

Winter 2019

Response: Animus, Its Critics, and Its Potential

William Araiza

Brooklyn Law School, bill.araiza@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Constitutional Law Commons](#)

Recommended Citation

48 Stetson L. Rev. 275 (2018-2019)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

RESPONSE: ANIMUS, ITS CRITICS, AND ITS POTENTIAL

William D. Araiza *

Philosophers may still disagree whether a tree falling in the woods out of human earshot makes a sound, but any academic can tell you that a piece of scholarship that lies unread and unremarked on makes no impact beyond that on the author herself. For this reason, I'm deeply grateful for the careful engagement provided to my book, *Animus: A Brief Introduction to Bias in the Law*,¹ by the participants in the *Stetson Law Review's* symposium devoted to that book.² I'm particularly grateful to Professors Daniel Conkle and Katie Eyer for their insightful and generous written comments on the concept of animus,³ and to Michelle Moretz for her careful consideration of the question of sexual orientation as a protected ground under Title VII of the Civil Rights Act of 1964.⁴ These written pieces, and Professors Conkle's and Eyer's previous writing on animus doctrine,⁵ have

* © Professor of Law, Brooklyn Law School. This response addresses articles that were written as part of a larger symposium on my book, *Animus: A Brief Introduction to Bias in the Law* (2017), held at Stetson University College of Law on April 20, 2018. My deep thanks go out to all of the participants in that symposium, to the staff of the *Stetson Law Review*, and to the faculty and staff at Stetson University College of Law, especially Professor Lou Virelli, who suggested the symposium originally.

1. WILLIAM ARAIZA, *ANIMUS: A BRIEF INTRODUCTION TO BIAS IN THE LAW* (2017) [hereinafter ARAIZA, *ANIMUS*].

2. *Animus: A Brief Introduction to Bias in the Law*, Stetson Law Symposium (Apr. 20, 2018) (video on file with the *Stetson Law Review*).

3. Daniel Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195 (2019) [hereinafter Conkle, *Animus and Its Alternatives*]; Katie Eyer, *Animus Trouble*, 48 STETSON L. REV. 215 (2019) [hereinafter Eyer, *Animus Trouble*].

4. Michelle Moretz, Comment, Baldwin, Hively, and Christiansen, *Oh My! Navigating the Yellow Brick Road of Employment Discrimination for LGBT Plaintiffs*, 48 STETSON L. REV. 235 (2019).

5. See, e.g., Daniel Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27 (2014) [hereinafter Conkle, *Evolving Values*] (suggesting that substantive due process and heightened equal protection scrutiny offer better doctrinal paths than animus to the constitutional recognition of same-sex marriage); Brief of Amici Curiae Steven G. Calabresi, Daniel O. Conkle, Michael J. Perry, & Brett G. Scharffs In Support of Certiorari and Opposing a Ruling Based on Voters' Motivations, *Herbert v. Kitchen*, 2014 WL 4380924

engaged and challenged my own thinking about animus and equality law more generally, and in the process have improved it greatly. This brief response engages both their earlier works and their contributions to the *Stetson Law Review*'s symposium, as well as Ms. Moretz's fine illustration of the difficulties faced by, but also the opportunities available to, emerging groups seeking equality today.⁶ Part I responds to Professor Conkle, Part II responds to Professor Eyer, and Part III responds to Ms. Moretz. Part IV synthesizes these responses into some overall reflections. Those final reflections are not—at least I hope that they are not—the end of the dialogue. The issues animus doctrine raises are too important to call any one statement the final word.

I. PRINCIPLE, PRUDENCE, AND STATESMANSHIP

A. The Critique

Professor Conkle's contribution to the *Stetson Law Review*, like his other scholarship that addresses animus, is characteristically generous, smart, and informed by a deep concern for the American constitutional project. His *Stetson Law Review* contribution recognizes "that animus doctrine is sound as a matter of constitutional principle."⁷ Generously, he describes my argument as "compelling,"⁸ and agrees with me that "animus-based lawmaking violates deep-seated constitutional understandings and should be regarded as categorically impermissible."⁹

Nevertheless, Professor Conkle expresses two concerns about animus doctrine, both of which he places under the broad umbrella of concerns about what he calls "judicial prudence."¹⁰ First, he worries about the workability of animus doctrine. Professor Conkle

(U.S. Sept. 4, 2014) (No. 14-124) [hereinafter Brief of Amici Curiae] (urging the Court to grant review in a same-sex marriage case, but, without arguing for a particular result, simply arguing that the Court should reject an animus justification for striking down state same-sex marriage bans); Katie Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018) [hereinafter Eyer, *The Canon*] (comparing animus doctrine unfavorably with standard rational basis review); Katie Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975 (2017) [hereinafter Eyer, *Protected Class*] (same).

6. Moretz, *supra* note 4.

7. Conkle, *Animus and Its Alternatives*, *supra* note 3, at 198.

8. *Id.*

9. *Id.* at 199.

10. *Id.* at 197.

identifies concerns about both how we should define animus and how courts should go about uncovering it.¹¹ With regard to the first, Professor Conkle wonders how beliefs based on religious and other morality-based worldviews fit within a doctrinal structure that condemns “a bare . . . desire to harm”¹² a particular group.¹³ Harkening to Justice Kennedy’s acknowledgement in *Obergefell v. Hodges* that much religious-based opposition to same-sex marriage is based on “decent and honorable” precepts,¹⁴ he acknowledges that opponents of same-sex marriage cannot instantiate such morality-based opposition in law.¹⁵ Nevertheless, he considers it “tendentious”¹⁶ to describe such opposition as based in animus. This objection thus sounds in concerns about definitions—namely, how one can fairly characterize particular attitudes and arguments as based in animus. Still focusing on workability, Professor Conkle then wonders, more prosaically but still importantly, how a court can determine whether animus, however defined, is responsible for a given decision if that decision was also actuated by other, more public-regarding motives.¹⁷

Moving then to judicial statesmanship, Professor Conkle reprises concerns he has expressed before, about the deleterious effects of animus allegations on American political, legal, and

11. *Id.* at 198, 202–04.

12. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973). The “bare desire to harm” language has become the canonical judicial formulation of what constitutes “animus.” *See also* *United States v. Windsor*, 570 U.S. 744, 770 (2013) (quoting that same language); *Lawrence v. Texas*, 539 U.S. 558, 579–80 (2003) (O’Connor, J., concurring in the judgment) (same); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (same); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985) (same).

13. *See* Conkle, *Animus and Its Alternatives*, *supra* note 3, at 101 (“[Q]uestions of workability [concerning animus doctrine] remain, notably including the core definitional question: exactly what counts as forbidden animus? . . . For example, what if the belief in question is a religious belief about human nature or personal morality?”); *id.* (“[R]eligious beliefs about human nature or personal morality are not easily equated with animus, at least not invariably, in that they do not necessarily entail hatred, dislike, or disfavor for a group of people as such.”).

14. 135 S. Ct. 2584, 2602 (2015).

15. *Id.*

16. Conkle, *Animus and Its Alternatives*, *supra* note 3, at 202.

17. *See id.* (“Even if animus can be defined appropriately and with sufficient clarity, there remains the problem of mixed motives or mixed purposes, when a law is based in part on animus but in part on other, public-regarding objectives.”) (footnote omitted).

social dialogue.¹⁸ Using eloquent language,¹⁹ he worries about the fate of American democracy when such debate takes the form of name-calling that polarizes and tribalizes our politics. For this reason, he concludes that “judicial prudence generally, and judicial statesmanship in particular, counsel against the use of animus doctrine.”²⁰ To be sure, Professor Conkle agrees with me that, as a matter of constitutional theory, animus is both a valid and important concept.²¹ Nevertheless, he concludes, concerns about its judicial workability and impact on American political debate justify its use only as “a doctrine of last resort, to be utilized only when there is no viable and preferable doctrinal alternative.”²²

In the final part of his paper, Professor Conkle offers such an alternative: suspect class analysis. He argues that of the classic animus “quadrilogy”—*Moreno*, *Cleburne*, *Romer*, and *Windsor*—three cases (all but *Moreno*) could and should have been decided by according the group in question suspect or quasi-suspect class status and applying the requisite level of heightened scrutiny to strike down the action in question.²³ To be sure, Professor Conkle acknowledges arguments that suspect class analysis is difficult to manage.²⁴ But he notes that animus doctrine presents similar workability challenges.²⁵ With this consideration in what he calls “equipoise,”²⁶ for Professor Conkle the deciding factor becomes “judicial statesmanship.”²⁷ He argues that suspect class doctrine is superior to animus doctrine on this ground because it produces fewer deleterious effects on democratic debate. To repeat, Professor Conkle doesn’t flatly reject animus. Indeed, he at least implies that no better theory justifies the Court’s result in *Moreno*,

18. *Id.* at 205; Brief of Amici Curiae, *supra* note 5, at 9 (“Charging voters [who supported initiatives supporting same-sex marriage bans] with bias will unnecessarily vilify those who disagree and will chill public debate.”).

19. See, e.g., Conkle, *Animus and Its Alternatives*, *supra* note 3, at 205 (“America today is being torn apart by sharply worded political rhetoric and extreme political polarization, trends that are threatening the very fabric of our democracy.”); *id.* at 206 (“Invoking animus in resolving such disputes . . . fans the flames of our cultural conflagrations.”).

20. *Id.* at 206.

21. *Id.* at 198–99.

22. *Id.* at 198.

23. *Id.*

24. *Id.* at 208 (“Turning to considerations of judicial prudence, one might argue that [suspect class] doctrine is, or has become, unworkable. . . . The identification of suspect and quasi-suspect classifications is not an exact science. . . .”).

25. *Id.*

26. *Id.* at 210.

27. *Id.*

the first of the animus “quadrilogy.”²⁸ Nevertheless, for Professor Conkle, judicial use of animus doctrine should be, as he says, a “last resort,” employed only when other doctrinal tools are unavailable.

B. Response

I begin with the common ground between Professor Conkle and myself. I appreciate his acknowledgement of the foundational nature of the anti-animus idea in American constitutional law. This agreement renders our disagreement simultaneously more technical and at the same time more normative. On the technical side, Professor Conkle’s critique centers on the difficulty courts face when attempting to decide whether, in fact, a challenged government action is infected with animus. More normatively, his discussion of “judicial statesmanship” requires consideration of the collateral effects of animus doctrine—in particular, its effect in encouraging uncivil, winner-takes-all discourse in a democratic society.²⁹ Both of these concerns are fair. Ultimately, however, they should not push courts away from a forthright reliance on animus doctrine when appropriate.

First, as to practicalities: detecting animus and pronouncing its presence does indeed present courts with a difficult challenge. The animus inquiry, by requiring investigation into governmental motive, raises all the difficulties courts have encountered in other areas of the law where motive matters. Prominent among those difficulties is one that Professor Conkle raises: the problem of mixed motives. Nevertheless, because this inquiry and its related problems are common to other areas of the law, the solutions the law has created in those other areas, such as presumptions and

28. As Conkle writes:

Given the [*Moreno*] statute’s impact on personal decisions concerning intimate, family-like relationships, perhaps the Court in *Moreno* could have grounded its ruling on substantive due process. But the doctrine of substantive due process raises difficult questions of its own, both as a matter of constitutional principle and as a matter of judicial prudence. In any event, if neither substantive due process nor any other alternative ground was viable and preferable in *Moreno*, then the Court’s animus ruling was proper.

