id*. at 1729.

[58] *Id.* at 1730.

analogous exemption requests based on secular grounds.[59] Citing his opinion in *Lukumi*, but this time speaking for the Court, Justice Kennedy again identified and applied the *Arlington Heights* factors in finding a lack of neutrality in the Commission's conduct.[60]

Strikingly, Justice Kennedy described the neutrality requirement—which again, he applied using the *Arlington Heights* factors—in terms suggesting not mere classification on the basis of religion but rather as reflecting explicitly invidious conduct. He wrote:

> In *Church of Lukumi Babalu Aye*, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations *that are hostile* to the religious beliefs of affected citizens and cannot act in a manner that *passes judgment upon or presupposes the illegitimacy* of religious beliefs and practices.[61]

He also cautioned that "The Constitution 'commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from *animosity to religion or distrust of its practices*, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.'"[62] Thus, in *Masterpiece*, Justice Kennedy wielded the tools provided by equal protection discriminatory intent jurisprudence, but did so in support of a conclusion of ultimate invidiousness rather than mere classification. This reflects a slight but crucial shift in the direction in which the tools point.[63]

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[59] Justice Thomas concurred in part and in the judgment, mainly in order to focus on the baker's free speech claim, which the Court did not address. While Justice Thomas agreed with the Court's free exercise conclusion, he seemed to base that conclusion on the Commission's actual disposition of the religious- and secular-based exemption requests, rather than on the narrower ground of the particular commissioner's comments about religion. *See id.* at 1740 (Thomas, J., concurring in part and concurring in the judgment). Justice Gorsuch joined Justice Thomas's opinion, and indeed in his own concurrence he stressed the differences in the actual dispositions of the two exemption requests. *See id.* at 1734, 1740 (Gorsuch, J., concurring). But he also joined the majority opinion, thus indicating his agreement with the majority's focus on the commissioner's comments as at least one, if not the only, source of the Commission's unconstitutional conduct. *Id.* at 1722. Justice Ginsburg, joined by Justice Sotomayor, dissented. *Id.* at 1748.

[60] *Id.* at 1731 (citing those factors and quoting *Lukumi*).

[61] *Id.* at 1731 (emphasis added).

[62] *Id.* at 1731 (emphasis added) (quoting Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993)).

[63] *See also Lukumi*, 508 U.S. at 540 ("That the ordinances were enacted '"because of," not merely "in spite of,"' their *suppression* of Santeria religious practice, is revealed by the events preceding their enactment.") (emphasis added) (internal citation omitted).

Several weeks after *Masterpiece*, the Court again considered a Religion Clause-based claim grounded in animus. But in this third Religion Clause case implicating animus, *Trump v. Hawaii*, a five-Justice majority rejected the plaintiffs' claim.[64] *Hawaii* upheld a revised iteration of President Trump's "Muslim ban" executive order temporarily halting immigration from eight nations, most of which were majority-Muslim.

The Court, speaking through Chief Justice Roberts, began its rational basis discussion[65] with a recitation of the first three cases of the animus quadrilogy—*Moreno*, *Cleburne*, and *Romer*.[66] The Court read those cases as resting on conclusions that it was "impossible to discern a relationship to legitimate state interests or that the policy [was] inexplicable by anything but animus."[67] By contrast, the Court found a rational connection between the challenged order and national security, given the order's facial neutrality vis-à-vis Muslims, the fact that the vast majority of the world's Muslims lived in nations not subject to the order, the status of the affected nations as subjects of previous congressionally imposed, security-based restrictions, the worldwide inter-agency review that preceded the order, the removal of several nations from the restrictions after the order was promulgated, and, finally, the order's exceptions and waiver provisions.[68]

To be sure, *Hawaii* did not cite *Arlington Heights* or explicitly employ its factors. Still, it is worth noting the Court's observations about the order's allegedly insignificant disparate impact on Muslims[69] and the procedural regularity of the government's decision-making process,[70] as well as the Court's engagement with the statements made by candidate and then-President Trump regarding Muslims and Muslim

64 Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

65 The Court assumed, for purposes of deciding the case, that the national security basis for the President's decision did not preclude judicial review of the decision's rationality beyond whether the decision was "facially legitimate and bona fide." *Id.* at 2420.

66 *Id.* at 2420.

67 *Id.* at 2420–21 (internal quotations omitted).

68 *See id.* at 2421–23.

69 *See id.* at 2421 ("Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.").

70 *Id.* ("The Proclamation . . . reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies.").

immigration.[71] These considerations all reflect some of the *Arlington Heights* factors.[72] More generally, the opinion's description of the order as resting on a measured and deliberative decision-making process hearkens back beyond *Arlington Heights* to the Court's application, in *Washington v. Davis*,[73] of the intent requirement that it announced in that case.[74]

C. *DHS v. Regents*

The cases described above provide the foundation for the Court's discussion of the plaintiffs' animus claim in *Regents*. In at least two of the three cases consolidated in *Regents*, the plaintiffs alleged that the rescission of DACA was based on "animus" or "discriminatory animus."[75] The two district courts that considered those claims[76] proceeded by applying the *Arlington Heights* factors, concluding that they sufficiently established the plausibility of the plaintiffs' claims to defeat the government's motion to dismiss.[77]

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[71] *See id.* at 2418 ("Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider *not only* the statements of a particular President, but also the authority of the Presidency itself.") (emphasis added).

[72] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977) (specifying the factors relevant to discriminatory intent, including the degree of disparate impact, the procedural regularity of the decision, and any statements directly suggesting discriminatory intent).

[73] Washington v. Davis, 426 U.S. 229 (1976).

[74] For a further explanation of how *Davis*'s application of the intent requirement established the framework for the *Arlington Heights* factors, *see* ARAIZA, *supra* note 11 at 149–50.

[75] *See* Third Amended Complaint, Vidal v. Nielsen (No. 16-4756), 2017 WL 10088221 (Dec. 11, 2017 E.D.N.Y); Complaint for Declaratory and Injunctive Relief, Garcia v. United States (No. 17-5380), 2017 WL 4157508 (Sept. 18, 2017 N.D.Cal.). The complaints in the consolidated litigation conducted in the District Court for the District of Columbia may not have used the actual term "animus." *See, e.g.*, Plaintiffs' Opposition to Defendants' Motion to Dismiss, NAACP v. Trump (No. 17-2325), 2017 WL 9728575 (Dec. 15, 2017 D.D.C.) (referring to "equal protection" but not "animus" in their argument against dismissal of the equal protection claim). It was in this litigation that the district court chose to defer the equal protection issue, thus precluding any more specificity about how that court understood the claim. *See* NAACP v. Trump, 298 F. Supp. 3d 209, 246 (D.D.C. 2018).

[76] One court deferred consideration of the plaintiffs' equal protection claims. *See infra* note 98.

[77] *See* Vidal v. Nielsen, 291 F. Supp. 3d 260, 279 (E.D.N.Y. 2018); Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec., 298 F. Supp. 3d 1304 (N.D. Cal. 2018); *see also* Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec., 908 F.3d 476, 518–20 (9th Cir. 2018) (affirming the lower court's decision on that point). In doing so,

In *Regents*, a plurality of the Court adopted that approach and analyzed that claim by explicit reference to *Arlington Heights*, writing that "[t]o plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision."[78] After citing three of the *Arlington Heights* factors ("disparate impact on a particular group, '[d]epartures from the normal procedural sequence,' and 'contemporary statements by members of the decisionmaking body'"[79]), the Court methodically but quickly disposed of them,[80] finding the plaintiffs' allegations insufficient to plead an animus claim. Justice Sotomayor dissented on the Court's application of those factors but did not disagree with their relevance. The remaining four Justices concurred in the result rejecting the plaintiffs' animus claim, but without saying anything more about it.[81]

The *Regents* plurality's treatment of the animus issue—and just as much, the bare statements of the four-Justice bloc agreeing with the plurality's rejection of that claim—might suggest, in the words of one prominent commentator, "trouble for discrimination law."[82] Perhaps. But perhaps not. As the rest of this Article argues, while a decision for the plaintiffs would certainly have been more helpful to equality plaintiffs, *Regents* might have a silver lining. To be sure, however, that silver lining comes with a caution.[83]

those district courts followed other lower court decisions that had employed the *Arlington Heights* factors in the context of an animus claim. *See infra* note 87 (noting the frequency of lower court use of the *Arlington Heights* factors in similar contexts).

78 Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

79 *Id.* (quoting *Arlington Heights*, 429 U.S. at 266–68).

80 *See, e.g.*, *Fifth Amendment—Due Process Clause—Equal Protection*—Department of Homeland Security v. Regents of the University of California, 134 HARV. L. REV. 510, 519 (2020) [hereinafter *Fifth Amendment*] (characterizing the Court's dismissal of the plaintiffs' animus claim as "hasty").

81 *See supra* note 3 (setting forth and citing the opinions of the Justices who did not join the plurality's discussion of the animus issue).

82 *See* Jessica Clarke, *The DACA Decision is Trouble for Discrimination Law*, TAKE CARE BLOG (June 24, 2020), https://takecareblog.com/blog/the-daca-decision-is-trouble-for-discrimination-law; *see also Fifth Amendment*, *supra* note 80, at 519 (expressing concern that the Court's "hasty dismissal" of the *Regents*' plaintiffs animus claim at the pleading stage "may therefore make claims of discrimination by the government even harder to prove.").

83 *See infra* Part V (discussing these implications).

III. THE SURVIVAL OF ANIMUS

The first striking feature of *Regents*' treatment of animus is that the Court broached the issue at all. But before we can understand the significance of that decision, we need to unpack the concept of animus. In particular, understanding the importance of animus's survival requires that we appreciate, at least tentatively, its relationship to discriminatory intent.

A. *Animus and Intent: A First Cut*[84]

The concept of animus, and invidiousness more generally, has a tangled relationship with the idea of discriminatory intent.[85] The plaintiffs in the DACA cases alleged that the government had acted with "discriminatory animus."[86] This locution is not unusual; reported cases often refer to equal protection claims using that term.[87] But its meaning is cloudy.[88] If the term means only that the plaintiffs had alleged that the government acted with discriminatory intent, such claims would simply constitute garden variety arguments that facially neutral government actions were tainted with an intent to classify on the alleged ground. On this reasoning, the addition of "animus" to the claim

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[84] The relationship between animus and intent is reprised later in this Article. *See infra* Part IV.

[85] *See generally* Aziz Huq, *What Is Discriminatory Intent?*, 103 CORN. L. REV. 1211 (2018) (exploring this relationship).

[86] *See* Vidal v. Nielsen, 291 F. Supp. 3d 260, 269 (E.D.N.Y. 2018) (setting forth the plaintiffs' allegations); Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1028 (N.D. Cal. 2018) (citing the plaintiffs' allegations).

[87] A Westlaw search in the "All Federal" database for "equal protection" within the same paragraph as "discriminatory animus," limited to opinions handed down since 2000, yielded 2,969 hits. To be sure, some of these cases likely involve statutory causes of action that have some connection to equal protection. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (construing 42 U.S.C. § 1985(3) as requiring that the plaintiff show some type of "discriminatory animus"). Nevertheless, the large number suggests that core equal protection claims are often stated using this terminology. *See, e.g.*, Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 108 (4th Cir. 2011) ("In order to survive a motion to dismiss an equal protection claim, a plaintiff must plead sufficient facts to demonstrate plausibly that he was treated differently from others who were similarly situated and that the unequal treatment was the result of discriminatory animus."). As an illustration of the tangled relationship between animus and intent, the *Equity in Athletics* court referred to the "discriminatory animus" requirement as the "intent" requirement. *See id.* As support for the proposition quoted above, that court cited another case that simply referred to the requirement of "intentional or purposeful discrimination." *See id.* (citing Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001) (requiring that an equal protection plaintiff allege "intentional or purposeful discrimination")).

