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Fire, Aim, Ready! Militarizing Animus: “Unit Cohesion” and the Transgender Ban

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Fire, Aim, Ready! Militarizing Animus: “Unit Cohesion” and the Transgender Ban

Eric Merriam*

ABSTRACT

President Trump’s currently litigated “transgender ban,” which excludes transgender persons from military service, is premised in part upon a claim that transgender persons’ presence in the military adversely affects “unit cohesion.” This use of identity-based “unit cohesion” as a justification for excluding a group from military service is the latest episode in a long history of the government asserting “unit cohesion” to justify excluding people from military service based on their identities. This Article contends that unit cohesion, when premised on identity, is always an impermissible justification for exclusion from military service because it is unconstitutional *animus*. Though the animus doctrine is incomplete, with only a few Supreme Court cases identifying its contours, its growing significance to equal protection jurisprudence should not be ignored. This Article demonstrates that unit cohesion is animus under each of the variants articulated by the Supreme Court and understood by animus scholars. Though this Article argues that all attempts to justify exclusion from military service using identity-based claims of unit cohesion are impermissible animus, it applies animus jurisprudence only to the current “transgender ban.” By applying animus jurisprudence to the transgender ban, this Article demonstrates that this latest use of unit cohesion should invalidate the ban.

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INTRODUCTION

The military has asserted “unit cohesion”¹ to exclude from military service a variety of groups, including African-Americans;² women;³ homosexual individuals;⁴ and, most recently, people with non-cis-gendered gender identities.⁵ The argument that the presence of certain people will, because of their identity, cause military units to lack the cohesion necessary for military effectiveness is unconstitutional, invidious discrimination.

1. “Unit cohesion” generally refers to a military group’s mutual reinforcement of positive behaviors and attitudes toward group membership and commitment to a common goal. For a thorough discussion of research and current understandings of military unit cohesion, see THOMAS S. SZAYNA ET AL., *CONSIDERATIONS FOR INTEGRATING WOMEN INTO CLOSED OCCUPATIONS IN U.S. SPECIAL OPERATIONS FORCES* 55–76 (2016). Numerous studies of unit cohesion have culminated in the modern understanding of unit cohesion having two dimensions: task cohesion and social cohesion. Task cohesion is “the extent to which unit members share a common goal and coordinate their efforts to achieve it.” *Id.* at 59. Social cohesion includes three elements: “unit members’ interpersonal attraction, shared bonds of trust, and provision of social support.” *Id.* at 65.

2. See, e.g., Alexander B. Downes, *Would Transgender Troops Harm Military Effectiveness? Here’s What the Research Says*, WASH. POST (Mar. 27, 2018), <https://wapo.st/2LwtXHE> (noting Army Chief of Staff Gen. George Marshall defended segregation in the military in 1940 by claiming, “to intermingle white and colored personnel in the same regimental organization . . . would inevitably have a highly destructive effect on morale—meaning military efficiency.”).

3. As recently as 1980, a Senate Committee on Armed Services report rejected women registering for the draft for a variety of reasons, including that their presence would “impair the male bonding and unit cohesion necessary for military effectiveness.” Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 326 (2005) (citing LINDA BIRD FRANCKE, *GROUND ZERO: THE GENDER WARS IN THE MILITARY* 157 (1997)).

4. The so-called “Don’t Ask, Don’t Tell” law was premised in part on unit cohesion. See 10 U.S.C. § 654(a)(14) (2006) (repealed 2010) (“The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces’ high standards of morale, good order and discipline, and *unit cohesion* that are the essence of military capability.”) (emphasis added). Don’t Ask, Don’t Tell’s predecessor, which banned service by homosexual persons, was similarly supported in part by unit cohesion justifications. See, e.g., *Beller v. Middendorf*, 632 F.2d 788, 811 (9th Cir. 1980) (“The Navy is concerned about tensions between known homosexuals and other members who ‘despise/detest homosexuality.’”).

5. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <http://bit.ly/2xljxsT>; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <http://bit.ly/2MC9LR6>; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), <http://bit.ly/2QuNKqG> [hereinafter “July 26, 2017 Twitter Announcement”] (barring transgender persons from serving in the military).

This Article accepts that military unit cohesion, long understood as essential for effective military action, is a compelling government interest.⁶ Additionally, this Article does not evaluate factual claims regarding whether the presence of a specific excluded group actually affects unit cohesion or whether impaired unit cohesion actually affects mission accomplishment.⁷ Rather, this Article demonstrates that identity-based unit cohesion is always an unconstitutional basis for exclusion from military service because it constitutes impermissible animus. In other words, excluding persons from military service because their mere presence—based on who they are, rather than what they can do⁸—will adversely affect unit cohesion is nothing more than government institutionalization of private biases and prejudices, a practice prohibited by the Supreme Court’s animus jurisprudence.

When the government claims “unit cohesion,” it justifies identity-based exclusions from military service using the perceived adverse effect of a group’s presence on unit cohesion. However, when the government puts forth this justification, it essentially accepts that the social discomfort, dislike, or disapproval of certain military unit members will lead to ineffectiveness. In the military context, these private prejudices have been launched against the inclusion of African-Americans, Asian-Americans, women, homosexual individuals, and now transgender persons.⁹ In all of these cases, the adverse effect on unit cohesion was premised on the idea that individuals within the military unit harbored some view of the excluded

6. See, e.g., SZAYNA, ET AL., *supra* note 1, at 55; Robert J. MacCoun & William M. Hix, *Unit Cohesion and Military Performance*, in *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY* 137, 137–158 (2010). This article likewise does not address which forms of cohesion—especially task cohesion and social cohesion—actually result in military effectiveness. Because this article focuses on unit cohesion based on identity rather than capacity, it necessarily relates most to social cohesion rather than task cohesion. However, it does so without entering the debate regarding the relative importance of those types of cohesion. See, e.g., MacCoun & Hix, *supra* note 6, at 139 (describing social and task cohesion); see generally Robert J. MacCoun et al., *Does Social Cohesion Determine Motivation in Combat? An Old Question with an Old Answer*, 32 *ARMED FORCES & SOC.* 646 (2006) (arguing social cohesion does not impact unit performance and suggesting a contrary finding in a paper by the Army War College ignored critical evidence).

7. See, e.g., SZAYNA ET AL., *supra* note 1, at 60, 70 (noting evidence that cohesion affects unit performance is mixed).

8. I do not argue that *all* claims of unit cohesion are invalid, as claims of unit cohesion based on members’ abilities to contribute to the mission, attitude, or performance may be non-invidious discrimination and militarily necessary. For example, combat units may exclude persons who lack sufficient physical aptitude to perform missions requiring uncommon physical abilities without violating the Constitution’s prohibition on inequality based on arbitrary or irrational classification.