Id. at 211–12 (footnotes omitted).

29. See, e.g., Conkle, *Evolving Values*, *supra* note 5, at 41–42 (worrying that an animus justification for striking down state same-sex marriage bans would make it more difficult to accommodate religiously-based opposition to same-sex marriage).

burden-shifting frameworks,³⁰ should be able to do analogous work in the animus area. Indeed, much of my book attempts to demonstrate how the Supreme Court's animus decisions have, without explicitly acknowledging it, borrowed from the analogous framework in discriminatory intent jurisprudence.³¹

To be sure, this response does not fully answer Professor Conkle's concern about workability. Most importantly, it does not answer his question about the animus status of religious- or morality-based opposition to the traits that mark certain persons, such as sexual orientation or gender identity. I address this more normative concern below.

As to judicial statesmanship: Professor Conkle is surely justified in raising a concern about the impact animus allegations have on the already-fraught nature of American political discourse. But ironically, it is exactly that fraught nature that militates in favor of courts employing animus doctrine when appropriate. In my symposium keynote, I argued that the very existence of a political and social environment marked by xenophobia and deep cultural conflict on fundamental issues of identity and national belonging *requires* a jurisprudence that is willing to call out animus when it exists.³²

To be sure, the very rhetorical power of an animus conclusion counsels caution about its use. Courts should not wield animus doctrine as an all-purpose tool to combat any form of discrimination they may find distasteful, irrational, or even deeply unfair.³³ For example, a sincere misunderstanding of the capabilities of persons with a particular disability may warrant judicial correction, whether via rational basis or some higher form of equal protection review, some form of fundamental rights review, or a combination of the two.³⁴ So might an unthinking

30. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (creating what is now known as the *McDonnell Douglas* burden-shifting framework in which the plaintiff must first prove a prima facie case of discrimination under Title VII, shifting the burden to the employer to show a non-discriminatory reason for termination or rejection, then shifting the burden back to the plaintiff to show that the employer's response was merely a pretext for discriminatorily motivated behavior).

31. ARAIZA, ANIMUS, *supra* note 1, at 79–143.

32. William D. Araiza, *Call It By Its Name*, 48 STETSON L. REV. 181 (2019) [hereinafter Araiza, *Call It By Its Name*].

33. See *id.* at 193 (“creating an animus doctrine that is both *fit for* and *limited to* its appropriate tasks helps ensure the vitality of the doctrine”) (emphasis in original).

34. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 455, 460 (1985) (Marshall, J., concurring in the judgement in part and dissenting in part) (“I have long

stereotype about appropriate sex roles.³⁵ But at the same time, it would be appropriate to refrain from condemning such actions as grounded in animus.³⁶

Such forbearance may be similarly appropriate when discrimination can be fairly understood in moral terms. Of course, that proposition presumes an ability to distinguish between good faith religious or moral beliefs and animus that deserves to be identified as such and promptly rejected. Professor Conkle worries about the former being mistaken for the latter.³⁷ But I believe that the structure I sketched out in *Animus*, when sensitively applied, provides courts with tools with which to distinguish the two.

First, opposition to a particular equality claim can be examined for its connection to what we normally understand as issues relevant to what constitutes a moral life. For example, one might be hard-pressed to label as animus-based a religion's refusal to perform a same-sex marriage. To be sure, such a refusal might well reflect a view of same-sex unions as distinctly inferior to other unions that the given religion validates with the term "marriage." But the choices one makes about one's intimate life and other analogously self-constitutive choices are sufficiently and conventionally understood and described as morality-based, such that condemnation of these choices is typically understood as a moral judgment, rather than simple dislike of persons who make those disfavored choices.³⁸ To be sure, instantiation of such moral

believed the level of scrutiny employed in an equal protection case should vary with the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.") (internal quotation marks omitted).

35. See, e.g., *Weinberger v. Weisenfeld*, 420 U.S. 636, 643 (1975) (identifying "archaic and overbroad" sex stereotypes as subject to judicial correction).

36. To be sure, as Professor Conkle recognizes, standard suspect class analysis focuses in part on whether the discrimination at issue has a long historical pedigree, and in part on whether that discrimination turns on a trait that is "broadly irrelevant to legitimate generalization, rendering discrimination on this basis not only unfair but also indefensible in a wide range of governmental settings." See Conkle, *Animus and Its Alternatives*, *supra* note 3, at 208 (quoting Daniel Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 34–35 (2014)). This (accurate) description of suspect class analysis reveals more than a hint of animus-based reasoning.

37. Cf. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The Court has mistaken a *Kulturkampf* for a fit of spite.").

38. Indeed, Professor Conkle's illustration of the type of morality-based viewpoints he is talking about focuses exactly on such subjects. See Conkle, *Animus and Its Alternatives*, *supra* note 3, at 201 (describing the viewpoints he is discussing as "typically reflect[ing] religious perspectives about how people should live their lives and structure their interpersonal relationships").

judgments into public law remains unconstitutional.³⁹ Nevertheless, such unconstitutional lawmaking need not, and should not, be held up as an instance of animus, unless independent reasons exist to suspect the sort of intentional social subordination that I argue should be understood as reflecting animus.⁴⁰

At the other extreme from private religious beliefs, across-the-board opposition to the equal civil status of a group should best be understood as opposition to that group's standing as equal members of the community.⁴¹ Even if such opposition is grounded in religious teachings, the willingness of such opponents to subordinate a group in the context of civil society can only be understood as "a bare . . . desire to harm"⁴² or the disapproval of that group, if that term is to have any meaning. Such discrimination would appropriately be subject to condemnation as animus-based. Simply put, one cannot be heard to assert a "sincere moral judgment," based on "decent and honorable precepts,"⁴³ when alleging that a lesbian has no right to any legal protection at

39. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (finding Establishment Clause violations in laws that are not supported by a "secular legislative purpose").