[88] *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 288 (1997) (arguing that scholars often "misconstrue" the Court's doctrine on this point).

carries no independent legal significance and adds nothing to the straightforward allegation of discriminatory intent.[89]

But "animus" can mean more. As Section II.A sets forth, "animus" has come to identify a specific subset of equal protection cases in which a "bare . . . desire to harm"[90] a particular group constitutes a sufficient reason to strike down a law as violating equal protection. In light of that doctrinal evolution, an allegation of "discriminatory animus" should be understood, at least in some cases, as something different than an allegation of "discriminatory intent." If it were otherwise—that is, if "animus" and "intent" were the same concept—then there would be no point in applying the relevant scrutiny level (say, intermediate scrutiny) after concluding that a facially neutral law intentionally classifies on the relevant basis (say, on the basis of sex). To put the matter slightly differently, if "intent" necessarily means "animus," and if animus is a constitutional wrong,[91] then the intent finding is logically and necessarily fatal to a law without the need to apply a given level of scrutiny.

Of course, this is not the law. Rather, hornbook law calls for "intentional" sex classifications to face intermediate scrutiny and "intentional" race classifications to face strict scrutiny. Indeed, this rule reflects not just hornbook law but logic: if a *facially explicit* race classification (say, a race-based affirmative action program) is not struck down but instead triggers strict scrutiny that the Court insists is not necessarily fatal,[92] then why should a *facially neutral* but intentional race classification be subject to automatic invalidation? For purposes of equal protection law today, these two types of race classifications are treated the same.[93] Most notably for our purposes, they both get a final chance to survive by prevailing after application of the relevant scrutiny level.

Thus, if "animus" truly is different from "intent," then "discriminatory animus" must also be different from "discriminatory intent." The plurality in *Regents* seemed to understand this. It began its

89 *See id.* (noting this superfluity).

90 United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

91 *See, e.g.*, Pollvogt, *supra* note 11, at 889 ("when animus is found, it functions as a doctrinal silver bullet").

92 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Strict scrutiny is not 'strict in theory, but fatal in fact.'"); *id.* at 343–44 (upholding an affirmative action university admissions program that was conceded to consider race among other diversity factors); Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001) (upholding a facial sex classification).

93 *See* George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 125 (1995) ("If anything plainly falls under the description of intentional discrimination, it is affirmative action.").

review of the plaintiffs' equal protection claim as follows: "To plead *animus*, a plaintiff must raise a plausible inference that an invidious discriminatory purpose was a motivating factor in the relevant decision."[94] It concluded its equal protection analysis on the same note: "Thus, like respondents' other points, the [President's anti-Latino] statements fail to raise a plausible inference that the rescission was *motivated by animus*."[95] Thus, the plurality's analysis did not identify its task as the ferreting out of an intent to classify against Latinos, and its conclusion, while susceptible to such a characterization, is more naturally read as a statement about something more than mere classificatory intent.[96]

B. *The Significance of the Survival of Animus Doctrine*

Now that we understand that there is a difference between animus and our hornbook understanding of intent (even if we are not yet sure exactly what that difference is),[97] we can appreciate the significance of *Regents*' engagement with the former. That engagement was striking for its willfulness. While two of the three lower court opinions reviewed in *Regents* addressed the animus argument,[98] a Supreme Court decision on that issue was unnecessary to the Court's ultimate decision reversing the DACA rescission, which rested on administrative law principles of reasoned decision-making. Further, the administrative law basis for the Court's result raised the prospect of permanently mooting the plaintiffs'

94 Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (emphasis added) (internal quotations omitted).

95 *Id.* at 1916 (emphasis added).

96 To be sure, a conclusion about animus necessarily incorporates within it a conclusion about an intent to classify: surely, logic dictates that one cannot be guilty of acting with animus toward a person or group while being innocent of an intent to single that group out or classify based on its relevant characteristic. But the opposite does not hold true; one may be guilty of classificatory intent without being guilty of animus. *See* Selmi, *supra* note 88, at 288 ("Proving that a defendant acted with animus or an illicit motive will generally suffice to establish intent to discriminate, however, neither animus nor motive is *required* to prove intent.") (emphasis in original); *see also* Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) ("the purpose of strict scrutiny [of race classifications] is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool").

97 *See infra* Section IV.B.2 (clarifying the relationship between these two concepts).

98 *See* Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec., 298 F. Supp. 3d 1304, 1315 (N.D. Cal. 2018); Vidal v. Nielsen, 291 F. Supp. 3d 260, 279 (E.D.N.Y. 2018); *see also* Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec., 908 F.3d 476, 518–20 (9th Cir. 2018) (affirming the district court on the animus pleading issue). *But see* NAACP v. Trump, 298 F. Supp. 3d 209, 246 (D.D.C. 2018) (deferring a ruling on the equal protection issue).

equal protection claim.[99] Indeed, reaching the animus issue required the Court to brush past a preliminary question of how to characterize the plaintiffs' claim, which again might have allowed the Court to ignore the animus issue.[100]

Yet the *Regents* Court reached the question. To be sure, one could interpret its decision to do so as reflecting a desire conclusively to inter the doctrine by imposing near-impossible requirements for animus claimants to satisfy. But that hypothesis collides with the facts: three of the then-four liberals joined the Chief Justice's approach (and even Justice Sotomayor's dissent adopted the same approach as the plurality,

[99] While ignoring the lower courts' rulings in favor of the plaintiffs' animus claims would have left those claims available to be litigated, the reversal of the Administration's rescission decision on administrative law grounds meant that there was no longer a decision to challenge on animus grounds. Of course, if the Administration responded by reiterating its rescission, if that rescission was not reversed by a new presidential administration, and if that future decision satisfied the administrative law requirements of reasoned decision-making, then the animus claims would have been ripe. But this is a highly speculative chain of events. The election of Vice President Joe Biden to the presidency makes it quite likely that no recission will be in force after January 20, 2021. (Indeed, on his first day in office, President Biden directed his Secretary of Homeland Security to "take all actions he deems appropriate . . . to preserve and fortify DACA".) Office of the President, Memorandum for the Attorney General and the Secretary of Homeland Security, Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA) (January 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca. But even in June 2020, when the Court decided *Regents*, the chain of events noted above was still quite speculative. *But see* Michael D. Shear & Emily Cochrane, *Trump Says Administration Will Try Again to End 'Dreamers' Program*, N.Y. TIMES (June 19, 2020), https://www.nytimes.com/2020/06/19/us/politics/trump-daca.html (reporting that the Administration will try again, after *Regents*, to rescind the DACA program). On the other hand, the Trump Administration's unusually poor record of prevailing in legal challenges to its regulatory initiatives should have suggested that any renewal of the rescission effort might well again fail on administrative law grounds. *See, e.g.*, Institute for Policy Integrity, *Roundup: Trump-Era Agency Policy in the Courts*, https://policyintegrity.org/trump-court-roundup (updated Apr. 5, 2021) (noting that the Administration experienced a success rate of around 20% when defending its regulatory initiatives in court). Regardless of these multiple layers of speculation characterizing the situation the *Regents* Court confronted, it is notable that the district court in the one case that did not reach the plaintiffs' equal protection claim deferred its decision on that claim exactly because it had ruled for the plaintiffs on the administrative law point. *See* NAACP v. Trump, 298 F. Supp. 3d 209, 246 (D.D.C. 2018). Moreover, that court observed that its administrative law decision "could . . . alter DACA's rescission in ways that might affect the merits of plaintiffs' constitutional claims." *Id.* Thus, the Court had before it an analysis that clearly established how speculative an animus ruling would be.

[100] *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (assuming, for purposes of deciding the animus issue, that the plaintiffs were not stating a selective enforcement claim, which under Supreme Court precedent could not be raised by an alien).

differing only in her application[101]), while the four conservatives contented themselves with barren agreements with the result that remained silent on the merits of that approach.[102]

Without access to the Justices' records—and even with them—it is impossible to know with certainty their motivations for reaching out to decide certain issues in certain ways.[103] At any rate, as Mark Tushnet reminds us, knowledge of those motivations adds little to our understanding of the law itself—instead, what matters is what is in the opinions.[104] Thus, the reasons the Chief Justice and his colleagues may have had for reaching out to decide the animus question matter less than the bare fact that they decided it and the details of their analysis.

Consider that decision to engage the animus issue. The *Regents* Court's engagement with the animus concept suggests a renewed legitimacy for animus arguments. One might have been forgiven for expecting the animus idea to wither in the Supreme Court—and thus eventually in the lower courts—after Justice Kennedy's retirement. Justice Kennedy wrote *Romer* and *Windsor*, as well as the two free exercise opinions that imported animus-style reasoning into the Free Exercise Clause. More generally, he was the Justice most closely associated with the concept of animus,[105] and his status as the swing Justice on a closely divided Court gave his doctrinal preferences an

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101 Of course, as scholars have noted, in equality law, the Court's application of the relevant standard is at least as important as the standard itself. *See*, *e.g.*, Selmi, *supra* note 88, at 334 (1997) ("[W]hen the Court engages in the 'sensitive inquiry' of circumstantial proof mandated by *Arlington Heights*, it invariably fails to find intentional discrimination and upholds the challenged governmental practice"). Nevertheless, as this Article explains, the Court's preservation of the animus doctrine is in fact a significant development.

102 *See Regents,* 140 S. Ct. at 1918 (Thomas, J., joined by Alito and Gorsuch, JJ., dissenting); *id.* at 1932 (Kavanaugh, J., dissenting).

103 A reporter has suggested that there was little serious negotiation over the DACA decision, and that the three liberal Justices who joined all of the Chief Justice's opinion acted quickly, apparently not raising any serious concerns about the animus part of his opinion. *See* Joan Biskupic, *Behind Closed Doors During One of John Roberts' Most Surprising Years on the Supreme Court*, CNN (July 27, 2020, 4:28 PM) https://www.cnn.com/2020/07/27/politics/john-roberts-supreme-court-liberals-daca-second-amendment/index.html.

104 *See* Mark Tushnet, *The Supreme Court and Race Discrimination, 1967–1991: The View From the Marshall Papers*, 36 WM. & MARY L. REV. 473, 473 (1995) ("Lawyers and historians agree that almost everything we need to know about constitutional law is found in the Supreme Court's published opinions. Internal Court documents . . . tell us something about the dynamics within the Court but relatively little about constitutional law.").

105 *See, e.g.*, Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 266 ("[Justice] Kennedy, in his tenure on the Court, has done more than any modern Justice to advance the doctrine of animus in the Court's equal protection jurisprudence.").

outsized influence. His departure in 2018 left many observers wondering about the fate of the concept he had urged throughout his tenure on the Court.[106]

The Court's decision to reach the animus issue places the post-Kennedy Court on record as recognizing that sort of equal protection claim. Rather than ignoring it, acknowledging but dismissing or deferring it, or transmuting it into a straightforward question of discriminatory intent, the Court instead legitimized the claim by both engaging it and providing a doctrinal structure for analyzing such claims. The Court's treatment of that issue sends a clear signal to lower courts, not just setting forth how to analyze animus claims but directing that such claims *should* be analyzed rather than simply rejected out of hand. That fact may have the effect of solidifying the status of animus as a tool in a would-be plaintiff's litigation toolbox.

Nor does the plurality's rejection of the animus argument necessarily weaken the force of future claims of that sort. *Regents*' application of the *Arlington Heights* factors it considered relevant in that particular case—the extent of the disparate impact, any alleged procedural irregularities, and statements made by the relevant officials—was cursory, hardly the stuff of an emphatic rejection reverberating beyond the particular facts of the case in front of the Court.[107] The plurality opinion provided no suggestion that the animus inquiry required particularly compelling evidence. Indeed, it offered nothing to distinguish animus analysis from the "sensitive inquiry into such circumstantial and direct evidence . . . as may be available"[108] that is required by the discriminatory intent analysis to which the Court closely tied its analysis of the animus issue. Moreover, it is worth remembering that discriminatory intent conclusions are considered factual, rather than legal, conclusions, suggesting that trial courts have primary responsibility for making such findings.[109] To the extent the Court's analysis in *Regents* connected the concepts of discriminatory intent and animus, it presumably transferred from the former into the latter context the factual nature of the relevant conclusion (and thus

106 *See, e.g.*, Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal Protection Quiver*, 69 SYRACUSE L. REV. 69 (2019) (suggesting that the Court's tendency to use the animus concept in gay rights cases is less secure after Justice Kennedy's retirement); *see also* William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 216 (2019) [hereinafter *Discontents*] (raising this same possibility).