9. See *supra* notes 3–6 and accompanying text.

group that restricted their abilities to work together effectively in the military environment.¹⁰ These views are animus, and government classifications based on animus are unconstitutional.

Numerous plaintiffs filed lawsuits challenging the United States' ban on transgender persons serving in the military.¹¹ In response, the government defended its so-called "transgender ban" on three bases: (1) "[a]t least some transgender individuals suffer from medical conditions that could impede the performance of their duties;"¹² (2) certain medical conditions "may limit the deployability of transgender individuals as well as impose additional costs on the armed forces;"¹³ and (3) the presence of transgender individuals in the military would harm "unit cohesion."¹⁴ This Article focuses on the last justification.

The animus doctrine has quietly taken center stage in the Supreme Court's equal protection jurisprudence. Indeed, in the last few decades the Court has used animus to find a variety of government actions unconstitutional, including discrimination against "hippies,"¹⁵ the cognitively impaired,¹⁶ gays and lesbians,¹⁷ and ra-

10. See, e.g., 10 U.S.C. § 654(a)(14) (2006) (repealed 2010) ("The armed forces must maintain personnel policies that exclude [homosexual] persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."); Beth J. Asch & Paul Heaton, *Recruiting and Retention*, in *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY* 167, 171–72 (2010) (quoting a letter written by Admiral Adolphus Andrews that said the Navy limited black sailors to stewards because if afforded greater rank and responsibilities, "team work, harmony, and ship efficiency [would be] seriously handicapped"); SZAYNA ET AL., *supra* note 1, at 78 (noting 85 percent of special forces survey participants opposed letting women into their specialties, with 80–83 percent expecting a decline in cohesion); Rowan Scarborough, *Lawmaker Moves to Bar Women from Subs: Wants Congress to Decide Matter*, WASH. TIMES, May 5, 2000, at A1; Anna Simons, *Here's Why Women in Combat Units Is a Bad Idea*, WAR ON ROCKS (Nov. 18, 2014), <http://bit.ly/2D13NK6> (arguing unit cohesion would be adversely harmed because heterosexual men would compete for women's attention); see generally BRIAN MITCHELL, *WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY* (1989) (arguing that the presence of women in the military is harmful to cohesion and effectiveness);

11. See, e.g., *Doe v. Trump*, 275 F. Supp. 3d 167, 211 (D.D.C. 2017); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017). See *infra* Part III for a thorough discussion of the transgender ban.

12. *Doe*, 275 F. Supp. 3d at 212; *Karnoski*, 2017 WL 6311305, at *8.

13. *Doe*, 275 F. Supp. 3d at 211.

14. *Id.* at 212; *Karnoski*, 2017 WL 6311305, at *7.

15. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f 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 government interest.").

cial minorities.¹⁸ These animus cases each arose under circumstances where the Court could have applied its traditional tiers-of-scrutiny analysis based on suspect or quasi-suspect classifications¹⁹ but instead cited animus as the basis for striking down unconstitutional discrimination. Moreover, these animus cases were decided during a period in which the Supreme Court failed to identify new suspect or quasi-suspect classifications.²⁰

Scholars have recognized this “rise of animus.”²¹ Some have applauded this new equal protection doctrine and have attempted to comprehensively explain the Court’s varied animus decisions.²²

16. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985) (“[S]ome objectives—such as ‘a bare . . . desire to harm a politically unpopular group’—are not legitimate state interests.” (quoting *Moreno*, 413 U.S. at 534)).

17. *United States v. Windsor*, 570 U.S. 744, 770 (2013) (“The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.’” (quoting *Moreno*, 413 U.S. at 534–35)); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (finding an amendment to a state constitution that barred gays and lesbians from any particular protections from the law violated the Equal Protection Clause because, in part, it was born out of “animosity toward the class of persons affected”).

18. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

19. Under the Supreme Court’s traditional approach, to assess an equal protection claim, a court determines whether the classification at issue is “suspect” or “quasi-suspect.” *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (finding that racial classifications are suspect classifications); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (developing the idea of quasi-suspect classifications). If the classification is suspect, the court applies strict scrutiny, which requires that the government’s interest is compelling and the classification is narrowly tailored to accomplish the interest. *Grutter*, 539 U.S. at 326. If the classification is quasi-suspect, the court applies intermediate scrutiny, which requires that the government’s interest is important and that the classification substantially relates to accomplishing that interest. *Clark*, 486 U.S. at 461. If the classification is neither suspect nor quasi-suspect, the court applies only rational basis review, under which the government must be attempting to accomplish a legitimate interest and classifying in a way that is rationally related to accomplishing that interest. *See, e.g.*, *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (applying rational basis review to economic regulation).

20. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 (2011) (“At least with respect to federal equal protection jurisprudence, th[e] canon [of suspect class analysis] has closed.”).

21. *See, e.g.*, William D. Araiza, *Animus and Its Discontents 1* (unpublished manuscript), <http://bit.ly/2pcF23V> (last visited Aug. 30, 2018) (noting the concept of animus in equal protection law and observing that the concept has been responsible for a string of equal protection victories for gay and lesbian advocates).

22. *See, e.g., id.*; Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (2013); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

Others have sounded alarms and have critiqued the role that animus has come to play in the Court's jurisprudence.²³

Lower federal courts have also begun using animus to decide cases, even beyond the equal protection context. For instance, the early "travel ban" cases were decided, in part, on the notion that animus toward a particular religion violated the First Amendment.²⁴ But the irregularity with which federal courts have applied the Court's animus jurisprudence suggests that some courts have missed the jurisprudential shift: the Court appears to have abandoned the rigid tiers-of-scrutiny approach for a new method of discerning equal protection violations.

Lower federal courts are not solely to blame for missing the Supreme Court's equal protection shift. First, though the Court has broken no new ground in its traditional tiers-of-scrutiny approach, it still routinely employs that approach's terminology to decide challenges to suspect and quasi-suspect classifications. More significantly, while the Court has identified various forms of animus,²⁵ it has failed to articulate a unified understanding of the doctrine and its significance. Indeed, though the animus canon has developed over several decades, scholars have only recently begun attempting comprehensive explanations.

Part I of this Article discusses each of the "forms of animus" that the Court has recognized and explains how each form interacts with the justification of unit cohesion. In addition to case precedent, this Article applies several scholarly explanations of the animus doctrine to the unit cohesion justification and concludes that identity-based unit cohesion is animus in all of its conceptions.

Part II discusses various theories regarding the *effect* of a finding of animus and applies those theories to unit cohesion claims.

23. See generally Brief of Amici Curiae Stephen G. Calabresi, Daniel O. Conkle, Michael J. Perry, and Brett G. Scharffs in Support of Certiorari and Opposing a Rule Based on Voters' Motivations, *Herbert v. Kitchen*, 135 S. Ct. 265 (2014) (No. 14-124) (arguing the Court should reject animus as a reason to strike down same-sex marriage bans); Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675 (2014) (arguing that *Windor* exemplifies the Supreme Court's contribution to the so-called "culture wars"); see also Dan Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 40 (2014).