40. This caveat justifies the Court's animus conclusion in *Windsor*, while simultaneously embracing a presumption that state law same-sex marriage bans of the sort struck down in *Obergefell* should not be viewed as grounded in animus. By contrast to those bans, the federal Defense of Marriage Act's (DOMA's) unusual intrusion into the realm of states' power to define marriage, the wholesale nature of the federal definition of marriage as between one man and one woman (as opposed, say, to a more granular definition for purposes of particular federal programs), and its effect of subordinating state-validated same-sex marriages all gave reason for the animus label the Court affixed to DOMA. For another statement of the argument about intentional social subordination as the core of the animus idea, see William D. Araiza, *Animus and Its Discontents*, FLA. L. REV. (manuscript at 66–74) (forthcoming 2019) (Brooklyn Law School, Legal Studies Paper No. 563) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225974 [hereinafter Araiza, *Animus and Its Discontents*].

41. See, e.g., *Romer*, 517 U.S. at 623 (using the language of caste to describe the effect of Amendment 2).

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

43. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.").

all.⁴⁴ To be sure, these two extreme examples present the easy cases. But they illustrate the basic idea.

The book's proposed structure accounts for this idea. Most notably, its direction to courts to consider the scope of the challenged discrimination, such as whether that discrimination imposes an across-the-board disability, helps distinguish between areas that are properly the subject of good faith moral disagreement and those that are susceptible to an animus analysis.⁴⁵ So does the book's insistence on considering the more specific context of the discrimination.⁴⁶ In particular, more private realms, whether religious or intimately interpersonal, may be thought the proper realm of morality-based arguments, as Professor Conkle himself suggests.⁴⁷ By contrast, the pluralistic and heterogeneous nature of the social, governmental, and commercial worlds render morality arguments for discrimination in those areas not only less constitutionally cognizable⁴⁸ but also, depending on the facts of the given case,⁴⁹ more amenable to a characterization of such discrimination as reflecting a desire to subordinate that group within those secular realms.

Thus, in situations where it applies—not just situations where no other doctrinal tool is available, but rather, situations that squarely present discrimination that can fairly be described as animus-based⁵⁰—courts should, as my keynote argues, call such discrimination by its name.⁵¹ To do otherwise obscures the reality of the situation under the bloodless technocratic jargon of tiers of scrutiny and comparisons of statutory ends and means.

44. See *Romer*, 517 U.S. at 635 (describing Amendment 2 as making “a class of persons a stranger to its laws”).

45. See, e.g., ARAIZA, ANIMUS, *supra* note 1, at 56–58 (explaining *Romer* in this way).

46. See, e.g., *id.* at 145–51 (discussing the context of disability discrimination).

47. *Supra* note 38.

48. See *supra* note 39 (citing Due Process Clause and Establishment Clause cases rejecting morality as a legitimate government interest for a challenged law). This same pluralism provides government with a significant interest in ensuring equal status in those realms even when the Constitution does not directly guarantee it. See, e.g., *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727, 1732 (2018) (recognizing the government interest in ensuring full and equal access to the marketplace).

49. See, e.g., ARAIZA, ANIMUS, *supra* note 1, at 144–62 (providing examples of types of discrimination that, based on their facts, might or might not appropriately be condemned as animus-based).

50. See *id.* (discussing cases that justify a court condemning the challenged law as animus-based).

51. See generally ARAIZA, *Call It By Its Name*, *supra* note 32 (calling on courts to label actions as animus-based when that description is appropriate).

Heightened scrutiny may get litigants to the same place—again, Professor Conkle seems to agree that when it doesn't, recourse to animus doctrine may be appropriate.⁵² But it does so without courts playing any public role in calling out animus when it exists. Professor Conkle believes that such judicial reticence is appropriate to avoid courts embroiling themselves in deep cultural conflicts. The concerns he identifies make it clear that a choice has to be made. Professor Conkle's (completely legitimate) choice is for such reticence. Mine is for judicial candor.

II. ANIMUS TROUBLE

A. The Critique

Professor Eyer's contribution, just like Professor Conkle's, raises serious questions about animus doctrine—questions that, again like those posed by Professor Conkle, she has raised in previous writing.⁵³ Professor Eyer's concerns about animus connect objections to its accuracy as a description of the Court's modern equal protection jurisprudence with normative worries about its implications for the future course of equal protection law and its potential as a tool for positive change.⁵⁴ These concerns merit a serious response.

Professor Eyer's critique of animus is largely grounded in her favorable view of rational basis, or what she calls "minimum tier,"⁵⁵ review. As a descriptive matter, Professor Eyer contends that such review has yielded a degree of success for emerging social movements, which may be surprising to those who associate such scrutiny with inevitable wins for the government.⁵⁶ To be sure, she recognizes that such victories both resulted from and created further ambiguities in rational basis review, which she describes as "messy" and underdetermined.⁵⁷ However, Professor Eyer

52. See, e.g., Conkle, *Animus and Its Alternatives*, *supra* note 3, at 212 (concluding that *Moreno* was appropriately decided as an animus case).

53. Eyer, *The Canon*, *supra* note 5 (comparing animus doctrine unfavorably with standard rational basis review); Eyer, *Protected Class*, *supra* note 5 (same).

54. *Supra* note 53.

55. Eyer, *Animus Trouble*, *supra* note 3, at 216.

56. See *id.* at 221–24 (discussing the extent to which rational basis scrutiny has yielded victories for social movement litigators).