107 *See Fifth Amendment*, *supra* note 80, at 519 (describing the Court's rejection of the animus claim as "hasty").

108 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

109 *See* Rodgers v. Lodge, 458 U.S. 613, 623 (1982).

trial courts' primary responsibility for such inquiries) and, more generally, the "sensitiv[ity]" of the relevant inquiry.[110] This is hardly a directive to lower courts to smother such claims in the crib.

The apparent survival of animus doctrine signals to litigants and lower courts that such claims should receive serious consideration. Chief Justice Roberts had options had he wished to use *Regents* as an opportunity to tamp down such litigation. For example, he could have characterized animus claims as resting on allegations of bad subjective motivations on the part of government decision-makers and thus warned against over-aggressive use of that theory.[111] Alternatively, the Chief Justice could have cited his own language in *Trump v. Hawaii* for the proposition that an animus conclusion requires that "[i]t . . . be said that it is impossible to 'discern a relationship [between the challenged action and] legitimate state interests' or that the [government] policy is 'inexplicable by anything but animus.'"[112] It is possible that any such skeptical analysis would have won the support of his conservative colleagues, given their previous skepticism about animus arguments,[113] and thus allowed him to rely on that bloc of judges for a majority decision on the animus question.

Or perhaps not. Recall that a recent prior use of animus-type reasoning occurred in a religious liberty case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[114] where that idea was deployed in support of a religion-based claim for an exemption from a public accommodations statute.[115] Given the relatively inhospitable doctrinal

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[110] Concededly, scholars have argued that, despite its description of the intent inquiry as a "sensitive" one, the Court has been notably unenthusiastic about finding discriminatory intent as a result of that inquiry. *See, e.g.*, Selmi, *supra* note 88 at 334 (citing "[t]he Court's reluctance to draw inferences of discrimination . . . when the Court engages in the 'sensitive inquiry' . . . mandated by *Arlington Heights*"). Still, the factual nature of a discriminatory intent (and presumably, now, an animus) conclusion suggests that lower courts and in particular district courts, rather than the Supreme Court, will have primary authority for animus inquiries going forward. For a careful study of the success of claims alleging intentional government discrimination, see Theodore Eisenberg and Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991).

[111] *Cf.* Dept. of Commerce v. New York, 139 S. Ct. 2551, 2573–74 (2019) (stating that courts should probe the mental processes of decision-makers only in rare circumstances).

[112] Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) (quoting Romer v. Evans, 517 U.S. 620, 632, 635 (1996)).

[113] *See*, *e.g.*, United States v. Windsor, 570 U.S. 744, 778, 797–98 (2013) (Scalia, J., joined by Thomas, J., dissenting).

[114] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[115] *See id.* at 1729 ("The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere

terrain governing Free Exercise Clause claims,[116] it might well be that those conservative Justices—and Chief Justice Roberts himself—remain interested in preserving a role for animus more generally in order to preserve its utility in Free Exercise Clause cases where plaintiffs otherwise face a steep uphill climb.[117] Perhaps the conservative Justices' residual interest in an animus theory explains their failure to offer a more emphatic rejection of the plaintiffs' animus claim in *Regents*.[118]

Conceding the speculative nature of such explanations, and their limited value for understanding legal doctrine,[119] this possibility would explain both the Chief Justice's engagement with the animus argument when it was unnecessary to do so and the terse concurrences in the judgment on that issue from the then-four conservatives.[120] Those bare statements of agreement with the result allow Justices Thomas, Alito, Gorsuch, and Kavanaugh to deploy animus reasoning in future contexts, unencumbered by any limitations one might be able to glean from the Chief Justice's analysis in his plurality opinion. But regardless of their motivations, their actions in *Regents* created a situation in which Chief Justice Roberts' opinion accomplished little except to keep animus open as a doctrinal path, should that bloc of Justices wish to embark on it.[121]

religious beliefs that motivated his objection [to the application of the public accommodations law to him].").

116 *See* Emp't Div. v. Smith, 494 U.S. 872 (1990) (declining to engage in meaningful scrutiny of generally applicable laws that impose incidental burdens on religiously motivated conduct).

117 *See, e.g.*, Mark Satta, *Unclear Hostility: Supreme Court Discussions of 'Hostility to Religion' from* Barnette *to* American Legion, 68 BUFF. L. REV. 641, 671 (2020) ("[C]onservatives may be more apt to perceive animus on the part of those whose actions inhibit or disfavor religion (along with being more apt to see actions as inhibiting or disfavoring religion to begin with) than liberals"). To be sure, Professor Satta may not be using "animus" in its strict doctrinal sense. *See id.* at 647 (providing a dictionary definition of "animus" and discussing its common, rather than doctrinal, meaning). Nevertheless, the point remains that an animus theory may remain attractive to conservative Justices who may be more prone to discern hostility to religion in government actions.

118 *See* discussion *supra* note 3.

119 *See supra* text accompanying notes 103–04.

120 *See* discussion *supra* note 3.

121 Indeed, this possibility may also explain the actions of Justices Breyer, Ginsburg, and Kagan in signing onto the Chief's plurality discussion of animus. Perhaps their desire to create a majority (when combined with Justice Sotomayor's dissent) for a willingness to apply animus analysis was enough to allow themselves to sign on to his opinion rejecting the plaintiffs' animus claims, especially since the Court had already ruled in favor of the DACA plaintiffs on the administrative law ground. On this (once again, highly speculative) point, it might be helpful to recall the reporting suggesting that the three liberals quickly and without major comment signed on to the Chief Justice's draft opinion in *Regents*. *See supra* note 103. Perhaps those Justices wished to

Whatever the underlying reasons, *Regents*' response to the plaintiffs' animus argument allows that theory to live another day. Given speculation that Justice Kennedy's retirement would halt the further evolution of that idea,[122] this development from *Regents* is worthy of note.

But what about the terms of that survival? *Regents* is worthy of note also because it explicitly connected equal protection animus to the Court's preexisting structure for uncovering discriminatory intent.[123] Part IV examines the details of that connection before Part V considers its implications.

IV. ANIMUS, DISCRIMINATORY INTENT, AND THE RISKS AND OPPORTUNITIES OF THEIR CONNECTION

A. *The Roundabout Return to* Arlington Heights

The survival of animus makes possible new explorations of that concept's meaning. Beyond rescuing the animus concept from the constitutional law discard pile, the Chief Justice's plurality opinion in *Regents* accomplished a roundabout evolution in the methodology for identifying animus. That evolution began in the first two Free Exercise Clause cases discussed earlier, *Lukumi*[124] and, a quarter-century later, *Masterpiece*.[125] In those cases, Justice Kennedy, initially writing only for two Justices and then in *Masterpiece* for a majority, borrowed the *Arlington Heights* discriminatory intent factors from equal protection law as tools for identifying the targeting of religion that, even after *Smith*, presumptively violates the Free Exercise Clause.

While the Court's earlier equal protection animus cases had employed considerations analogous to the *Arlington Heights* factors when determining whether animus was lurking,[126] Justice Kennedy's free exercise analysis in *Lukumi* was the first to explicitly cite *Arlington Heights* for that connection.[127] One could understand that as a

lock in the stability of the Court's incipient majority rejecting DACA's rescission on administrative law grounds and saw his rejection of the animus argument as not so decisive as to deprive the animus theory of any future usefulness.

122 *See supra* note 106.

123 Recall that this connection had already been made in religious freedom cases. *See supra* Section II.B (explaining that connection in those cases).

124 Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

125 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018). *See supra* Section II.B (discussing these two cases).

126 *See* ARAIZA, *supra* note 11 at 137–38 (explaining those cases as implicitly applying the *Arlington Heights* factors).

127 *See Lukumi*, 508 U.S. at 540.

seemingly minor move. His inquiry in *Lukumi* sought to determine whether the city's animal slaughtering ordinance was a neutral one, as post-*Smith* Free Exercise Clause doctrine demanded, or instead whether it was targeted at religion.[128] That anti-discrimination inquiry is easily analogized to an equal protection inquiry into whether a challenged government action intentionally targeted a group based on a suspect classification, such as race or gender.[129]

By *Masterpiece*, however, the inquiry had shifted, subtly but meaningfully. In *Masterpiece*, Justice Kennedy described the government's duty under the Free Exercise Clause as not only to demonstrate neutrality toward religion but to refrain from "impos[ing] regulations that are hostile to the religious beliefs of affected citizens"[130] or from "act[ing] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices,"[131] and to avoid "proposals for state intervention [that] stem from animosity to religion or distrust of its practices."[132] No longer content with simply exposing government action that treated religion differently—that is, an action that classified based on religion—in *Masterpiece*, Justice Kennedy employed the *Arlington Heights* factors to expose government action that was taken with intent we would describe as invidious: reflecting "hostil[ity]" to religious beliefs, "pass[ing] judgment" on religion, "presuppos[ing] [its] illegitimacy," and reflecting "animosity to religion

128 *See id.* at 531–32.

129 *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 696 (1970) (Harlan, J. concurring) (stating, in the context of an Establishment Clause case, that "[n]eutrality in [the] application [of a challenged statute] requires an equal protection mode of analysis."); *see also Lukumi*, 508 U.S. at 540 ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."); *id.* (citing Justice Harlan's statement in *Walz*). *Compare Lukumi*, 508 U.S. at 540–42 (plurality opinion) (discussing neutrality with reference to the *Arlington Heights* factors), *with* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (setting forth those factors).

130 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018).

131 *Id.*

132 *Id.* (quoting *Lukumi*, 508 U.S. at 547).

or distrust of its practices."[133] Thus, by *Masterpiece*, the Court[134] had gone on record as relying on the *Arlington Heights* factors, not just for identifying the bare fact of classification or "discrimination" but also for the related but further inquiry into whether the challenged government action reflected bad ultimate government intent—what we call animus.[135]

Lukumi and *Masterpiece* were, of course, Free Exercise Clause cases. *Regents* then transplanted that Free Exercise Clause doctrine, which had originated in equal protection doctrine, back into its original equal protection soil. To be sure, *Regents* did not cite those free exercise cases. This is hardly surprising; *Arlington Heights* is an equal protection case, and it would be odd to cite free exercise cases as authority for how to apply an equal protection case (*Arlington Heights*) to decide an equal protection claim.[136] Nevertheless, Chief Justice Roberts' deployment of the *Arlington Heights* factors as part of an equal protection animus inquiry follows Justice Kennedy's deployment of those factors, to the

[133] *See id.* To be sure, *Lukumi* also features language which hints at this inquiry into invidiousness rather than simply anti-classification. *See Lukumi*, 508 U.S. at 540 ("That the ordinances were enacted '"because of," not merely "in spite of,"' their *suppression* of Santeria religious practice is revealed by the events preceding their enactment.") (internal citation omitted) (emphasis added). Nevertheless, *Lukumi*'s subsequent application of strict scrutiny to the challenged city ordinances suggests that the Court's conclusion about those laws' discrimination did not rise to the level of a finding of invidiousness. By contrast, the Court's conclusion in *Masterpiece* about the state's treatment of the baker's religious motivations did in fact reflect such a finding. More generally, much of the tone of the discrimination/classification analysis in *Masterpiece* focused on the invidiousness issue, while *Lukumi* focused more heavily on whether the challenged ordinances were in fact neutral and generally applicable, or alternatively, whether they singled out religion.

[134] Unlike his use of the *Arlington Heights* factors in *Lukumi*, his use of those factors in *Masterpiece* spoke for a majority.