24. See, e.g., *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 595–601 (4th Cir. 2017); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018). In *Trump v. Hawaii*, the Court rejected the plaintiffs' argument that the travel ban constituted religious animus in violation of First Amendment because the travel ban was "inexplicable by anything but animus." *Id.* The Court's animus discussion was not full-throated and occurred in the First Amendment context, rather than in light of the Equal Protection Clause. See *id.* at 2420–23.

25. See *infra* Part I for a discussion of the various forms of animus.

The government rarely justifies a classification solely on bases that suggest animus. Thus, whether a finding of animus in one of the government's proffered justifications invalidates the others is critical to our understanding of the impact of the animus doctrine on equal protection claims.

Part III addresses the transgender ban and its subsequent litigation. Part III demonstrates how unit cohesion is an unconstitutional justification. Further, Part III notes the surprising paucity of animus discussions in the transgender ban opinions produced thus far.

Although this Article uses the transgender ban as an example in its discussion of unit cohesion claims, the scope of this Article is not limited to the unconstitutionality of the transgender ban. Rather, this Article demonstrates the unconstitutionality of all identity-based unit cohesion claims that are premised on the disruptive effect of certain persons in the military.

I. UNIT COHESION AND THE SEVERAL FORMS OF ANIMUS

The Supreme Court's animus jurisprudence is incomplete. The Court's animus cases, though not contradictory, illuminate different facets of what animus is, how it is identified, and what effect a finding of animus has on a government action. Scholarly catalogues of the cases that comprise the animus "canon" vary, but most identify some version of a "quadrilogy" of cases, while others identify more.²⁶ This section groups the animus cases in the following manner: animus based on private stereotype and prejudice;²⁷ animus demonstrated by legislative desire to harm;²⁸ animus demonstrated by structure;²⁹ and dignitary injury as impermissible animus.³⁰

While scholars continue to debate the significance of the Supreme Court's animus cases, some have begun attempting to articulate a coherent animus doctrine—something the Court has yet to do. As this Article demonstrates, unit cohesion as a justification for excluding people from military service based on their identities is animus in all of its forms.³¹ That is, unit cohesion is animus under

26. Compare Carpenter, *supra* note 22, at 183 (referring to the group of primary animus cases as a "quadrilogy"), with Pollvogt, *supra* note 22, at 898–900 (identifying at least seven animus cases).

27. See *infra* Part I.A.

28. See *infra* Part I.B.

29. See *infra* Part I.C.

30. See *infra* Part I.D.

31. See *infra* Parts I.A.3, I.B.2, I.C.2, I.D.2.

each of its conceptions set forth by the Supreme Court and articulated by leading animus scholars.

A. *Animus Based on Private Stereotype and Prejudice: Palmore and Cleburne*

1. *The Palmore Approach to Animus*

Two early animus cases—*Palmore v. Sidoti*³² and *City of Cleburne v. Cleburne Living Center*³³—focus on the type of animus that most directly relates to the root of the “unit cohesion” justification: where the government adopts or gives effect to private bias or prejudice.

In *Palmore*, the Supreme Court unanimously held that a family court judge’s order, which awarded sole custody of a child to the child’s father because the mother was in an interracial marriage, violated the Equal Protection Clause.³⁴ The family court’s decision was purportedly based not on the judge’s own racial prejudice or intolerance of miscegenation, but rather on a concern that the mother’s marriage would subject the child to social stigmatization resulting from society’s disapproval of multi-race marriages.³⁵ In other words, the animus underlying the government action belonged to society, not the government actor.

Palmore is not always presented in discussions of the animus canon.³⁶ This omission is not without reason. First, the word animus does not appear in the Court’s opinion. Second, the classification at issue was based on race, so one might observe that the traditional strict scrutiny test underlie the Court’s analysis. Indeed, the Court appeared to apply heightened scrutiny, noting that the state’s interest in granting custody based on the best interests of the child was “indisputably a substantial governmental interest for purposes of the Equal Protection Clause.”³⁷ Further, it would have been difficult to argue that when racial prejudice obstructs the government’s interest, the government’s reliance on race to solve the problem was not narrowly tailored.³⁸ Thus, the Court could have

32. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

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

34. *Palmore*, 466 U.S. at 433–34.

35. *Id.* at 431–32.

36. Compare Carpenter, *supra* note 22, at 204 (identifying only *Windsor*, *Romer*, *Cleburne*, and *Moreno* as animus cases), with Pollvogt, *supra* note 22, at 906–10 (identifying the animus analysis in *Palmore* as its own form of animus).

37. *Palmore*, 466 U.S. at 433.

38. See Pollvogt, *supra* note 22, at 907 (suggesting that the use of race under the circumstances was “perfectly tailored”).

easily decided *Palmore* by applying traditional strict scrutiny. But it did not.

Palmore's importance to the animus cannon emerges from the Court's unanimous conclusion that the family court's order was unconstitutional, even though the judge's decision survived strict scrutiny. The Supreme Court held the judge's decision unconstitutional because "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."³⁹ The *Palmore* Court did not attempt to ascertain whether the underlying private bias was reasonable or even whether it existed at all, but it instead found fault in the fact that the judge's order gave effect to private bias. The Court thus mandated that public laws not express or enforce private bias. In fact, the Court opined, "the reality of private biases and the possible injury they might inflict" are impermissible considerations.⁴⁰

The Court in *Palmore* also alluded to another instance of private bias that is relevant to the military's unit cohesion justification. The *Palmore* Court referenced its earlier decision in *Buchanan v. Warley*,⁴¹ which invalidated a Kentucky law that forbade black persons from buying homes in white neighborhoods. The law had been premised on promoting the public peace by preventing race conflicts.⁴² Quoting from its decision in *Warley*, the *Palmore* Court noted: "Desirable as [preventing race conflicts] is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."⁴³ The *Palmore* Court cited additional cases that held the community's reaction to the presence of certain individuals could not justify excluding those individuals. The Court quoted from its earlier opinion in *Wright v. Georgia*,⁴⁴ which held "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present."⁴⁵ These cases demonstrate that the Supreme Court has repeatedly and consistently found government enforcement of private prejudice impermissible, even when the justifications are legitimate or even compelling.

39. *Palmore*, 466 U.S. at 433.

40. *Id.*

41. *Buchanan v. Warley*, 245 U.S. 60 (1917).

42. *Palmore*, 466 U.S. at 433–34 (citing *Buchanan*, 245 U.S. at 81).

43. *Id.* at 434 (quoting *Buchanan*, 245 U.S. at 81).

44. *Wright v. Georgia*, 373 U.S. 284 (1963).