57. See, e.g., *id.* at 217 (noting that "rational basis victories have continued to be a messy affair"); *id.* at 224 (stating that "opinions affirming rational basis victories have tended to be muddy and ill-defined").

considers that messiness is a benefit, rather than a drawback, of rational basis review, since, as she explains, that feature opens up doctrinal space that social movement litigators can exploit.⁵⁸ The most relevant point about such victories, she argues, is that they were won before any animus argument was even remotely plausible.⁵⁹ Thus, she concludes, it is simply incorrect to argue that animus is an indispensable element of a successful rational basis challenge.⁶⁰

This description of “minimum tier” review provides the basis for Professor Eyer’s normative concern about animus. Animus doctrine, she argues, forecloses future opportunities for emerging group victories of the sort she describes.⁶¹ She fears that if animus doctrine comes to predominate thinking about non-suspect class judicial review—that is, if animus becomes understood as the main or even exclusive path for such classes to obtain meaningful rational basis review—then the generative potential of minimum tier review will be lost.⁶² As evidence of this dynamic, she concludes her comments by noting how the majority in *Trump v. Hawaii*⁶³ seemed to describe animus as playing just a gatekeeper role.⁶⁴ Thus, just as the intent requirement restrains the generative potential of equal protection review generally,⁶⁵ so too, she fears, the creation of an animus requirement as a gatekeeper for meaningful rational basis review will restrain the future potential for the types of victories she describes emerging social groups as having won over the last several decades.⁶⁶

B. Response

As with Professor Conkle’s paper, there is much to admire, and for me to be grateful for, in Professor Eyer’s forceful yet careful analysis. Her emphasis on what she has called the Supreme

58. *Id.* at 217.

59. *Id.*

60. *Id.* at 224–25.

61. *Id.* at 216–17, 226.

62. *Id.* at 226–28.

63. 138 S. Ct. 2392 (2018).

64. Eyer, *Animus Trouble*, *supra* note 3, at 230–33.

65. *Id.* at 228.

66. *Id.* at 219–21 (noting how even racial justice groups won rational basis victories before equal protection doctrine hardened into the bifurcated structure that existed until the creation of the intermediate tier in the mid-1970s).

Court's "rational basis canon"⁶⁷ and her meticulous excavation of lower court cases in which social movement litigators prevailed by using rational basis review remind us of the submerged legal history—often messy but for that reason generative—that often is overly tidied-up by scholars after the fact. Nevertheless, such tidying up, or systemization, may generate benefits beyond doctrinal housekeeping for its own sake. Indeed, in the case of animus doctrine, that tidying up can help achieve the types of results Professor Eyer hopes to make possible through her scholarship.

My hope in writing *Animus* was to provide clarity about a concept that the Supreme Court has explicitly recognized. To be sure, the Court has not provided the relatively detailed doctrinal structure that *Animus* offers. Nevertheless, in providing that structure, the book, and my other work on that concept,⁶⁸ aspires to provide a roadmap for a concept that already exists, and that Justices have recognized as a distinctive idea at least as far back as Justice O'Connor's 2003 concurrence in *Lawrence v. Texas*⁶⁹ and as recently as the Court's majority opinion in *Hawaii v. Trump*.⁷⁰

My hope in providing that structure is to provide a roadmap for courts—especially lower courts—seeking to determine whether unconstitutional animus exists in a given case. Professor Eyer's concern appears to be, in part, that such a roadmap—and, indeed, even recognition of animus as a distinct legal concept—would crowd out the garden-variety, non-animus-inflected, rational basis review that she views (correctly) as having been so important to emerging social groups at the outset of their litigation sagas. But animus exists as an equal protection concept. In light of this reality, an important task for scholars is to explain what that concept means or should mean. My own contribution to that attempt focuses not only on the narrow question of what animus is and how courts should identify it, but also on where animus fits within the broader constellation of constitutional equality

67. See generally Eyer, *The Canon*, *supra* note 5 (presenting what she describes as several canonical rational basis review cases).

68. See, e.g., Araiza, *Animus and Its Discontents*, *supra* note 40 (presenting an approach to animus that fits the Supreme Court's analyses of the issue and harmonizes it with its approach to the closely-related doctrine of discriminatory intent).

69. 539 U.S. 558, 578 (2003) (O'Connor, J., concurring in the judgment).

70. 138 S. Ct. 2392, 2420 (2018).

doctrines.⁷¹ To be sure, my efforts on the latter question have been halting and speculative. But my argument that animus doctrine can find its roots in the venerable concept of class legislation (an argument that Professor Eyer, to her credit, acknowledges)⁷² offers a hope of reconnecting modern equal protection doctrine to its historical roots. In the context of a doctrine that has now attained at least some measure of judicial recognition, this seems to me a worthwhile enterprise.

But what about the crowding out that concerns Professor Eyer? It is my hope that animus does not crowd out such claims. Instead, in my book, I have attempted to explain how animus doctrine can complement traditional equal protection doctrine. I argue that animus analysis complements traditional heightened scrutiny review, replicating the steps of that more traditional doctrinal structure when those more traditional steps are, for whatever reason, unavailable.⁷³ To be sure, rational basis review is not heightened scrutiny; thus, it's fair for scholars such as Professor Eyer to worry that a widely applied animus doctrine would become, in her words, a "gatekeeper"⁷⁴ doctrine that would serve to defeat rational basis arguments unless the court could reasonably suspect animus. This is not my goal, nor is it, in my view, a necessary effect. By situating animus doctrine within the broader scope of class legislation history, I hope to make clear that animus doctrine is *one strand of*, or *one path toward*, a better understanding of what equal protection is all about.⁷⁵

An example may help clarify this. In my book, I discuss a variety of types of discrimination that, at least in some cases, could

71. See, e.g., ARAIZA, ANIMUS, *supra* note 1, at 11c28, 176–78 (locating modern animus doctrine within the nineteenth-century class legislation tradition); Araiza, *Animus and Its Discontents*, *supra* note 40, at 62–84 (same).