[135] Indeed, the parallel between how these free exercise cases thought about bad government intent and their equal protection analogues goes further. In *Lukumi*, the Court, after finding the law to have singled out religious exercise, applied strict scrutiny, much as a court in a standard equal protection case would do after finding the requisite intent to classify. *See* 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.") (internal quotations omitted). By contrast, in *Masterpiece*, the Court's finding of bad government intent itself constituted the free exercise violation, in a manner similar to the animus cases. *See* 138 S. Ct. at 1732 ("The official expressions of hostility to religion in some of the commissioners' comments . . . were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.").

[136] Indeed, a Westlaw search of the briefs in *Regents* reveals no citations at all to either *Lukumi* or *Masterpiece*.

same end, in the free exercise context. Regardless of whether the Chief Justice considered those free exercise cases as binding precedent for his use of *Arlington Heights* or as mere guideposts, or whether he considered them at all, his use of the *Arlington Heights* factors parallels Justice Kennedy's use in those cases.

In sum, the *Arlington Heights* factors Justice Kennedy borrowed[137] and transformed in the free exercise context were lent back, in their transformed version, in *Regents.* That reborrowing carries with it important possibilities for equal protection law—some positive and some potentially problematic. The next section sketches out the theoretical foundation for those possibilities. Part V examines on-the-ground implications.

B. *Reopening Equal Protection Law*

1. The Current Closed System

The discriminatory intent requirement announced one year before *Arlington Heights* in *Washington v. Davis*[138] has been heavily criticized for its deadening effect on equal protection doctrine. Critics have argued that the intent requirement is difficult to satisfy,[139] thus placing a significant roadblock in the path of civil rights plaintiffs, and reflects a mistakenly limited understanding of discrimination.[140] They have also noted the irony that, because that requirement stands in the way of plaintiffs only when alleged racial discrimination is not explicit on the face of the government action, it raises this hurdle mainly in cases involving minority plaintiffs, since white plaintiffs' equal protection claims usually involve challenges to explicit race classifications such as set-aside and other affirmative action programs.[141]

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137 For a more general discussion of constitutional borrowing, see Nelson Tebbe & Robert Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010).

138 Washington v. Davis, 426 U.S. 229 (1976).

139 *See, e.g.*, Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 703 (2006) [hereinafter *Mistake*] ("Liberal academics have denounced [*Davis*] as unjustifiably limiting the scope of the Equal Protection Clause . . . .").

140 *See, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that the intent requirement reflects a limited, perpetrator-focused, perspective on discrimination); Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that the intent requirement betrays a basic misunderstanding of human decision-making).

141 For a statement and explanation of the basic rules of laid out above, see Selmi, *supra* note 88 at 290 ("The [Supreme] Court's intentional discrimination cases can be divided into two familiar categories: those that involve facially discriminatory classifications and those that are facially neutral. For facially discriminatory practices

It did not have to be so. Professor Ian Haney-Lopez has explained that in the period immediately after *Davis* the Court embraced a more holistic understanding of the concept of discriminatory intent.[142] That concept focused less on identifying instances of mere government classification and more on identifying invidious discrimination. For example, Professor Haney-Lopez emphasizes a 1977 case, *United Jewish Organizations of Williamsburgh v. Carey* ("*UJO*").[143] In that case, the Court made clear that what it was looking for was not simply "discrimination" in the sense of classification but rather what a concurring Justice called "invidious" discrimination.[144]

In *UJO*, the Court upheld a New York legislative gerrymander that was designed to increase minority political power beyond that in a previous redistricting proposal that had failed Department of Justice preclearance review under the Voting Rights Act.[145] The Justices fully recognized that the state had enacted the challenged gerrymander with a racial purpose.[146] Nevertheless, the Court upheld the government's action against a Fourteenth Amendment challenge. Writing at that point for three Justices, Justice White concluded that the challenged law

and policies, the element of intent is inferred from the language, and the Court engages in no additional inquiry to determine whether the statute or policy was discriminatory. . . . These cases, however, . . . are now generally confined to either the race-based affirmative action context or to gender-specific practices. . . . More commonly, statutes and policies challenged as discriminatory are facially neutral, and the court must infer intent from the fact of differential treatment."). For an examination of the irony noted in the text, see, e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); *see also id.* at 1141 ("In the very same era that the Court adopted the highly deferential *Davis*/*Feeney* framework, it began steadily to increase its scrutiny of affirmative action policies—recently subjecting such policies to strict scrutiny. Considered together, these two bodies of law create an interesting study in contrasts. When plaintiffs challenge facially neutral policies that have a disparate impact on minorities or women, the Court adopts a highly deferential stance towards a legislature's judgments. But when white plaintiffs challenge affirmative action policies that increase the institutional representation of minority groups, the Court has, with increasing insistence, warned that it will review and restrict the ambit of legislative action."). Katie Eyer has explained how the changing character of race discrimination claims reaching the Court transformed the ideological and policy valence of the intent requirement. *See* Katie Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1 (2016).

142 Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1816 (2012) (observing that cases decided a year after *Davis* reflected a "contextual" approach to equal protection).

143 United Jewish Orgs., Inc. v. Carey, 430 U.S. 144 (1977).

144 *Id.* at 179–80 (Stewart, J., joined by Powell, J., concurring in the judgment).

145 Pub. L. No. 89-110, 79 Stat. 437.

146 *See UJO*, 430 U.S. at 165 ("There is no doubt that in preparing the 1974 legislation the State deliberately used race in a purposeful manner.").

"represented no racial slur or stigma"[147] on whites or members of any other race. Writing for himself and Justice Powell, Justice Stewart was even more explicit in applying a nuanced understanding of discriminatory intent. He posed the question as "whether New York's use of racial criteria in redistricting Kings County violated the Fourteenth or Fifteenth Amendment."[148] One would think that, however he answered that question, his assumption that New York had "use[d] . . . racial criteria"[149] meant that the intent requirement from *Davis* was satisfied and that the State's action would confront the level of scrutiny appropriate for intentional race discrimination. But it did not. Instead, Justice Stewart wrote as follows:

> Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. *Washington v. Davis*. Disproportionate impact may afford some evidence that an invidious purpose was present. *Arlington Heights v. Metropolitan Housing Dev. Corp*. But the record here does not support a finding that the redistricting plan undervalued the political power of white voters relative to their numbers in Kings County . . . . That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent. The clear purpose with which the New York Legislature acted—in response to the position of the United States Department of Justice under the Voting Rights Act—forecloses any finding that it acted with the invidious purpose of discriminating against white voters.[150]

In other words, Justice Stewart, using criteria that either had been[151] (or soon would be[152]) acknowledged as relevant to the discriminatory intent inquiry, found no such "purposeful [race] discrimination"[153] that

147 *Id*.

148 *Id.* at 179 (Stewart, J., concurring in the judgment).

149 *Id.* at 179 (Stewart, J., concurring in the judgment).

150 *Id.* at 179–80 (some citations omitted).

151 *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (recognizing that "[t]he impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point") (internal quotation and citation omitted).

152 *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 n.25 (1979) (recognizing that, while the foreseeability of a law's disparate impact is inadequate to establish discriminatory intent, it remains relevant).

153 *Id.* at 179.

triggered strict scrutiny, despite the State's "use of racial criteria" in its redistricting decision.[154]

The plurality's statements in *UJO*—and, even more, Justice Stewart's—strike modern ears as odd. Today, the distinction between mere racial classification and invidious racial discrimination may seem obvious. It is current hornbook law that a racial classification merely triggers strict scrutiny rather than constituting the ultimate decision about whether a given instance of discrimination is unconstitutional.[155] Indeed, as a plurality of the Court explained in 1989, the strict scrutiny that follows a conclusion of intentional (or explicit) race classification is designed precisely to sift out benign uses of race from invidious ones.[156] Thus, a finding that the government has intentionally classified is merely the first step in the two-step judicial decision-making process, a necessary but still preliminary conclusion that furnishes the foundation for the application of the appropriate scrutiny level. In turn, it is the application of that scrutiny that determines the ultimate conclusion about the invidiousness (and hence unconstitutionality) of the classification identified at the first step. The *UJO* plurality's—and, even more, Justice Stewart's—conflation of the intent and ultimate constitutionality questions[157] is fundamentally incongruent with this modern structure.[158]

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154 Justice Stewart's analysis cannot be read as reflecting a preliminary conclusion that the state's conceded use of race satisfied the intent requirement, followed by a second conclusion that this use of race satisfied the applicable equal protection standards for "racial discrimination." Rather, he began his analysis by stating the question as "whether the reapportionment plan represents purposeful discrimination against white voters." *Id.* (citing Washington v. Davis, 426 U.S. 229 (1976)). He concluded that it did not. Indeed, by concluding his analysis with the statement that the fact that New York acted in response to the Department of Justice's view about what the Voting Rights Act requires "forecloses any finding that it acted with the invidious purpose of discriminating against white voters." *Id.* at 180. Justice Stewart all but explicitly understood the discriminatory intent inquiry he had just performed as equivalent to an inquiry into "invidious purpose." *Id.*

155 *See* supra note 141 (quoting Professor Selmi's explanation of this law).

156 Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

157 *See* Haney-Lopez, *supra* note 142 at 1820 ("[F]ive Justices— . . . White, Stevens, Rehnquist, Stewart, and Powell—thought [in *UJO*] that race-conscious remedies should be treated just like every other use of race and evaluated for an intent to harm.").

158 Indeed, in 1995 a Court adhering to this modern two-step approach overruled *UJO* to the extent that it endorsed less than strict scrutiny in some cases involving intentional race classifications. *See* Miller v. Johnson, 515 U.S. 900, 914–15 (1995).

But that modern structure is of relatively recent vintage. The intent test itself arose as a constitutional requirement only in the 1970s.[159] More importantly, *Davis* and the intent requirement more generally[160] predated the Court's confrontation with race-based affirmative action. It was the Court's ultimate resolution of that confrontation decisively in favor of a rule according all racial classifications the same level of (strict) scrutiny[161] that solidified the two-step process that constitutes the modern rule: all intentional uses of race trigger strict scrutiny, but the intent inquiry asks only about intent to classify—not intent that as a matter of logic is necessarily invidious.[162]

By contrast, in a world in which it was not at all clear whether race-based affirmative action would be considered constitutionally problematic (and certainly not as problematic as Jim Crow laws and other oppressive uses of race),[163] one could see those two steps as really one. In that alternative world, a search for "discriminatory intent" could easily be understood as a search for "invidious intent." Indeed, the Court's use of intent analysis before *Davis*—in particular, in race cases in the two decades after *Brown v. Board of Education*—reveals the Justices' attempts to use the concept of intent to pierce the veil of facially neutral government action that in fact sought to maintain the previously explicit Jim Crow racial hierarchy.[164] As Professor Haney-Lopez documents, the Court's use of the intent concept immediately after *Davis* reflects similar anti-subordination concerns firmly grounded in

159 *See, e.g.*, Eyer, *supra* note 141 at 34–48 (tracing the evolution of the Court's thinking in the 1970s toward a rule that both allowed heightened review of classifications that reflected intentional classification and also disallowed such review in cases featuring merely disparate effects).

160 Scholars often view the Court's 1973 school segregation decision in *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) as a critical turning point in the Court's adoption of an intent requirement. *See* Mitchell Ducey, *The Unitary Finding and the Threat of School Resegregation:* Riddick v. School Board, 65 N.C. L. REV. 617, 627–29 (1987) (tracing the path from *Keyes* to *Davis*); Eyer, *supra* note 141, at 47 (noting the importance of *Keyes* as a turning point).

161 *See Croson*, 488 U.S. at 493–500 (plurality opinion) (setting forth and defending that rule); *see also* Adarand Constructors v. Pena, 515 U.S. 200 (1995) (concluding that that same rule applies to federal race-based affirmative action).

162 Recall that this modern structure features statements from the Court insisting that strict scrutiny of intentional race classifications is not "strict in theory but fatal in fact." *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Strict scrutiny is not 'strict in theory, but fatal in fact.'") (quoting *Adarand Constructors*, 515 U.S. at 237 (internal quotation marks and citation omitted)).

163 *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 359 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (calling for some, but not the strictest, scrutiny of race-based affirmative action set-asides).