45. *Palmore*, 466 U.S. at 434 n.3 (quoting *Wright*, 373 U.S. at 293).

2. *The Cleburne Approach to Animus*

The Court's decision in *Cleburne* further clarified the significance of *Palmore* to the animus doctrine and advanced the Court's animus jurisprudence in two significant ways. First, *Cleburne* may have marked the end of the Court's use of suspect classification analysis and the traditional tiers-of-scrutiny approach. Since *Cleburne*, the Court has identified no new suspect or quasi-suspect classifications; in fact, the Court's subsequent equal protection decisions use only the classifications and levels of scrutiny that were in place at the time of *Cleburne*. Second, *Cleburne*'s reliance on *Palmore* advanced the idea that a government actor violates the Equal Protection Clause when its actions are based on private bias. *Cleburne* clarified that such private bias constitutes animus. And if a government actor bases a decision on animus, it violates the Equal Protection Clause.

In *Cleburne*, the Supreme Court held that the Cleburne City Council violated the Equal Protection Clause when it denied the Cleburne Living Center's (CLC) request for a special use permit. CLC planned to build a group home for mentally disabled persons, but a city zoning regulation required CLC to first obtain a special use permit. The city required special use permits for certain types of homes, including "[h]ospitals for the insane or feeble-minded."⁴⁶ When the Cleburne City Council declined CLC's request for a permit, CLC sued alleging the denial violated the Equal Protection Clause.

The U.S. Court of Appeals for the Fifth Circuit concluded that cognitive disability qualified as a quasi-suspect classification. Despite several factors weighing in favor of such a determination—including the immutability of cognitive disability and the relative political powerlessness of the class—the Supreme Court overruled the Fifth Circuit's decision.⁴⁷ The Court found that because mental disability could be relevant to public legislation, classification on that basis was not inherently suspect.⁴⁸ Because it found that cognitive disability did not qualify as a suspect classification, the Court applied rational basis review.⁴⁹

Contrary to the expected result of rational basis review, the Court struck down the City Council's denial of the permit, finding animus underlay the City Council's decision. Specifically, the Court

46. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 436–37 (1985).

47. *Id.* at 442–47.

48. *Id.*

49. *Id.*

determined that the City Council's decision rested on "irrational prejudice against the mentally [disabled]."⁵⁰ Importantly, the Court determined it immaterial whether the irrational prejudice belonged to the individual City Council members or the City Council as an institution or whether the decision merely manifested the City Council's acquiescence to city residents' stereotypes and fears of the intellectually disabled.⁵¹ The Court noted that "the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause . . . and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic."⁵²

In *Cleburne*, the legislative history of the City Council's decision provided explicit evidence of community members' ill will. Community members publicly expressed negative attitudes toward persons with intellectual disabilities. Perhaps more charitably, some community members expressed concerns that others—nearby high school students, for example—might harass mentally disabled persons based on *their* irrational prejudices.⁵³

As it had in *Palmore*, the Court held the City of Cleburne's reliance on private prejudices and biases unconstitutional. *Cleburne* extended *Palmore*'s exhortation that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."⁵⁴ Where *Palmore* prohibited government action that relied on private biases about race, which was already a suspect classification, *Cleburne* prohibited government action that relied on private biases about cognitive ability.⁵⁵ In so doing, *Cleburne* expanded the prohibition on government adoption of private bias against suspect classifications to *all* private biases.

3. *Palmore*, *Cleburne*, and the Unit Cohesion Justification

Palmore and *Cleburne* stand for the principle that impermissible animus exists when irrational private biases motivate govern-

50. *Id.* at 450.

51. This distinguished *Cleburne* from *Moreno*, which was based on the legislators' animus against "hippies." See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). For an elaboration of the distinction between *Cleburne* and *Moreno*, see *infra* notes 68–72 and accompanying text.

52. *Cleburne*, 473 U.S. at 448 (citation omitted).

53. *Id.* at 449.

54. *Palmore v. Sidoti*, 466 U.S. 329, 433 (1984).

55. In fact, the *Palmore* Court noted that the case raised "important federal concerns arising from the Constitution's commitments to eradicating discrimination based on race." *Id.* The Court elaborated, "A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination *based on race.*" *Id.* at 432 (emphasis added).

ment action. Viewed in light of this principle, *Cleburne*'s devastating effect on claims of identity-based unit cohesion becomes clear. When the government claims that the presence of a particular group in the military would disrupt unit cohesion, it is not claiming that the military as an institution is incapable of accepting those persons. Rather, the government is claiming that individual military members have prejudices based on stereotypes—whether dislike, discomfort, disapproval, or moral approbation—that adversely affect their abilities to work closely with persons from the excluded group. The individual military members comprise the military's "society"; therefore, claims of unit cohesion rest entirely on the attitudes—the private biases and prejudices—of the military society. As opposed to other purported deleterious effects of the presence of a particular group in the military, the only way that the presence of a particular type of person or persons could disrupt unit cohesion is through the views of individual unit members. The *Cleburne* Court clearly mandated that such private biases are impermissible considerations for classifications when it declared: "[T]he [government] may not avoid the strictures of [the Equal Protection Clause] by deferring to the wishes or objections of some fraction of the body politic."⁵⁶

Moreover, *Palmore*'s allusion to earlier decisions that invalidated laws that excluded people based on the anticipated adverse reactions of community members⁵⁷ incorporated into modern equal protection jurisprudence the notion that no matter how disruptive someone's presence may be, the reaction of others—or even the disorder caused by including unpopular persons—cannot form the basis for exclusion. Claims of identity-based unit cohesion are founded on this forbidden basis. The claim of "unit cohesion" maintains that members of society (the "unit") will react in a manner that causes disorder (or lack of "cohesion") if certain individuals occupy the community (the unit). The Court has repeatedly prohibited unequal treatment based on a community's reaction, even when the government's interest is undeniably compelling, such

56. *Cleburne*, 473 U.S. at 448; see also *Palmore*, 466 U.S. at 433 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

57. The *Palmore* Court cited to *Buchanan v. Warley*, which invalidated a prohibition of black residents purchasing homes in white neighborhoods that was premised on the possibility that integration would cause a disruption of peace. *Palmore*, 466 U.S. at 433–34 (citing *Buchanan v. Warley*, 245 U.S. 60, 81 (1917)). The *Palmore* Court also quoted *Wright v. Georgia*, in which the Court concluded that "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present." *Id.* at 434 n.3 (quoting *Wright v. Georgia*, 373 U.S. 284, 293 (1963)).

as when the government attempts to ensure the best interest of a child,⁵⁸ prevent violence and turmoil in public places,⁵⁹ preserve the safety and tranquility of residential areas,⁶⁰ or avoid disorder.⁶¹ In other words, the compelling government interest of “unit cohesion” cannot save the government’s unconstitutional enforcement of private bias.