72. Eyer, *Animus Trouble*, *supra* note 3, at 226 n.62.

73. ARAIZA, ANIMUS, *supra* note 1, at 105–33 (explaining how the proper steps in the animus inquiry parallel those in more traditional equal protection review). See also Conkle, *Animus and Its Alternatives*, *supra* note 3 (expressing a preference for heightened scrutiny under traditional suspect class analysis rather than animus, but recognizing a role for animus doctrine when such heightened scrutiny is unavailable).

74. Eyer, *Animus Trouble*, *supra* note 3, at 226–28.

75. See, e.g., Araiza, *Call It By Its Name*, *supra* note 32, at 188, 192–93 (suggesting that animus can be understood as one modern strand among several of the type of class legislation condemned by nineteenth-century jurisprudence and calling for a project of delineating the proper reach of animus doctrine, in order to ensure that it does not become an all-purpose claim available to any equal protection plaintiff).

conceivably be thought of as being motivated by animus.⁷⁶ Disability is one such example.⁷⁷ I argue that, in order for such discrimination not to be considered animus-based, it has to be “careful, calm, and compassionate,” not “overbroad,” “hysterical,” or “based on mean-spiritedness or disgust.”⁷⁸ But even if such discrimination can be described using the former, more benign set of terms, this doesn’t mean that such discrimination is necessarily constitutional. Government can make mistakes, even when it acts in good faith. Deep, but sincere, misunderstandings of a disability may lead even the best-intended decision-maker to make decisions that we could reasonably condemn as irrational. We would not—or at least should not—describe such mistakes or misunderstandings or even unintentional stereotyping as animus.

Concededly, doctrinal slippage can confound this analysis. As Professor Eyer suggests, the everyday understanding of the term *animus* connotes a significantly bad state of mind.⁷⁹ If left uncorrected, that common understanding, when combined with the temptation to equate “unconstitutional” with “evil,”⁸⁰ raises the risk that courts will insist on some type of subjective bad intent in an equal protection challenge that does not already carry the doctrinal and moral force of explicitly heightened scrutiny. Thus, animus—in a strong, subjective form—risks becoming the gatekeeper Professor Eyer worries about, prompting her anxiety about systematizing and thus more firmly establishing something called “animus doctrine.”

But animus doctrine is already here. Given that it is here, it is essential that it be explained, in part so it can be celebrated, but also so it can be properly cabined.⁸¹ To be clear, and in particular to make clear where Professor Eyer and I part ways, I do celebrate animus doctrine. I believe that it responds to something real, and does so with candor and force rather than obfuscation and indirection. But just as my book should not lead a court to uphold

76. See generally ARAIZA, ANIMUS, *supra* note 1, at 144–62 (providing several such examples).

77. See generally *id.* at 145–51 (discussing disability discrimination and its relation to animus).

78. *Id.* at 147.

79. Eyer, *Animus Trouble*, *supra* note 3, at 229.

80. Araiza, *Animus and Its Discontents*, *supra* note 40, at 78–80 (suggesting the attractiveness of this temptation).

81. See generally ARAIZA, ANIMUS, *supra* note 1, at 144–62 (considering examples where an animus conclusion is appropriate and examples where it is not).

a seriously mistaken but animus-free instance of disability discrimination, so too should its more general explanation of animus not be taken as advocacy of animus as an indispensable element of any equal protection claim, including one made under the rational basis standard.

To be sure, my book focuses on when animus *should* be found, not when it should *not* be found. But this should hardly be surprising, given that courts have done a very poor job of explaining the animus concept. To delineate a concept's proper realm usually requires beginning by demarcating that realm, rather than identifying situations where it does not apply. Regardless, and to be completely clear, animus should not be understood as supplanting other forms of equal protection scrutiny. As the book sets forth in detail, that concept should be understood as supplementing heightened scrutiny, performing the same role of smoking out bad intent that strict scrutiny is explained as doing.⁸² It should also serve to supplement conventional rational basis review.

That last statement requires unpacking the relationship between animus doctrine and both heightened scrutiny and rational basis review. By contrast to its close connection with heightened scrutiny,⁸³ animus doctrine has a more tenuous relationship with rational basis review. This is counter-intuitive, since animus cases are, in fact, cases where—for whatever reason—heightened scrutiny is inappropriate or otherwise unavailable. In other words, animus cases are rational basis cases where a court finds animus lurking.⁸⁴ This distinction thus implies

82. *Id.* at 112–14.

83. *Id.*

84. To be sure, at times courts will speak of “discriminatory animus” when considering claims that government actors are unconstitutionally discriminating on the basis of a characteristic that triggers more than rational basis review. In other words, courts will sometimes look for “animus” even when being asked to perform heightened scrutiny. *See, e.g.,* N.Y. v. U.S. Dep’t of Commerce, 315 F. Supp. 3d 766, 806 (S.D.N.Y. 2018) (“To state a claim under the [equal protection component of the] Fifth Amendment in the circumstances presented here [which feature claims of race and ethnicity discrimination], NGO Plaintiffs have to plausibly allege that Defendants’ decision was motivated by discriminatory animus and its application results in a discriminatory effect.”) (internal quotation omitted). In particular, they sometimes seem to equate the discriminatory intent such claims require with “discriminatory animus.” *See, e.g., id.* (implying that the discriminatory intent requirement equal protection plaintiffs face can be satisfied by a showing of “discriminatory animus”). This phenomenon raises fascinating questions about whether animus doctrine can generate positive doctrinal changes in the traditional discriminatory intent jurisprudence that has existed now for a generation. *See* Vill. of Arlington Heights v. Metro.