164 *See* Eyer, *supra* note 141 at 15–22.

real-world context[165] Recall, for example, that in *UJO*, Justice White's plurality rejected the plaintiffs' Fourteenth Amendment argument because the state's use of race to draw electoral district lines "represented no slur or stigma"[166] based on race. Even more explicitly, Justice Stewart's concurrence answered his "purposeful discrimination"[167] question in the negative, despite his acknowledgment that the state had used "racial criteria"[168] to draw those lines.[169]

165 *See* Haney-Lopez, *supra* note 142 at 1816 (observing that cases decided a year after *Davis* reflected a "contextual" approach to equal protection).

166 United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 165 (1977) (plurality opinion).

167 *Id.* at 179–80 (Stewart, J., concurring).

168 *Id.*

169 One can also perceive this contextual analysis in *Arlington Heights*, in particular in that case's recognition that procedural or substantive irregularities might be probative of discriminatory intent. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977); *see also* Selmi, *supra* note 88 at 304–05 (explaining that "when legislatures deviate from customary practices where race may be a factor, and no reasonable explanation for the departure is forthcoming, the legislature's action is understood against the historical fact that legislatures have often made distinctions based on race in order to disadvantage minority groups. Other than our history of racial discrimination, there is no reason that deviations from legislative procedures would be relevant to proving intentional racial discrimination."). One can also perceive such a contextual analysis in *Davis* itself. In applying the discriminatory intent rule it had just announced, Justice White's majority opinion identified facts—the reasonableness of the government's goal in employing Test 21, the test's ability to further that goal, the police force's recruitment efforts in the African American community, and the results of those efforts—that "negated any inference that the Department discriminated on the basis of race." Washington v. Davis, 426 U.S. 229, 246 (1976). Just as with Professor Selmi's explanation of the procedural/substantive regularities issue in *Arlington Heights*, one can understand *Davis*' use of these facts in its discriminatory intent inquiry as reflecting an analysis in which that inquiry targeted ultimate invidious intent rather than a mere intent to classify based on race.

Indeed, one might be able to perceive a distant connection between these understandings of irregular government action as invidious government action and Justice Breyer's dissent in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). In his dissent from the majority's decision striking down two school districts' voluntary use of race in student assignment decisions to achieve integration, Justice Breyer focused heavily on what can be described as the regularity, transparency, and inclusiveness of the decisional processes those districts employed. *See id.* at 848 (Breyer, J., dissenting). Those characteristics seemed to persuade Justice Breyer that the resulting government actions—their (partially) race-based student assignment schemes—were not invidious. More generally, Justice Breyer argued that strict scrutiny was not appropriate for these integrative uses of race. *See id.* at 823–37 (Breyer, J., dissenting). One might combine this latter argument with his observations about the districts' decisional procedures to reach a conclusion that, in a distant echo of *Arlington Heights*, the regularity of the government's action sufficed to defeat any claim that the government action in question reflected "invidious intent"—even though the districts' actions explicitly employed "racial criteria." *UJO*, 430 U.S. at 179 (Stewart, J., concurring).

But we know what happened instead. By 1989, a five-Justice majority had coalesced for the proposition that any and all race-based state government classifications trigger strict scrutiny.[170] Six years later, another bare majority pronounced that such scrutiny applied to federal action as well.[171] As if to emphasize the distance the Court had traveled, the same year as that latter decision, the Court, again on a 5-4 vote, overruled *UJO* to the extent that it accorded less than strict scrutiny to any legislative reapportionment based on race.[172] All three decisions triggered dissents objecting that the majority's analyses failed to distinguish between benign and invidious classifications at the crucial stage of determining the level of scrutiny.[173]

This mechanization and decontextualization of the Court's review of racial classifications had a similar mechanizing effect on intent doctrine. Gone were conclusions like Justice Stewart's in *UJO*, that acknowledged—indeed, even facial—uses of race might be deemed to not constitute the "race discrimination" that triggers the highest judicial scrutiny. Instead, any use of race for any reason triggers strict scrutiny, with the invidiousness inquiry shunted off to the resulting strict scrutiny analysis, where the deck is usually stacked against the government, via unforgiving judicial ends-means examination of the race classification.[174]

To be sure, some slippage in that otherwise strict scrutiny may arise from the Court's ad hoc watering down of the scrutiny it purports to be performing.[175] Moreover, the Court and individual Justices have sometimes implied that race-conscious government action that does not

170 Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

171 Adarand Constructors v. Pena, 515 U.S. 200 (1995).

172 Miller v. Johnson, 515 U.S. 900, 914–15 (1995).

173 *See Croson*, 488 U.S. at 528, 552 (Marshall, J., dissenting); *Adarand Constructors*, 515 U.S. at 242–46, 264 (Stevens, J., dissenting); *Miller*, 515 U.S. at 945–48 (Ginsburg, J., dissenting).

174 For an example of such unforgiving scrutiny, see *Croson*, 488 U.S. at 498–508. One might discern a similar dynamic in recent First Amendment doctrine, where the Court has now concluded that facial content classifications, and not just laws that are justified based on content, constitute the content discrimination that triggers strict scrutiny. *See* Reed v. Town of Gilbert, 576 U.S. 155 (2015).

175 *See, e.g.*, Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2215 (2016) (Alito, J., dissenting) (accusing the majority of doing this); Grutter v. Bollinger, 539 U.S. 306, 378–80 (2003) (Rehnquist, C.J., dissenting) (same). Again analogizing to First Amendment law, *see supra* note 174 (also noting this analogy), in some cases dissenting Justices have accused the majority of watering down the strict scrutiny that is now automatically required whenever government facially regulates speech based on its content. *See, e.g.*, Williams-Yulee v. Fla. Bar, 575 U.S. 433, 462–73 (2015) (Scalia, J., dissenting) (leveling this accusation); *see also Reed*, 576 U.S. at 179–81 (Kagan, J., concurring in the judgment) (expressing concern about this possibility in light of the majority's rigid requirement of strict scrutiny in every instance of facial content classification).

directly classify based on race may escape strict scrutiny.[176] But for the most part, what we have now is an equal protection structure that turns on whether the challenged law facially classifies or reflects a classificatory intent. As critics have long pointed out, that structure has no logical connection to what many consider to be the proper primary subject of equal protection's concern—not government action that happens to classify based on race but rather government action that oppresses or stigmatizes based on race[177] or that is taken without adequate consideration of the interests of historically oppressed groups.[178]

Regents' re-engagement with equal protection animus could help change all that.

2. Animus and Intent: A Second Cut

A critical—indeed, *the* critical—part of *Regents*' animus analysis is the connection it draws between animus and discriminatory intent. Section III.A provided a preliminary discussion of this relationship. But now, armed with our understanding of the evolution of the intent requirement, we can understand that connection more deeply. In turn, that understanding will help us appreciate the implications of that connection, which Part V discusses.

To state a complex idea briefly, animus can be understood as a direct pathway to ultimate constitutional conclusions about the invidiousness of government action challenged as violating equal protection.[179] Thus, animus plays the same role as the two-step process of modern hornbook equal protection doctrine described above, the first of which inquires into the existence of discriminatory/classificatory intent and the second, follow-on step of

176 *See infra* Section V.B (discussing those suggestions).

177 *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (explaining this perspective and arguing that it is both more faithful to the Court's equal protection jurisprudence and normatively attractive).

178 *See, e.g.*, Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 51 (1977) ("If we were talking about some new form of discrimination—say, discrimination against persons with red hair, or discrimination against whites—then the 'purpose' doctrine would make eminent sense, as would its corollary view that stigmatic harm can result only when there is a purpose to cause it. But in America today, where the problem of racism is the problem of eliminating a long-established stigma of inferiority—that is, a day-to-day assumption by many among us that some of our citizens are not quite persons—it is as plain as a cattle prod that we are talking about something quite different. A legislature oblivious to this existing stigma of caste will nonetheless reinforce the stigma when it produces racially discriminatory effects through ostensibly 'neutral' legislation.").

179 *See* ARAIZA, *supra* note 11 (providing a fuller explanation of this idea).

which applies the relevant level of scrutiny (assuming that the requisite classificatory intent is found in the first step).

As illustrated by Professor Haney-Lopez's discussion of the intent requirement's early years,[180] that requirement could have been—and, indeed, originally was—understood as combining those two inquiries. That is, the intent inquiry as performed in cases such as *UJO* did not focus on discerning whether the challenged law classified based on race, thus triggering a second step of heightened scrutiny to determine its ultimate constitutionality. Rather, it focused simply and comprehensively on determining whether the law was in fact invidious.

One can understand those early applications of the intent requirement as analogous to animus analysis. Indeed, the language in *UJO* implies such a similarity. Recall that Justice White's plurality opinion upheld New York's race-based action because it "represented no racial slur or stigma."[181] Similarly, Justice Stewart's concurrence answered what he called the "purposeful discrimination" inquiry in the negative by concluding that the state had not engaged in "invidious discrimination."[182] The intuitive connection between such language and conclusions about animus is clear.[183]

The parallel extends beyond language to doctrinal structure and content. Recall that *UJO*'s more holistic invidiousness analysis stands in tension with the rigid, two-step approach that has come to characterize equal protection doctrine. That latter approach relies heavily on the application of a particular level of scrutiny as the critical ultimate step once discriminatory intent is established. By contrast, the *UJO* approach is more similar to animus doctrine.

First, as to structure, in contrast to the modern equal protection approach, the canonical equal protection animus cases—*Moreno*, *Cleburne*, *Romer*, and *Windsor*—either rejected heightened scrutiny (*Cleburne*) or simply ignored the tier of scrutiny question (*Moreno*, *Romer*, and *Windsor*). This feature establishes animus analysis as an approach that, analogously to *UJO*, abjures a multi-step[184] process in

180 *See* Haney-Lopez, *supra* note 142, at 1802–25 (discussing those early years).

181 *See* United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 165 (1977) (plurality opinion).

182 *Id.* at 179–80 (Stewart, J., concurring in the judgment).

183 *See also infra* notes 228–32 (identifying specific connections between language used in *UJO* and conclusions either explicit or implicit in the canonical animus cases).

184 The word "multi" is used instead of "two" because the suspect classification approach could take up to three steps: concluding that a government action classified on the alleged basis, determining whether that basis triggers heightened scrutiny, and then, finally, applying that scrutiny. Indeed, if one subdivides the first of these steps into two, reflecting *Arlington Heights*' two-step burden shifting structure, the number of steps increases to four.

which ultimate questions of constitutionality are deferred to the second step. Instead, just as *UJO* moved immediately to an ultimate consideration of invidiousness, so too animus analysis skips the tiers of scrutiny question and moves immediately to that same ultimate question. Second, as to content, after *Regents*, both of these single-step, holistic inquiries draw from the same evidentiary well—the *Arlington Heights* factors.[185] This parallel was only implicit before *Regents*.[186] Now, thanks to *Regents*' reborrowing from the Free Exercise Clause animus cases, this additional similarity has become explicit.

Thus, the structure of animus analysis as it has evolved has come to resemble the original structure of the discriminatory intent requirement. Moreover, these two inquiries now rest on the same evidentiary factors. The interesting question then becomes, what are the implications of these emerging parallels?

V. IMPLICATIONS

The analysis in Part IV allows us now to appreciate and consider the generative potential of *Regents*' resurrection and clarification of equal protection animus. We now have an analysis—agreed upon by a majority of the Court even if one member of that majority disagreed with its application[187]—that explicitly employs the discriminatory intent factors from *Arlington Heights* in order to uncover animus. This explicit comingling of the discriminatory intent and animus concepts opens several theoretical, doctrinal, and litigatory possibilities. Some of them may be welcome to equality advocates. Others may cause worry.

A. *A Firmer Foundation for Animus Doctrine*

One important implication of *Regents*' analysis is that it legitimates animus doctrine and places it on a more secure doctrinal footing. The Court's very recognition of the concept of animus, in a case in which it did not have to reach out to engage that issue,[188] establishes the concept's continued *bona fides* in the post-Kennedy era. That recognition was not a given. After all, animus was an idea especially

185 *Arlington Heights* had been decided nearly two months before *UJO*. *Compare* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (decided January 11, 1977), *with UJO*, 430 U.S. at 144 (decided March 1, 1977). It thus provided the then very recently announced guideposts for the *UJO* inquiry. *See UJO*, 430 U.S. at 179 (Stewart, J., concurring in the judgment) (citing *Arlington Heights*).