B. Animus Demonstrated by Legislative Desire to Harm: Moreno

1. The Moreno Approach to Animus

The first modern equal protection case in the Court’s animus canon was *U.S. Department of Agriculture v. Moreno*.⁶² In 1971, Congress amended the Food Stamp Act to disqualify households with two or more unrelated individuals from receiving food stamp benefits.⁶³ The amendment thus distinguished between persons who lived only with relatives from those who lived in households with one or more unrelated occupants.⁶⁴ In addressing an equal protection challenge to this classification, the Supreme Court applied rational basis review and determined that the amendment had no rational connection to the overall purposes of the food stamp program.⁶⁵ The Court cited the amendment’s legislative history and specifically focused on several legislators’ comments about “hippies” and “hippie communes.”⁶⁶ The Court then set forth the foundational articulation of modern equal protection animus jurisprudence: “[I]f 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.”⁶⁷

58. *Id.* at 433 (“The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.”).

59. *Watson v. City of Memphis*, 373 U.S. 526, 535–36 (1963).

60. *See Buchanan*, 245 U.S. at 81 (“[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.”).

61. *See Wright*, 373 U.S. at 293 (“[T]he possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present.”).

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

63. *Id.* at 529.

64. *Id.*

65. *Id.* at 538.

66. *Id.* at 534 (quoting H.R. REP. NO. 91-1793, at 8 (1970) (Conf. Rep.) (statement of Sen. Spessard Holland)).

67. *Id.*

The government actors' personal desires to cause harm in *Moreno* is distinct from the government's reliance on private bias in *Palmore* and *Cleburne*. Yet the primary difference between the two sets of cases is not whose prejudice is at the root of the discrimination, but rather the intent behind the classification. In *Palmore*, racial prejudice underlay the impermissible classification, but no evidence showing the judge intended to cause race-based harm existed.⁶⁸ Similarly, in *Cleburne*, the stereotypes upon which the City Council based its impermissible decision did not produce an affirmative desire to harm people with cognitive disabilities; rather, the stereotypes produced a not-in-my-backyard desire to avoid the theoretical consequences of permitting a group home in the center of the city.⁶⁹ By contrast, the goal of the legislation in *Moreno* was to harm a specific group.⁷⁰ The Court did not explore why the government wanted to cause harm. Instead, the Court focused only on the government's attempt to harm and found that discrimination for the sake of discrimination is impermissible.⁷¹

2. *Moreno and the Unit Cohesion Justification*

If *Moreno* is interpreted to prohibit a form of animus where there is affirmative intent to harm the adversely affected class, it may be the most difficult to associate with unit cohesion claims. Though a government actor's language or actions could demonstrate an affirmative desire to harm a group by excluding it from military service, a reasonably circumspect government actor would likely not offer such direct evidence as the pejorative language that the legislators used in *Moreno*.⁷²

At its core, a unit cohesion claim is an assertion that military members dislike certain persons and is thus based on private prejudice or fear, as were the actions *Palmore* and *Cleburne*. But unit cohesion claims could also serve as pretext for a government actor's desire to harm the excluded group.

At a minimum, assertions that a unit lacks cohesion based on the identity of a particular person or group are premised on the

68. Recall that the judge's intent was to benefit a child by not subjecting her to societal disdain attached to mixed-race parents. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

69. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448–50 (1985).

70. *See Moreno*, 413 U.S. at 534–35.

71. *Id.*

72. The Court found a "desire to harm" in the legislative history where it demonstrated that the amendment was intended to prevent "hippies" and "hippie communes" from participating in the food stamp program. *Id.* at 534.

idea that individuals belonging to the excluded group make current military members feel uncomfortable. And because those members feel uncomfortable, they cannot work with individuals who belong to the excluded group. But excluding people on this basis is nothing more than exclusion for exclusion's sake, or discrimination for discrimination's sake. Military members' dislike of a particular group could ostensibly motivate some political actors to "harm" that group. These political actors might harm the disliked group to curry favor with the electorate. When government actors exclude a particular group to please the majority, they act in direct contravention of *Moreno*. Thus, the "political unpopularity" of the excluded group can comprise both the reason why members of the excluded group disrupt unit cohesion and the government actor's animus-based motivation to harm it.

C. *Animus Demonstrated by Structure: Romer*

1. *The Romer Approach to Animus*

In *Romer v. Evans*,⁷³ the Court assessed an equal protection challenge to Colorado's Amendment 2, an amendment to the Colorado Constitution that eliminated antidiscrimination protections for homosexual, lesbian, or bisexual conduct, orientation, practices, or relationships at any level of state government.⁷⁴ Opponents of Amendment 2 deemed it a hate-motivated revision to Colorado law.⁷⁵

Compared to *Moreno*, where direct evidence of lawmaker animus existed,⁷⁶ or *Cleburne* and *Palmore*, where lawmakers responded to private animus,⁷⁷ the animus in *Romer* was more elusive. The elusive nature of the animus behind Amendment 2 stemmed in part from the manner in which it was adopted: state-wide ballot referendum.⁷⁸ In essence, all of Colorado's citizens who voted for Amendment 2 were its "lawmakers." As such, the legislative intent behind the amendment could not be gleaned from a simple review of the legislative history. *Romer* thus illustrates the difficulty of determining the government's intent, especially when

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

74. *Id.* at 623–25.

75. *Id.* at 625; Julie Turkewitz, *Colorado, Once Called the 'Hate State,' Grapples with Cake Baker Decision*, N.Y. TIMES (June 5, 2018), <https://nyti.ms/2xMBv3n> (noting Colorado was labeled the "Hate State" in response to Colorado's adoption of Amendment 2).

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

77. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

78. *Romer*, 517 U.S. at 623.

the “government” encompassed millions of minds.⁷⁹ Perhaps anticipating an animus challenge, Amendment 2 proponents argued that a dislike of gays and lesbians did not motivate their support for the amendment; rather, their support for the amendment stemmed from a neutral desire to prohibit those groups from possessing “special rights.”⁸⁰ Thus, the proponents argued, Amendment 2 did not discriminate against a particular group but instead attempted to protect the associational rights of people who disapproved of homosexuality.⁸¹ In other words, proponents claimed that Amendment 2 *protected* the rights of many. If Amendment 2 was really founded upon libertarian ideals, then, arguably, no animus existed because it was motivated by a desire to protect associational rights. One element of unit cohesion claims parallels the libertarian ideals advanced by the proponents of Amendment 2: the government should not force a person to associate with something or someone that he or she dislikes.