a category of “pure” irrationality cases—that is, cases where no bad intent (subjective or objective) is hinted at. Such cases exist—at least if courts are willing to perform more careful review than the toothless, extremely deferential, formulation of such review as exemplified in canonical cases such as *Railway Express v. New York*.⁸⁵ But those cases implicate raw inaccuracy—indeed, inaccuracy to the point of something that can be plausibly described as “irrationality.” Such irrationality may arise from concepts such as stereotyping, but unless those cases are understood as simply featuring a “lite” version of animus, they are shorn of any plausible claim that they are based in any sort of bad intent.⁸⁶

Such cases exist; indeed, in past writing I have highlighted the difference between such cases and animus cases, in the particular (and unique) context of the “class-of-one” doctrine.⁸⁷ But they are qualitatively different from animus cases. As such, it would constitute a category mistake to insist that any rational basis claim features allegations of animus. Of course, there is always the possibility that courts will commit that exact mistake—that is, that courts will come to conjoin such “pure” rational basis claims and animus claims, such that the former cannot succeed without proof of the latter. But that is all the more reason to explain animus doctrine: to ensure that it occupies a recognized channel of equal protection law, one that holds the potential to connect modern equal protection doctrine with its historical roots, but also to ensure that that doctrine stays within its recognized, but properly demarcated, channel.⁸⁸

Hous. Dev. Corp., 429 U.S. 252 (1977) (setting forth criteria by which courts can uncover discriminatory intent); *Washington v. Davis*, 426 U.S. 229 (1976) (announcing the intent requirement). These possibilities lay far beyond the scope of this brief response Essay.

85. 336 U.S. 106 (1949). *E.g.*, *Allegheny Pittsburgh Coal Co. v. Cty. Comm’n of Webster Cty.*, 488 U.S. 336 (1989); see also William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 *ECOLOGY L.Q.* 493 (2007) [hereinafter Araiza, *Irrationality and Animus*] (discussing the concept in the context of class-of-one equal protection cases).

86. Cf. Eyer, *Animus Trouble*, *supra* note 3, at 217 (noting rational basis review requires no showing of animus in order for a challenged law to be struck down).

87. Araiza, *Irrationality and Animus*, *supra* note 85. In that Article, I tentatively suggest that “pure irrationality” class-of-one cases may be best understood as substantive due process cases. *Id.* at 514–15. This conclusion is based on the unique aspects of class-of-one cases; by contrast, there is no reason such “pure irrationality” claims of class-based discrimination are conceptually incompatible with review under the Equal Protection Clause.

88. See *supra* note 76 (discussing examples of laws triggering animus-based equal protection claims).

Indeed, to close this part of my response, I would urge, *contra* Professor Eyer, that *Hawaii v. Trump* stands as a lesson favoring the animus project as a matter of scholarly attention. Professor Eyer cites the Court's language suggesting that successful rational basis claims must normally include allegations of animus to urge abandoning animus as a doctrinal theory, on the ground that it will become irretrievably conjoined with garden-variety rational basis claims.⁸⁹ But another way to respond to that language is as a clarion call to scholars to explain the animus concept, to ensure that courts understand its proper—and its properly limited—role. Doing so can make it clear that animus should not invade the domain of “pure irrationality” cases. One can, and should, argue for that limitation, even while urging that animus doctrine can serve salutary roles, both in connecting modern equal protection doctrine with its historical aspirations and in providing a vehicle for courts to respond forthrightly to government actions that clash with those aspirations.

III. LGB RIGHTS AND TITLE VII

A. The Argument

At first blush, Michelle Moretz's Comment examining the pathways for Title VII plaintiffs wishing to allege sexual orientation discrimination⁹⁰ does not directly engage animus doctrine. To be sure, gay rights claims more generally have been the vehicle for the Supreme Court's most recent applications of the animus concept.⁹¹ Nevertheless, Ms. Moretz's carefully constructed argument proposes several theories by which LGB⁹² plaintiffs might be able to succeed in moving forward with claims of sexual orientation-based employment discrimination, none of which

89. Eyer, *Animus Trouble*, *supra* note 3, at 232.

90. Moretz, *supra* note 4.

91. See *United States v. Windsor*, 570 U.S. 744, 770 (2013) (holding the Defense of Marriage Act unconstitutional); *Lawrence v. Texas*, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring in the judgment) (concurring in the majority decision holding a Texas statute that bans same-sex sodomy unconstitutional); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (holding unconstitutional a Colorado amendment denying protection from discrimination based on sexual orientation).

92. Moretz, *supra* note 4, at 238. It is unclear whether transgender Title VII plaintiffs face the same doctrinal structure as LGB plaintiffs, given that transgender plaintiffs would not be alleging, or seeking to allege, sexual orientation discrimination.

explicitly incorporates animus-based reasoning.⁹³ As she notes, some such plaintiffs have succeeded in pleading that they were discriminated against because their conduct did not conform to gender norms.⁹⁴ Analogizing to Title VII race cases, she also argues that LGB plaintiffs should be able to bring Title VII claims alleging discrimination based on the employee's choice of spouse or intimate partner.⁹⁵ Finally, she argues that courts should embrace the Equal Employment Opportunity Commission's (EEOC's) conclusion that sexual orientation discrimination constitutes sex discrimination, and thus is directly prohibited by Title VII.⁹⁶