186 *See* ARAIZA, *supra* note 11 at 137–38 (noting how various *Arlington Heights* factors surfaced implicitly in the animus cases).

187 *See supra* note 3 (noting Justice Sotomayor's position on the animus question in *Regents*).

188 *See supra* notes 98–99.

favored by now-retired Justice Kennedy. The Court's liberals accepted it as a way of creating majorities for the decisions in the gay rights cases, and perhaps Justices on both wings tolerated it in *Masterpiece* in order to create a majority without having to say more about the thorny debate between religious liberty, expressive conduct, and the reach of public accommodations laws.[189] The Court's acknowledgment of the plaintiffs' animus claim in *Regents* reinforces that idea's legitimacy. So does the plurality's treatment of it—that is, its consideration of the claim (even if performed summarily) rather than a dismissive rejection accompanied by warnings about how difficult it is to state such a claim.[190] The Court's treatment of the animus claim in *Regents* will likely invite litigants to raise such claims in the future.

In addition to acknowledging the legitimacy of the animus concept, *Regents* also placed it on a firmer doctrinal footing. Ever since its appearance in *Moreno*, equal protection animus has suffered from being under-theorized.[191] When the four-Justice plurality and Justice Sotomayor's dissent employed discriminatory intent analysis to decide the animus claim in *Regents*, they provided a more predictable, structured inquiry for uncovering animus. To be sure, that inquiry reflects what the Court had implicitly done in earlier animus cases. Now, however, it is explicit, and thus both more predictable and easier for advocates to present to lower courts constrained by Supreme Court precedent.

Moreover, *Regents*' use of discriminatory intent analysis to decide the animus claim renders animus analysis more objective. Critics of the animus concept have long complained that it reflects, at base, nothing more than a judicial conclusion that government has acted with a subjectively bad intent.[192] Those critics often argue that such a conclusion is incoherent, citing the well-known objection to imputing intent to multi-person decisional bodies, impersonal bureaucracies,

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189 *See supra* Part III; *see also* Mark Strasser, *Masterpiece of Misdirection?*, 76 WASH. & LEE L. REV. 963, 974 (2019) ("The *Masterpiece Cakeshop* Court seemed to be trying to find some kind of compromise position" between the positions of the same-sex couple, supported by the Colorado Civil Rights Commission, and the baker); Aaron Streett, *Supreme Court Review: An Analysis of* Masterpiece *and* Janus, 23 TEX. REV. L. & POL. 311, 312 (2018) ("In *Masterpiece*, Justice Kennedy similarly sought to forge a national compromise in which the dignity of gay and lesbian persons is respected, while sincere religious beliefs are protected and not equated by the government to bigotry.").

190 *Cf. supra* text accompanying notes 111–12 (noting the options Chief Justice Roberts had had he wished to discourage animus claims).

191 *See, e.g.*, Susannah W. Pollvogt, Windsor*, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 206 (2013) (noting "the persistent uncertainty surrounding [animus] doctrine's precise contours").

192 *See, e.g.*, Smith, *infra* note 194.

and, even entire electorates.[193] Beyond such epistemological objections, critics also object that animus accusations poison democratic discourse because, given the common meaning of the word "animus," they amount to name-calling—i.e., claims that government and the social forces influencing it are motivated by evil.[194]

Regents' explicit absorption of the discriminatory intent factors into animus analysis mitigates these objections.[195] While even a discriminatory intent inquiry requires a willingness to find "intent" in the actions of a bureaucratic or multi-member political body, the well-established set of *Arlington Heights* factors offers hope for a more objective understanding of that concept,[196] and now, after *Regents*, of the related concept of animus. In particular, several of those factors—most notably, the history of the issue in that decision-making body, any procedural or substantive deviations reflected in the challenged decision, and the extent of the decision's disparate impact—suggest a more institutional understanding of the intent

[193] *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 647 (1982) (Stevens, J., dissenting) (objecting to the Court's finding of discriminatory intent in a county's continuation of an at-large voting scheme that generated racially disparate impacts, on the ground that the intent inquiry was incoherent).

[194] For a notable statement of this objection, see Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675 (2014); *see also* KARST, *infra* note 199 (refencing the "name calling" that results even from a finding of discriminatory intent). But this common understanding need not be the only one, or even the best one. In other writing I have argued that an objective approach to animus is available. Indeed, I have grounded that argument on a claim that the best way to approach the animus question is by employing the relatively objective *Arlington Heights* factors. *See* Araiza, *Discontents*, *supra* note 106, at 184–85 (2019) (explaining the logical connection between the animus inquiry and the *Arlington Heights* factors). *Compare* Steven D. Smith, *Objective Animus?*, 71 FLA. L. REV. F. 51 (2020) (responding to my article by criticizing the animus idea as overly subjective), *with* William D. Araiza, *Objectively Correct*, 71 FLA. L. REV. F. 68 (2020) [hereinafter *Objectively*] (replying to Professor Smith).

[195] I have made this argument previously. *See* sources cited *supra* note 194.

[196] *See, e.g.*, Pers. Adm'r. of Mass. v. Feeney, 442 U.S. 256, 279 n. 24 (1979) (observing that "[p]roof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights*. The inquiry is practical.") (citation omitted); Sheila Foster, *Intent and Incoherence*, 72 TULANE L. REV. 1065, 1082–83 (1998) (contrasting a later case's turn to a more subjective "malice" approach to discriminatory intent with the *Arlington Heights* inquiry based on "objective factors"); Louis Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879, 964 n.500 (1985) (describing the *Arlington Heights* inquiry as "objective"). To be sure, one might be surprised to encounter such an endorsement of an objective inquiry in *Feeney*, the case that is often cited as the source of the Court's turn to a more subjective, malice-based approach to intent. Professor Haney-Lopez notes the irony. *See* Haney-Lopez, *supra* note 142, at 1837 n. 251 ("Even as the text [in *Feeney*] demanded proof of subjective malice, guilty footnotes acknowledged that discriminatory purpose doctrine operated through inference from surrounding circumstances—a 'practical' approach that examined a range of 'objective' contextual factors, including harmful impact.").

concept, one less focused on the relevant decision-makers' actual mindsets.[197] In making the intent (and now the animus) inquiries more objective, those factors also at least mitigate the sting a discriminatory intent or animus conclusion carries,[198] even if, concededly, they do not remove it.[199] The resulting increased acceptability of an animus finding further reinforces its grounding as a concept that is built to last.

That firmer grounding is a significant development. Since the 1980s, animus has emerged as an important alternative to the standard suspect class equal protection structure that assigns and then applies a level of scrutiny to a particular type of discrimination.[200] That structure—like the intent requirement, often criticized for its rigidity[201]—has shown significant signs of obsolescence.[202] Most notably, the Court has not found a new suspect or quasi-suspect class since the 1970s and has not performed a serious suspect class analysis since *Cleburne* in 1985. Yet, during that period, the Court has on several occasions ruled in favor of equal protection plaintiffs while either rejecting or simply ignoring any claim of suspect class status.[203] More conceptually, the difficulties courts have experienced applying suspect

197 These features also render the inquiry less prone to the objection that a court can never accurately determine an institution's "intent."

198 *See* Araiza, *Objectively*, *supra* note 194.

199 *See, e.g.*, KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 154 (1989) ("Perhaps any judicial finding of racial discrimination—even a finding based on racially disparate effects that are insufficiently justified by the state—will carry some implication of blame for government officials. But an inquiry centered on motive guarantees that antagonisms will be intensified, for it forces the litigants into name-calling on one side and self-righteousness on the other.").

200 *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–42 (1985) (explaining the status of that structure as of 1985).

201 Most notably, throughout his tenure on the Court, Justice Marshall objected to what he often characterized as the rigidity of the tiered scrutiny structure. *See*, *e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting) (describing the Court's "rigid . . . model" of tiered scrutiny); *see also* Andrew Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2344 n. 25 (2006) (citing scholars raising this same critique).

202 *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) ("Over the past decades, the Court has systematically denied constitutional protection to new groups."). This sentiment has existed for some time. *See, e.g.*, Harris M. Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 810 (1984) ("[I]t is extremely unlikely that the current Court will declare any additional classifications to be suspect.").

203 United States v. Windsor, 570 U.S. 744 (2013); Romer v. Evans, 517 U.S. 629 (1996); Allegheny Pittsburgh Coal Co. v. Cty. Com., 488 U.S. 336 (1989); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); *see also* Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the judgment) (voting to strike down a sodomy ban on equal protection grounds).

class analysis have been apparent for some time and have undermined its legitimacy.[204]

Looking forward, the Justices can expect to confront a variety of new types of discrimination—that is, discrimination whose status has not been already decided under the suspect class framework.[205] Unless the Court plans to resuscitate the suspect class approach it has ignored for nearly a generation, it will either resort to ad hoc decision-making or begin developing a new methodology.[206] Animus can play at least part[207] of that role in equal protection[208] doctrine. *Regents*' effect of placing animus doctrine on a firmer foundation can only help in that process.

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[204] As early as 1980, Laurence Tribe questioned the coherence of political process-based theories of constitutional interpretation, arguing that they reflected value judgments such theories sought to avoid. *See* Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1075 (1980). Even John Hart Ely's creation of a theory of judicial review based on political process insights conceded the difficulties of applying the Court's version of such a theory. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW ch.6 (1980). A newer generation of scholars has found other problems with the Court's version of suspect class theory. *See, e.g.*, Samuel Marcosson, *Constructive Immutability*, 3 U. PA. J. CON. L. 646 (2001) (observing that newer understandings of identity have put severe strain on the Court's focus on the immutability of a characteristic as relevant to the characteristic's status as suspect).

[205] For discussions of a sampling of such emerging equal protection issues, see RONALD DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE (2015) (discussing discrimination against polygamists); ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD (2008) (discussing obesity discrimination); Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 43 (2000) (discussing transgender discrimination); Jessica Roberts, *The Genetic Information Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597 (2011) (discussing genetics discrimination).

[206] To be sure, it will likely continue using the results of its older suspect class analysis to decide cases alleging discrimination, the suspectness of which the Court has already determined.

[207] Scholars have offered other theories that could supplement or supplant the tiered scrutiny structure. *See, e.g.*, SONU BEDI, BEYOND RACE, SEX, AND SEXUAL ORIENTATION: LEGAL EQUALITY WITHOUT IDENTITY (2013) (offering a powers-based approach to equal protection that asks, without reference to the group a challenged law burdens, whether that law is based on a constitutionally impermissible rationale); Kenji Yoshino, *A New Birth of Freedom?* Obergefell v. Hodges, 129 HARV. L. REV. 147, 148 (2015) (identifying in *Obergefell v. Hodges* a close intertwining of equal protection and substantive due process reasoning).

[208] Indeed, it could also play such a role in Religion Clause doctrine, as it already has in cases such as *Lukumi*, *Masterpiece*, and *Hawaii*. The proper role for animus in Religion Clause doctrine presents a question that is beyond the scope of this Article.

B. *Brass Tacks: Risks and Possibilities for Equality Advocates*

In addition to the positive conceptual implications set forth above, *Regents*' connection of animus and discriminatory intent also raises troubling possibilities for equality advocates litigating actual cases—but also some intriguing ones. These possibilities flow not from how animus claims may be litigated, now that the Court has endorsed using the *Arlington Heights* factors to evaluate them, but rather from how more conventional discriminatory intent cases may be litigated now that the Court has connected analysis of those claims to analysis of animus claims. Put more simply, the connection the *Regents* Court has drawn between animus and discriminatory intent may have consequences that flow in both directions. As Section V.A explained, intent doctrine may influence the animus inquiry. But the animus inquiry may also influence intent doctrine. This Section considers the implications of that latter possibility.