In *Romer*, the Supreme Court found direct evidence that animus had motivated 53 percent of the Colorado voters who voted in favor of Amendment 2. But the Court’s decision was not dictated by this finding. Indeed, the Court ignored strong evidence of animus, such as a significant record of anti-gay bias among Amendment 2’s proponents.⁸² The Court ignored this evidence, in part, because it could not invalidate Amendment 2 simply based on Amendment 2’s treatment of homosexual persons. When the Court decided *Romer*, *Bowers v. Hardwick*,⁸³ which permitted state criminalization of sodomy,⁸⁴ was still good law. Because it had upheld anti-gay legislation based on moral disapproval in *Bowers*,⁸⁵ the Court was at pains to strike down anti-gay legislation in *Romer* solely based on societal disapproval of homosexual orientation.

Because the Supreme Court could not deem Colorado voters’ moral disapproval unlawful discrimination, it turned to the structure of the law—in particular, the law’s unusual breadth and narrowness. The Court held that by withdrawing civil rights

79. See *id.*; see generally Michael D. Gilbert, *Interpreting Initiatives*, 97 MINN. L. REV. 1621 (2013) (arguing that courts should interpret initiatives based on the intent of the median voter).

80. *Romer*, 517 U.S. at 626.

81. *Id.* at 635.

82. See Cara DeGette, *Inside the Belly of the Beast*, in RESISTING THE RAINBOW: RIGHT-WING RESPONSES TO LGBT GAINS, POLITICAL RESEARCH ASSOCIATES 29 (2012), <http://bit.ly/2QAxQuR>.

83. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

84. *Id.* at 196.

85. *Id.*

protections from only one narrowly defined group and by “imposing a broad and undifferentiated disability” upon that group, Amendment 2 was both “too narrow and too broad,”⁸⁶ and thus, “inexplicable by anything but animus toward the class it affects.”⁸⁷ Focusing on the unusual impact of the law, the Court noted that Amendment 2 did not discriminate against homosexual persons in only one particular way.⁸⁸ Instead, by removing all non-discrimination protections based on sexual orientation, Amendment 2’s discrimination encompassed a wide array of the aspects of everyday life.⁸⁹ The Court also noted the unusual precision with which Amendment 2 discriminated against homosexual persons: Amendment 2 identified “persons by a single trait and then den[ied] them protection across the board.”⁹⁰ Amendment 2 especially troubled the Court because it withdrew “from homosexuals, but no others, specific legal protection from the injuries caused by discrimination.”⁹¹ Looking for a sufficient justification for Amendment 2’s breadth and laser-like focus on homosexual persons, the Court could find only one: animus.⁹²

2. *Romer and the Unit Cohesion Justification*

Unit cohesion justifications resemble the animus methodology in *Romer* in an important way. As with the justifications for Amendment 2 in *Romer*, unit cohesion justifications often constitute across-the-board discrimination that is at once too narrow and too broad; that is, there is a lack of fit between the discrimination and its purpose. If *Romer* animus is the idea that overly broad injuries to a single, narrow class “raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected,”⁹³ then total exclusion of a single, narrow class from military service raises the same inference. By excluding a class of persons from all military service based on their purported negative impact on “unit cohesion,” the military acts precisely in the manner that *Romer* prohibits: identifying “persons by a single trait and

86. *Romer v. Evans*, 517 U.S. 620, 632–33 (1996).

87. *Id.* at 632.

88. *Id.* at 629.

89. *Id.* (“Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.”).

90. *Id.* at 633.

91. *Id.* at 627.

92. *Id.* at 632.

93. *Id.* at 634.

then den[ying] them protection across the board.”⁹⁴ Unit cohesion justifications are not founded on desires to disadvantage undesirable people in limited or specific ways. Instead, unit cohesion justifications disadvantage undesirable people in all aspects of military service because they completely exclude the undesirable people from military service. Thus, claims of unit cohesion have overly broad effects on certain groups. This overbreadth results in laws of “unusual character” which prohibit certain groups from receiving protections simply because they exist. Simultaneously, the claim of unit cohesion has a narrow effect on the nation’s population. These claims affect only those in the excluded groups who wanted to serve in the military. Further, not all of the members of the excluded group would negatively affect the cohesion of the unit in every instance. Each military unit is composed of different people with wide ranges of life experiences. But the military simply assumes that the excluded group’s presence would disrupt cohesion across the board. This disconnect between the overly broad discrimination and the narrow scope of the justifications lies at the heart of many equal protection claims.

Romer’s direct applicability to future animus cases is difficult to predict. *Romer* seemingly stands for the proposition that a radical lack of fit may be presumably based on animus, but it is unclear just how radical that lack of fit must be to fail rational basis review. Moreover, the Court faced peculiar circumstances in *Romer*—namely, the Court attempted to strike down a law that discriminated against homosexual persons while circumnavigating the effect of *Bowers*. Yet, these peculiar circumstances have now evaporated since the Court overturned *Bowers* in *Lawrence v. Texas*.⁹⁵ This radical change in equal protection jurisprudence obscures *Romer*’s applicability to future cases. Nevertheless, *Romer*’s concern with narrowly targeted discrimination that has overly broad effects was revived in the Court’s latest animus case: *United States v. Windsor*.⁹⁶

94. *Id.* at 633.

95. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

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

D. *Dignitary Injury as Impermissible Animus: United States v. Windsor*

1. *Windsor's Approach to Animus*

In *Windsor*, the Supreme Court again struck down⁹⁷ an overly broad law that targeted gays and lesbians: the Defense of Marriage Act (DOMA).⁹⁸ DOMA had two key elements that conspired to render the law constitutionally inadequate: (1) Section 3, which defined “marriage” in all federal laws as a union between one man and one woman;⁹⁹ and (2) Section 2, which prohibited federal courts from compelling states to recognize same-sex marriages that were valid in other states.¹⁰⁰

DOMA shared similar traits with Colorado’s Amendment 2. First, DOMA’s impact was unusually broad: DOMA applied to over 1,000 federal laws that used the term “marriage.”¹⁰¹ DOMA constituted a “systemwide enactment with no identified connection to any particular area of federal law.”¹⁰² Thus, DOMA affected virtually every part of life—such as estate taxes, Social Security benefits, housing, criminal sanctions, copyright, veterans’ benefits, health care, and bankruptcy—with no particularized rationale for the effects in each instance. In the majority opinion, Justice Kennedy noted that DOMA’s broad effect belied any non-animus-based argument that DOMA’s purpose was administrative “efficiency.”¹⁰³ Second, the Court found that DOMA’s discrimination was of an “unusual character” in that it removed marriage—or at least its boundaries—from its traditional place as a state concern.¹⁰⁴ Because of the unusual character of the discrimination, the Court applied closer judicial scrutiny to the law. Unlike in *Romer*, however, the Court decided *Windsor* after *Lawrence* overturned *Bowers*. Thus, in *Windsor*, the Court did not need to engage in jurisprudential gymnastics to condemn animus against homosexual persons.

To the Court, DOMA’s breadth and unusual character suggested animus. In reviewing the legislative history and text of DOMA, Justice Kennedy noted that “interference with the equal

97. *Id.* at 774–75.