B. Response

Ms. Moretz's careful untangling and presentation of these distinct doctrinal paths for LGB Title VII plaintiffs reflects, albeit distantly, the structure for equal protection law that I advocate for in my book. Just as her piece lays out different paths for LGB Title VII plaintiffs, my book argues that different paths exist for constitutional equality plaintiffs. Equality arguments can rest on many different claims. Ms. Moretz lays out three that are available to LGB plaintiffs under Title VII. Similarly, equal protection plaintiffs have available several distinct pathways. As Professor Conkle urges, they can allege that the alleged discrimination requires careful scrutiny by a court, given that such discrimination is rarely justified.⁹⁷ Alternatively, they can allege that the alleged discrimination is simply irrational—a path whose success and future potential Professor Eyer lays out.⁹⁸ The animus cases, in my

93. To be sure, these theories might have some underlying basis in animus, or bad intent more generally. For example, Ms. Moretz's argument that an LGB plaintiff should be able to allege discrimination based on her associational choice (e.g., her choice of a spouse or other intimate partner) implies that such discrimination would in fact be based on an employer's disapproval of that choice. But because Title VII's text prohibits discrimination "because of" the employee's protected characteristic (here, her sex), all that is required is that the employer have discriminated "because of" that characteristic. This language requires no inquiry into the underlying motive for such discrimination. *See, e.g.*, Charles Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 916 (2005) ("The Court soon established that certain motivations, such as animus or disdain, were not essential to a violation: although sufficient, proof of such motives was not necessary for discrimination under Title VII because an employer discriminates within that statute's meaning if the employer intends to draw a distinction on prohibited grounds.").

94. Moretz, *supra* note 4, at 250–54.

95. *Id.* at 271–72.

96. *Id.* at 267–71.

97. *See supra* pt. I (discussing the heightened scrutiny pathway).

98. *See supra* pt. II (discussing the rational basis pathway).

view, offer a third alternative, one in which the plaintiff can allege that the particular discrimination in question is motivated by something we are willing to call animus.

One could carry this analogy even farther and note that, while Title VII disparate treatment cases do not require animus, other theories Ms. Moretz discusses—such as the associational rights theory—presumably imply a state of affairs in which the employer disapproves of the employee or her choice—for example, her choice of intimate partner or family relationship.⁹⁹ One might find a parallel between Title VII’s different answers to the question of whether animus is required and my own claim, in the constitutional sphere, that some equal protection claims may simply require the plaintiff to prove what one might call “innocent irrationality” while other claims are expressly grounded in animus. To be sure, this claim is speculative, and vulnerable to the response that it oversimplifies complex and context-specific species of discrimination claims, and the distinct structures of Title VII and the Equal Protection Clause. Still, the broader point remains: Ms. Moretz’s fine analysis of the litigation options LGB Title VII plaintiffs should enjoy reflects the point that, as I argue in the conclusion to this response, there are many paths to equality.

IV. CONCLUSION: MANY PATHS TO EQUALITY

The three pieces of scholarship to which this response is directed push in different directions. But they share a common feature. Each piece reveals the fundamental truth that there are many doctrinal paths to the same equality goal. Professor Conkle expresses a preference for suspect class analysis, but nevertheless acknowledges a role, if limited, for animus doctrine. Professor Eyer worries that animus doctrine will crowd out non-animus-based rational basis challenges by causing judges to conjoin irrationality and animus and insist that any rational basis challenge feature a plausible animus allegation. She values non-animus-based rational basis challenges exactly because they provide a path to success for plaintiffs who cannot (or cannot yet) claim heightened judicial protection under suspect class analysis, and who cannot plausibly claim to be the victims of unconstitutional animus. Ms.

99. Moretz, *supra* note 4, at 257 (discussing a case where an employer fired a worker once the employer became aware of the employee’s interracial child).

Moretz's piece identifies three distinct legal theories that gay rights litigators can embrace when arguing that Title VII covers sexual orientation discrimination.

In my book and in other writings, I have sought to construct a viable theory of equal protection animus that can provide an alternative path to success for equal protection plaintiffs beyond standard rational basis and suspect class/heightened scrutiny arguments. To be sure, this path presents hazards. Professor Conkle is correct when he worries about the potential for the animus concept to further polarize political debate. Professor Eyer is correct that that concept reflects a splitting of the rational basis canon she identifies into animus cases and what one might call "pure irrationality" cases. To the extent that this move reduces the force of that canon, or, paradoxically, "infects" that canon by adding a gatekeeping animus requirement, there is reason for concern.

But these are exactly the reasons work on animus doctrine is important. In response to Professor Conkle's concern, it is important for scholars to develop doctrinal structures that allow courts to uncover and call out animus without necessarily indicting the subjective motivations of lawmakers or, even worse, their constituents. In response to Professor Eyer's concern, it is important for scholars to delineate the proper scope of animus analysis in order to demarcate its proper domain—and, by implication, to prevent it from over-spilling its banks into other doctrines.

The title of my symposium keynote, *Call It By Its Name*,¹⁰⁰ reflects this dual concern. On the one hand, it urges judges and scholars to, indeed, call animus by its name when it exists. The rise of xenophobia and cultural conflict in modern American life requires such judicial candor, if constitutional law is to play any positive role in American life beyond that of the bloodless technocrat that measures ends and means as if they were inputs into a chemical formula. But calling animus by its name also implies delineating it—identifying it when it exists, but by extension, declining to use the term when it doesn't. In providing a path for courts to determine when animus should be found to exist, this work hopes to identify and explicate an additional, not a replacement, path to equality—one that responds to the lived

100. Araiza, *Call It By Its Name*, *supra* note 3232.

reality of twenty-first century America, but that also grounds that response in the aspirations of those who framed the Fourteenth Amendment during another era of deep cultural conflict.