1. Further Rigidifying the Intent Inquiry

One troubling consequence of the animus-intent connection may be a further rigidifying of discriminatory intent analysis as grounded in notions of subjective ill will. Recall that earlier I suggested that animus analysis may benefit from its connection to discriminatory intent doctrine, as that connection may mitigate some of the subjectivity implicit in animus claims.[209] But if animus doctrine may benefit from having some of that subjectivity cleansed away by its association with discriminatory intent doctrine, then, conversely, discriminatory intent law may find itself sullied by its connection to an implicitly subjective concept such as animus.

Such a development would likely dismay equality advocates. Critics of discriminatory intent doctrine have argued that, at least since the Court's 1979 decision in *Personnel Administrator of Massachusetts v. Feeney*,[210] the Court has equated discriminatory intent with subjectively willful action.[211] Most notably, those critics have pointed to *Feeney*'s

209 *See supra* Section VI.A.

210 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

211 *See, e.g.*, R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 578 n.28 (2003) (describing *Feeney*'s definition of discriminatory intent as enacting a malice standard); Siegel, *supra* note 141, at 1134 (concluding that the Supreme Court's discriminatory intent jurisprudence has evolved into an insistence on something approaching "malice"). *But see* Brian Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 309 (2001) ("Contrary to the suggestions of some commentators, it is irrelevant [to the discriminatory intent question] whether the state actors harbor ill will or animus towards a particular race when passing legislation."); David A. Strauss,

(in)famous statement that, to satisfy the intent requirement, government must have acted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"[212] as a signal that the search for discriminatory intent had devolved into a search for subjectively bad motives. Given the criticism of this development,[213] it is easy to understand the fear that connecting the discriminatory intent idea to an idea—animus—that is even *more* intuitively connected with subjective bad intent will further raise the hurdle equality advocates must already surmount to prove discriminatory intent.[214]

2. Legal Jujitsu: Using Animus to Rebut Attacks on Race-Consciousness?

This fear is a reasonable one. But before considering it in more detail, it is appropriate to consider whether the animus-intent connection could somehow redound to the benefit of equality advocates litigating discriminatory intent cases. In at least one, admittedly limited, context, it might: if an equality litigator's task is not to attack a facially neutral government action that has racially disparate effects but instead to *defend* a facially neutral government action taken for race-based reasons, then, in a case of legal jujitsu, a connection between intent and animus may prove helpful.[215]

Consider, for example, Texas's Top Ten Percent Plan. That program, which lurked in the background of the *Fisher* affirmative action litigation that made two stops at the Supreme Court,[216] guaranteed admission to the University of Texas at Austin to graduates in the top ten percent of Texas high schools. As Justice Ginsburg argued in her dissent in the first *Fisher* opinion, and as the full Court acknowledged in the second, the Top Ten Percent Plan was enacted for

Discriminatory Intent and the Taming of Brown, 56 U. CHI. L. REV. 935, 937 (1989) (contending that the Court's "discriminatory intent test reflects a requirement of impartiality: . . . invidious discrimination consists of a failure to be impartial").

212 *See Feeney*, 442 U.S. at 279.

213 *See, e.g.*, sources cited at *supra* note 211; Haney-Lopez, *supra* note 142, at 1833–37.

214 *Cf.* Selmi, *Mistake*, *supra* note 139, at 776 (citing, in the Title VII context, "the false impression that disparate treatment equaled animus" as a result of advocates' attempts to expand the disparate impact theory of liability under that statute).

215 For example, one scholar who attacks the constitutionality of race-neutral government action that was nevertheless taken for race-conscious reasons has argued that the requisite discriminatory intent required in order to subject such actions to strict scrutiny does not require a showing of subjective ill will. *See* Fitzpatrick *supra* note 211. As the upcoming text will set forth, requiring a showing of invidiousness as a component of the intent inquiry would help blunt such attacks.

216 Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198 (2016); Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297 (2013).

race-conscious reasons: the Texas legislature, knowing full well the segregated status of Texas schools, sought to ensure at least a degree of Black and Latino representation at the University of Texas by basing admission in part on graduation in the top ten percent from any Texas high school.[217]

Or consider *Parents Involved in Community Schools v. Seattle School District Number 1*.[218] That case involved school districts' voluntary use of race in student assignment decisions[219] in order to integrate the schools in each district. While a five-Justice majority struck down the districts' actions, Justice Kennedy, the fifth vote for that result, nevertheless maintained that districts could take race-conscious actions to achieve integration, as long as those actions were race-neutral—that is, as long as they did not involve the actual use of race when assigning individual students.[220] Thus, Justice Kennedy explained that, for example, districts could legitimately make school siting decisions with an eye to the resulting student racial demographics that would flow from such decisions.[221] Just as with the Top Ten Percent Plan, Justice Kennedy's model for constitutionally valid conduct contemplates race-consciousness but not actual use of race in individual decisions.[222]

Do such uses of race violate equal protection, or at least trigger heightened scrutiny? Scholars have raised these questions.[223] In answering them, one might hearken back to *UJO*. The State of New York

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217 *See Fisher I*, 570 U.S. at 334, 335–36 (Ginsburg, J., dissenting); *Fisher II*, 136 S. Ct. at 2213.

218 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

219 The use of race was voluntary in the sense that neither district in the case was then under court order to correct an adjudged violation of *Brown*'s rule against *de jure* segregation. The Seattle district at issue in the case had been sued for segregating but had entered into a consent decree, while the Jefferson County, Kentucky (Louisville) district had been adjudged guilty of segregation but had been released from judicial supervision upon a finding that it had achieved desegregation "to the greatest extent practicable." *Parents Involved*, 551 U.S. at 716; *id.* at 711–18 (setting forth the general facts); *id.* at 808–11 (Breyer, J., dissenting) (noting the lawsuits against the Seattle district and the settlement agreements to which the district agreed).

220 *See Parents Involved*, 551 U.S. at 782, 788–89 (Kennedy, J., concurring in part and concurring in the judgment).

221 *See id.*

222 For a broader discussion of programs of this sort, see Reva Siegel, *Race Conscious but Race Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2015).

223 For a defense of the Top Ten Percent Plan in particular, see David Hinojosa, *Of Course the Texas Top Ten Percent Plan is Constitutional . . . And It's Pretty Good Policy, Too*, 22 TEX. HISP. J.L. & POL'Y 1 (2016). For a canvassing of the somewhat mixed scholarly views on the constitutionality and intent questions plans like Texas's raise, *see id.* at 4–5 n.17. For statements by scholars suggesting that the Texas plan does in fact classify based on race, see Dorf, *infra* note 228; Fitzpatrick, *supra* note 211.

in *UJO*, the State of Texas in the Top Ten Percent Plan, and the school districts in Justice Kennedy's *Parents Involved* hypothetical were all aware of race, and indeed acted to achieve race-conscious results—respectively, increased minority representation in the legislature, increased minority presence in the University of Texas's student body, and a particular racial mix in the individual schools within each district.[224] If one follows the path marked by the Justices in *UJO*, the Top Ten Percent Plan and Justice Kennedy's hypothetical race-conscious school siting decisions would presumably be upheld because they, like New York's redistricting plan, "represented no racial slur or stigma"[225] and lacked an "invidious purpose,"[226] even if they reflected "awareness"[227] of race.[228]

Regents could conceivably support such a conclusion. Its use of the factors relevant to discriminatory intent in its animus analysis raises the potential for animus-style reasoning to migrate into the modern discriminatory intent inquiry. In other words, *Regents*' borrowing of the discriminatory intent factors as part of its animus analysis could open the door to a reverse borrowing, in which factors relevant to an animus

224 *See, e.g.*, Fitzpatrick, *supra* note 211 (arguing that the Texas Top Ten Percent Plan is unconstitutional because it constitutes facially race-neutral government action that is motivated by a desire to achieve race-based effects and achieves such effects, and in turn fails strict scrutiny). In March 2021 a lawsuit was filed challenging a selective public high school's move to a different set of admissions criteria, alleging that the new criteria, while facially race-neutral, were motivated by a desire to alter the racial makeup of the class. That suit may well shed light on the constitutionality of plans such as the Texas Top Ten Percent Plan. *See* Ilya Somin, *Important New Lawsuit Challenges Attempted Racial Balancing at Prominent Selective Virginia Public High School*, REASON: THE VOLOKH CONSPIRACY (Mar. 16, 2021, 4:59 PM), https://reason.com/volokh/2021/03/16/important-new-lawsuit-challenges-attempted-racial-balancing-at-prominent-selective-virginia-public-high-school (discussing the implications of this lawsuit).

225 United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 165 (1977) (plurality opinion).

226 *Id.* at 179 (Stewart, J., concurring in the judgment).

227 *Id.* (Stewart, J., concurring in the judgment).

228 To be sure, one important difference between *UJO* and the two more modern examples is that the latter do not involve the explicit assignment of persons or allocation of benefits by race. Nevertheless, at least two scholars have argued that the Top Ten Percent Plan (and, by extension, the hypothetical race-conscious actions suggested by Justice Kennedy in *Parents Involved*) do in fact satisfy the discriminatory intent test as it is currently understood, and thus constitute racial classifications under modern law. *See* Michael C. Dorf, *Is the Texas Ten Percent Plan "Race Neutral?"*, VERDICT JUSTIA (Dec. 16, 2015), https://verdict.justia.com/2015/12/16/is-the-texas-ten-percent-plan-race-neutral; Fitzpatrick, *supra* note 211. If those scholars are correct, then such government conduct would be subject to the same question one might ask about New York's race-based redistricting in *UJO*: are such plans automatically subject to strict scrutiny as intentional racial classifications, or are they better analyzed by asking the questions (about stigma and invidiousness) asked by members of the *UJO* majority?

determination—considerations about demeaning,[229] stigmatizing,[230] subordinating,[231] or otherwise invidious[232] government action—become relevant to a finding of discriminatory intent. On this approach, plans such as the Top Ten Percent Plan would survive—indeed, would be found not even to reflect discriminatory intent—if they did not impose the sort of stigma or reflect the sort of invidiousness the plurality and Justice Stewart, respectively, found similarly lacking in *UJO*.[233]

Such a development could open the door to broader, longer-term reforms in equal protection law. Most notably, a move to an animus-based understanding of discriminatory intent—or perhaps a complete collapsing of the discriminatory intent idea into an inquiry that fundamentally sounds in invidiousness rather than classification *simpliciter*—could provide the foundation for a more hospitable attitude toward affirmative action. Recall that both *Davis* and *UJO* were decided before the Court's first full confrontation with the constitutionality of race-based affirmative action in *Regents of the University of California v. Bakke*.[234] The Court's more contextual understanding of race discrimination in those pre-*Bakke* cases—particularly in *UJO*[235]—is reflected in Justice Brennan's opinion for four Justices in *Bakke*. Among its other features, Justice Brennan's opinion sought to distinguish

229 *Cf.* United States v. Windsor, 570 U.S. 744, 772 (2013) (concluding that Section 3 of the Defense of Marriage Act (DOMA) "demeans" same-sex married couples and "humiliates" their children).

230 *Cf. id.* at 770 (concluding that Section 3 of DOMA "impose[s] a stigma" on married same-sex couples).

231 *Cf.* Romer v. Evans, 517 U.S. 620, 635 (1996) ("Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

232 *Cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (concluding that the challenged government permit denial rested on "irrational prejudice" against the intellectually disabled); *id.* at 448 (noting the city council's reliance on constituent fear and dislike of the intellectually disabled and rejecting it as a justification for the permit denial); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (warning that "a bare . . . desire to harm a politically unpopular group" is an insufficient justification for government action).

233 For a more conventional application of the *Arlington Heights* factors, leading to the same conclusion about the Texas plan's lack of discriminatory intent, see Hinojosa, *supra* note 223, at 11–18.

234 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978). The Court considered an affirmative action case before *Bakke* (and *Davis*) but dismissed it on mootness grounds. *See* DeFunis v. Odegaard, 416 U.S. 312, 319–20 (1974).