98. Defense of Marriage Act, Pub. L. No. 104–199, § 3(a), 110 Stat. 2419 (codified as amended at 28 U.S.C. § 1738C (2012) and 1 U.S.C. § 7 (2012)), *invalidated by United States v. Windsor*, 570 U.S. 744 (2013) [hereinafter DOMA].

99. *Id.* § 3(a); 1 U.S.C. § 7.

100. DOMA § 2(a); 28 U.S.C. § 1783C.

101. *See Windsor*, 570 U.S. at 752.

102. *Id.* at 772.

103. *Id.*

104. *Id.* at 770 (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

dignity of same-sex marriages” was not just an “incidental effect” of DOMA, but rather its essence.¹⁰⁵ Kennedy found the “purpose and effect” of DOMA was “to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” The Court thus found DOMA unconstitutional.¹⁰⁶ In its holding, the Court noted: “[T]he principal purpose and necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional”¹⁰⁷ *Windsor* thus stands for the proposition that a government’s use of identity-based classifications to purposefully inflict dignitary injury is impermissible animus.¹⁰⁸

2. *Windsor and the Unit Cohesion Justification*

Windsor’s application to identity-based unit cohesion claims is striking. Like DOMA, a complete ban on military service based on one’s identity is an unusually broad strike against all persons with that identity. Such a ban prevents the military from even evaluating the abilities of persons with that identity. Unlike tailored, identity-based exclusions from specific tasks that are based on a person’s inability to contribute, unit cohesion-based exclusions deprive potential service members of all aspects of service—much like how DOMA eliminated same-sex marriage from all federal statutes.

That said, *Windsor*’s reliance on discrimination of an “unusual character” could arguably limit its application to some unit cohesion-based exclusions. Given the U.S. military’s history of discriminating for the sake of unit cohesion, deeming the character of such discrimination “unusual” may stretch *Windsor*’s reasoning. However, when compared to the many legitimate bases for excluding people from military service listed in current accession and retention policies,¹⁰⁹ the unusual character of unit cohesion-based exclusion becomes clear. The overwhelming majority of legitimate bases for exclusion from military service—health conditions, age, and

105. *Id.*

106. *Id.* at 775.

107. *Id.* at 774.

108. Justice Scalia confirmed this reading, observing in his dissent that “the real rationale of [the majority] opinion . . . is that DOMA is motivated by ‘bare . . . desire to harm’ couples in same-sex marriages.” *Id.* at 744 (Scalia, J., dissenting).

109. The accessions and recruiting policies of the Department of Defense include hundreds of bases for excluding persons from military service, including medical conditions, mental health diagnoses, and age. See, e.g., 10 U.S.C. § 532 (2018); DEP’T OF DEF., MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION INTO THE MILITARY SERVICES, DoD INSTRUCTION 6130.03 (May 6, 2018), <http://bit.ly/2y5TGxU>.

mental disability—are tied to an individual’s ability to contribute to the military mission. In this context, unit cohesion-based exclusions stand out as unusual; such exclusions are not based on the individual’s ability to contribute. Instead, unit cohesion-based exclusions are grounded in the individual’s identity and the anticipated disruption their identity might cause.

However, *Windsor*’s ultimate holding—that a law is unconstitutional when its principal purpose and necessary effect are to demean certain individuals—is a dagger in the heart of unit cohesion-based exclusions. Exclusion based on unit cohesion is demeaning per se and a dignitary harm. What greater harm can there be to one’s dignity—what can be more demeaning—than to be excluded from a group not because of an inability to contribute, but because members of the group do not like you? This dignitary effect is compounded when the government stamps its imprimatur on the social disdain. The demeaning effect is only amplified by complete exclusion from the military, an institution whose members accumulate significant reputational and pecuniary benefit from both the government and society at large.

E. Scholars’ Coherent Animus Doctrines and Unit Cohesion

Recently, scholars have attempted to articulate a coherent animus doctrine based on the various forms of animus that the Court has recognized. Three such theories are presented below.¹¹⁰ As unit cohesion implicates all forms of animus under the Court’s animus jurisprudence, it is not surprising that unit cohesion justifications also fall short of constitutional scrutiny under each of these scholars’ articulations of a unified theory of animus.

1. Professor Pollvogt’s Unconstitutional Animus Doctrine

In her unified theory of the Court’s animus jurisprudence, Professor Susannah Pollvogt argues that animus is a type of “impermissible objective function.”¹¹¹ Under this view, animus exists where law creates and enforces distinctions between social groups—that is, when groups of persons are identified by status rather than con-

110. These theories are presented with apologies to the scholars whose work is oversimplified here.

111. Pollvogt, *supra* note 22, at 926. Although Pollvogt wrote pre-*Windsor*, her theory survives it. The federal restriction on same-sex marriage in DOMA was held to be unconstitutional in part because it disparaged, injured, and demeaned people based on a single characteristic—the desire to marry someone of the same sex—without regard for meritocratic principles and for the purpose of asserting heterosexual marriage supremacy.

duct.¹¹² Pollvogt asserts several theoretical bases to support the unconstitutionality of animus. First, laws based on animus run counter to the meritocratic principles of the U.S. Constitution and American democracy.¹¹³ Second, laws that divide people into groups express the ideology of social group supremacy, which the Constitution forbids.¹¹⁴ Third, such laws, whether intended or not, create castes and thus contravene a fundamental purpose of the Equal Protection Clause: eliminating class-based legislation.¹¹⁵

Pollvogt's understanding of animus clearly supports the idea that identity-based unit cohesion claims are based in animus. When the government excludes persons from military service based on who they are, it ostensibly disrupts the social order of the military unit and enforces distinctions between social groups through public law.

Unit cohesion-based justifications further violate each of the policy considerations underpinning Pollvogt's unified theory. Excluding persons from military service because of who they are rather than what they can do runs counter to the meritocratic principles of the Equal Protection Clause. Additionally, citing unit cohesion to exclude groups from the military suggests that some types of people are "unacceptable." This suggestion results in an ideology of social group supremacy—castes—of the type forbidden by *Brown v. Board of Education*¹¹⁶ and *Loving v. Virginia*.¹¹⁷ Excluding a group of people from military service because they will not "fit in" based on their identity brands members of that identity group as "undesirable" or, at the very least, "lesser."

2. Professor Carpenter's "Windsor Products" Animus Doctrine

Writing with the benefit of the Court's latest installment of animus jurisprudence in *Windsor*, Professor Dale Carpenter's "anti-animus principle"¹¹⁸ asserts that in a liberal democracy, the government has a moral and sometimes constitutional duty to not act mali-

112. *Id.*

113. *Id.* (citing Maxwell L. Stearns, *Direct (Anti-)Democracy*, 80 GEO. WASH. L. REV. 311, 369–83 (2012)).