235 *See supra* notes 147–50. *Davis* presents a slightly more complicated picture. For an argument that *Davis* also reflected a more contextual approach to the intent question, *see* Selmi, *Mistake*, *supra* note 139, at 728–30; *see also supra* note 169 (explaining how *Arlington Heights* and *Davis* can also be understood, at least in part, as employing a context-sensitive approach).

between race-based set-asides based on the relative political power of the groups those set-asides benefited and burdened, and inquired into whether U.C. Davis's set-aside had the effect of demeaning either Allan Bakke or the beneficiaries of the program (by implying that they had inferior qualifications for admission).[236] Such concerns can easily be mapped onto Justice Stewart's inquiry into whether the state's use of race in *UJO* was "invidious"[237] and the *UJO* plurality's investigation into whether the state's use of race imposed a "slur" or a "stigma" based on race.[238]

Of course, Justice Brennan's approach to affirmative action failed to carry the day.[239] Instead, the Court ultimately settled on what has become the familiar two-step approach to equal protection. The first step in that approach seeks to determine whether the challenged law either facially classifies or reflects discriminatory intent, rigidly described as an inquiry into classificatory intent.[240] It is only the second step—application of the relevant scrutiny level—that seeks to determine the actual invidiousness of any such classification.[241] But if

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[236] *See Bakke*, 438 U.S. at 361 (Brennan, J., concurring in part and concurring in the judgment) (recognizing the risk that a race-based set-aside might harm the most politically powerless subgroup of whites); *id.* at 374 (concluding the Davis program did not raise that risk); *id.* at 375 (concluding that operation of the program did not stigmatize Bakke himself); *id.* at 375–76 (concluding that operation of the program did not stigmatize its intended minority beneficiaries).

[237] United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 179–80 (Stewart, J., concurring in the judgment).

[238] *Id.* at 165.

[239] For the importance of the Court's approach to affirmative action to this new understanding of the intent requirement, see Haney-Lopez, *supra* note 142, at 1829 (In *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979), "Stewart, joined by Powell and the three other Nixon appointees, used Powell's equal protection story in *Bakke* to rewrite the Fourteenth Amendment in terms of a basic concern with the act of classification. . . . In this narrative, the simple use of race, without more, triggered constitutional suspicion. . . . Stewart ostensibly reached back to *Brown v. Board of Education* for this radical proposition. Yet, clearly the appropriate citation was Powell's lone opinion in *Bakke*.").

[240] *See, e.g.*, Selmi, *supra* note 88, at 290 ("The Court's intentional discrimination cases can be divided into two familiar categories: those that involve facially discriminatory classifications and those that are facially neutral. For facially discriminatory practices and policies, the element of intent is inferred from the language, and the Court engages in no additional inquiry to determine whether the statute or policy was discriminatory. . . . More commonly, statutes and policies challenged as discriminatory are facially neutral, and the court must infer intent from the fact of differential treatment.").

[241] *See* Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (justifying strict scrutiny for all racial classifications in order to "smoke out" invidious uses of race). Note, however, that even the type of scrutiny *Croson* called for sought to uncover invidiousness not directly but rather though the ends-means analysis employed via strict scrutiny.

discriminatory intent comes (again) to be understood as an inquiry not into classificatory intent but rather into invidiousness, then the door might be opened to a reconsideration of the traditional two-step test that renders affirmative action so constitutionally precarious. Such a recasting of the intent requirement into a single holistic inquiry into ultimate invidiousness could follow from that requirement's new connection to animus-style reasoning.

To be sure, nobody should think that this doctrinal opening would change the minds of Justices who harbor a normative belief that all race classifications merit strict scrutiny.[242] On this issue, at least, legal doctrine may present pathways for Justices already inclined to search for a route to a particular destination; it does not, however, compel them to begin that journey. Nevertheless, the Court's recognition of the connection between discriminatory intent and animus offers a path to a destination that is more tolerant[243] of race-based affirmative action, should the Justices wish to take it.

3. Two Cheers for *Regents*

This prospect of a better eventual future for affirmative action may strike many as theoretical and speculative cold comfort—if even that[244]—when compared with the likelihood that a closer connection

[242] *See, e.g.*, Haney-Lopez, *supra* note 142, at 1836 (noting that "colorblindness was attractive insofar as it seemed to confirm [the Justices'] basic intuitions" about racial equality).

[243] To be sure, a frank, explicit invidiousness inquiry into affirmative action programs would not necessarily be completely deferential. There is room within that inquiry for a starting presumption that such programs, by using a potentially problematic tool such as race, must demonstrate their non-invidiousness. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 359–62 (1978) (Brennan, J., concurring in part and concurring in the judgment) (acknowledging the reasons that even benignly justified uses of race must be subject to meaningful scrutiny); *see also* Richmond v. J. A. Croson Co., 488 U.S. 469, 535 (1989) (Marshall, J., dissenting) (citing approvingly Justice Brennan's opinion in *Bakke*). But the difference is that this inquiry would be more frankly aimed, from the start, at the program's invidiousness, rather than starting with a rigid, acontextual inquiry into whether the law classifies on the basis of race, followed by a strict examination of the law's ends and means that purports to be the same regardless of the government's justifications for its use of race.

[244] For example, Professor Michael Selmi argues that the actual results of discrimination cases would not have changed had the Court adopted or more broadly employed an effects rather than intent test, since the Court would have still applied its fundamentally limited understanding of what constitutes discrimination. *See* Selmi, *supra* note 88, at 338. If one accepts his analysis, then one might also conclude that the Court would find a way to reject affirmative action plans even if it ostensibly applied a more holistic inquiry into invidiousness rather than the rigid and harsh ends-means test known as strict scrutiny. Indeed, the statements of individual Justices in the canonical affirmative action cases suggest that members of the Court held and continue to hold strong beliefs about the fundamental normative wrongness of any race-based

between discriminatory intent and animus will make it harder for equality litigators to prove the former as it becomes freighted with the latter's intimations of bad subjective motives.[245] To repeat, that risk is real. Equality advocates may well conclude that any collateral or long-term benefit this reverse borrowing provides to traditional equality claims are simply too speculative or theoretical to warrant welcoming the development *Regents* hearkens.

government action. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting speech by Frederick Douglass as part of an anguished protest against the concept of racial preferences); Richmond v. J. A. Croson Co., 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause."); *id.* at 527–28 (Scalia, J., concurring) ("It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still.").

[245] This is not to say that discrimination cases would necessarily be significantly easier to win under an alternative standard. *See, e.g.*, Selmi, *Mistake*, *supra* note 139, at 734 ("[O]ne of the central attractions to disparate impact [employment discrimination] claims is the perception that they are easier to prove than claims of intentional discrimination, given that intent is often difficult to establish through circumstantial evidence. In reality, however, the opposite is true. Disparate impact claims are more difficult to prove than standard intentional discrimination claims."); *see also* Selmi, *supra* note 88, at 335–36 ("Importantly, the Court's doctrine has not gone awry because of its focus on intent. The Court's restricted notion of intentional discrimination suggests that even if had adopted an effects test, the results would likely have been the same."). Professor Selmi made this latter claim in the context of a more general investigation of both statutory nondiscrimination and equal protection standards. Whether or not Professor Selmi is accurate in his conclusions presents a question that is far beyond the scope of this Article. *See* Selmi, *Mistake*, *supra* note 139, at 704, n.10 & 12 (citing scholars calling for increased use of disparate impact theory in a variety of equality contexts).

A related, but distinct, objection holds that animus doctrine should be disfavored because it infects not discriminatory intent doctrine, but rational basis review. This argument maintains that social justice movements can make use of rational basis review to obtain early litigation victories which can later ripen into broader judicial recognition of protected class status or other more broadly applicable doctrinal and even legislative innovations. This argument urges that the canonical animus cases be read instead as rational basis cases, in order to allow the accretion of such rational basis victories and thus the establishment of a judicial tradition of meaningful rational basis review that will ultimately benefit social movements. For a discussion of this issue, compare Katie Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1322 (2018) (making this argument), with Araiza, *Discontents*, *supra* note 106 (engaging Professor Eyer). Additionally, compare Katie Eyer, *Animus Trouble*, 48 STET. L. REV. 215 (2019) (responding), with William D. Araiza, *Response: Animus, Its Critics, and Its Potential*, 48 STET. L. REV. 275 (2019) (replying).

Still, we face the future with the doctrine we have, not the doctrine we would like to have.[246] In prior writing, I have strenuously urged explicit adoption of a robust but properly limited animus doctrine.[247] At this very early stage of the Court's development of its explicit connection between discriminatory intent and animus, it may be appropriate to cheer the Court on but monitor developments carefully as the implications of the doctrine *Regents* has helped create slowly take shape.

Two generations ago, Justice Jackson reminded us of something that Justice Cardozo cautioned about even earlier: doctrine matters.[248] Legal doctrine possesses its own momentum, which may generate results with one political or social valence during one era, and results with very different valences in another.[249] *Regents*' treatment of the plaintiffs' animus claim merits applause for both its current impact and its long-term potential. Nonetheless, litigants, judges, and perhaps especially scholars advocating for a robust role for animus in equal protection law have a responsibility to ensure that *Regents*' surprising turn to animus remains good news, rather than good news that soon turns bad.

VI. CONCLUSION

There is much to welcome in *Regents*' resurrection of the animus concept and its analysis connecting it to discriminatory intent. That resurrection places animus claims back on litigators' menu of options. The Court's analysis connecting animus to discriminatory intent, in turn, provides a firm and coherent grounding for the animus concept and

246 This statement alludes to then Secretary of Defense Donald Rumsfeld's infamous quotation, explaining the lack of preparedness for the second Iraq War: "You go to war with the army you have, not the army you might want or wish to have at a later time." *See* Eric Schmitt, *Iraq-Bound Troops Confront Rumsfeld Over Lack of Armor*, N.Y. TIMES, Dec. 8, 2004, https://www.nytimes.com/2004/12/08/international/middleeast/iraqbound-troops-confront-rumsfeld-over-lack-of.html.

247 *See* William D. Araiza, *Keynote Speech: Call It by Its Name*, 48 STET. L. REV. 181, 193 (2019) ("[C]reating an animus doctrine that is both *fit for* and *limited to* its appropriate tasks will help ensure the doctrine's vitality. It will accomplish that goal *exactly because* that doctrine will be limited enough to apply only when, in fact, it *should* apply.") (emphasis in original).

248 *See* Korematsu v. United States, 323 U.S. 214, 242, 246 (1944) (Jackson, J., dissenting) (cautioning that a legal principle announced in judicial opinions "lies about like a loaded weapon" ready for use by others); BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (noting the "tendency of a principle to expand itself to the limits of its logic"); *see also* Eyer, *supra* note 141 (concluding that the development of intent jurisprudence played a progressive role in race equality litigation in the 1960s and early 1970s but then evolved to play a more restrictive role after *Davis* and especially *Feeney*).

249 *See* Eyer, *supra* note 141.

raises the prospect of assisting equality claims both in the short and long term. These developments make it possible for the animus idea to evolve into at least a supplement to the Court's more traditional equal protection jurisprudence. That is welcome news when that jurisprudence—in particular, the *Carolene Products*-based structure of suspect classes and tiered scrutiny—has shown unmistakable signs of decrepitude.

At the same time, discriminatory intent jurisprudence may benefit from a newly explicit connection with animus. That connection may point the way toward a more nuanced, contextual understanding of intent, consistent with the Court's application of the intent requirement in the years immediately after its establishment. Thus, connecting animus to intent may redound to the benefit not just of the former but also the latter. The Court's action in resurrecting animus and connecting it to discriminatory intent may thus help renew that latter idea.

That resurrection and renewal, however, also raises risks to equality. Those risks require constant monitoring—by lawyers considering whether and how to employ the tools the Court has provided, judges responding to lawyers' deployment of those tools, and scholars evaluating the results and recommending the next steps. *Regents* is not the end of the evolution of animus. It is not even the beginning of the end. Instead, by bringing the concept into a new era, both in terms of its doctrinal grounding and its acceptance by a post-Kennedy Court, it is the end of the beginning.