114. *Id.*

115. *Id.* (citing William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 3 (2010)).

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

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

118. Carpenter uses the term "anti-animus principle" to describe the role that animus plays in equal protection jurisprudence. See generally Carpenter, *supra* note 22 (discussing the development of the "anti-animus principle" in equal protection jurisprudence).

ciously toward a person or group of people.¹¹⁹ Under Carpenter’s view, the “government acts on animus when, to a material degree, it aims ‘to disparage and to injure’ a person or group of people.”¹²⁰ The injury may be tangible or intangible, including an affront to the dignity and respect that all people deserve as equal citizens, and “may be caused by their exclusion from a status they would have absent animus against them.”¹²¹ Under Carpenter’s approach, the desire to reward and encourage socially beneficial behavior by one group—with the resulting inequality toward the group(s) not exhibiting the socially beneficial behavior—is not in itself animus. But the desire to harm one group is.¹²²

Carpenter argues that *Windsor* was primarily based on animus.¹²³ The label Carpenter assigns to his animus theory—“*Windsor* Products”—draws on the assertion that *United States v. Carolene Products Company*¹²⁴ would “correctly predict that the targets of animus will almost always be politically unpopular minorities.” But unlike *Carolene Products*’ concern for classifications involving certain vulnerable classes, the “*Windsor* Products” approach protects all citizens from animus-based government action.¹²⁵

Acknowledging the possibility that government acts may involve both benign and malign animus-based purposes, Carpenter suggests that a court need not accept either the government’s benign characterization of its purpose or the challenger’s malign characterization.¹²⁶ Instead, Carpenter argues, a court should determine if animus materially influenced the government action, and if it did, the court should invalidate the law.¹²⁷ Drawing from *Windsor* and other animus cases, Carpenter offers several factors for courts to consider when determining whether animus materially influenced a particular government action,¹²⁸ including: (1) the

119. *Id.* at 185.

120. *Id.* at 186 (quoting *United States v. Windsor*, 570 U.S. 744, 775 (2013)).

121. *Id.*

122. *Id.* at 186.

123. *Id.* at 187–88 (arguing the *Windsor* Court struck down DOMA because it thought that the act was motivated by animus).

124. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

125. Carpenter, *supra* note 22, at 215; see also Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 258 (1996) (“[The pariah principle] forbids the government from designating any societal group as untouchable, regardless of whether the group in question is generally entitled to some special degree of judicial protection, like blacks, or to no special protection, like left-handers (or, under current doctrine, homosexuals).”).

126. Carpenter, *supra* note 22, at 245.

127. *Id.*

128. *Id.* at 245–46.

statutory text (textual);¹²⁹ (2) the political and legal context of the statute's passage, including a historical background demonstrating past discriminatory acts and a departure from the usual substantive considerations governing the decision—especially if the considerations upon which the decision-maker relied strongly favor a decision contrary to the one reached (contextual);¹³⁰ (3) the legislative proceedings, including any evidence of animus that can be gleaned from the sequence of events that led to passage, the legislative procedure, and the legislative history accompanying passage (procedural);¹³¹ (4) the law's harsh real-world impact or effects, including the injury to the tangible or dignitary interests of the disadvantaged group (effectual);¹³² and (5) the utter failure of alternative explanations to offer legitimate ends and means that actually advance those ends (pretextual).¹³³

Applying Carpenter's animus doctrine to claims of unit cohesion demonstrates how barring a group from attaining a status that it might have otherwise have enjoyed—that of military member and veteran—constitutes cognizable animus-based injury. The central questions are whether the government's actions demonstrate intent to disparage or injure the excluded group and whether that intent is material to the government action. Determining whether a unit cohesion justification constitutes government intent to harm the excluded group requires examining the government decision's text, the political and legal context, the procedure surrounding the adoption of the decision, the actual effects of the government action on the disadvantaged group, and the value of alternative explanations. Carpenter's approach is thus highly fact-specific and difficult to apply to unit cohesion in the abstract.

129. *Id.* at 245 n.226 (first citing *Romer v. Evans*, 517 U.S. 620, 624 (1996); and then citing *United States v. Windsor*, 570 U.S. 744, 770 (2013)).

130. *Id.* at 246 n.227 (first citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 537–38 (1973); then citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985); then citing *Romer*, 517 U.S. at 623–24; then citing *United States v. Windsor*, 570 U.S. 744, 770–71 (2013); and then citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 257–59 (1977)).

131. *Id.* at 246 n.228 (first citing *Moreno*, 413 U.S. at 536–57; then citing *Windsor*, 570 U.S. at 771–74; then citing *Bassett v. Snyder*, 951 F. Supp. 2d 939, 968 (E.D. Mich. 2013); and then citing *Arlington Heights*, 429 U.S. at 268).

132. *Id.* at 246 n.229 (first citing *Romer*, 517 U.S. at 627–28; then citing *Windsor*, 570 U.S. at 770–75; and then citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Carpenter notes that the Supreme Court “has not explained why a law's harmful impact is a sign that animus motivated its passage.” *Id.*

133. *Id.* at 246 n.230 (first citing *Moreno*, 413 U.S. at 537; then citing *Cleburne*, 473 U.S. at 449–50; then citing *Romer*, 517 U.S. at 635; and then citing *Windsor*, 570 U.S. at 770–73). Carpenter also notes that “[c]oncern about using pretext to justify an unconstitutional act is as old as *McCulloch v. Maryland*.” *Id.*

3. *Professor Araiza's Burden-Shifting, Intent-Based Animus Doctrine*¹³⁴

Professor Araiza distills a slightly different theory of the Court's animus cases. Araiza posits that the cases parallel the Court's discriminatory intent equal protection jurisprudence.¹³⁵ Like Pollvogt and Carpenter, Araiza concludes that animus is unconstitutional *per se*.¹³⁶ Araiza argues that the Court's animus cases reflect attempts to answer one question: "[I]s the law really aimed at burdening a group for its own sake, out of simple disapproval of that group as human beings?"¹³⁷ When it is, the law is unconstitutional.

Araiza's explanation of the Court's various approaches to animus focuses on determining whether sufficient animus exists to invalidate the government action.¹³⁸ Extending Carpenter's purpose inquiry, Araiza argues that the Court's approach to finding animus parallels the burden-shifting inquiry found in discriminatory intent equal protection jurisprudence.¹³⁹ Under that approach, once a plaintiff shows that intent to discriminate was a motivating factor, the burden shifts to the government to show that it would have made the same decision absent discriminatory intent.¹⁴⁰ Applying this approach to the animus inquiry, Araiza suggests that once a plaintiff shows animus, the burden shifts to the government to show that the law or action was not based on animus and that the government would have taken the action absent the alleged animus. In other words, the government must show that "legitimate needs motivated the government's action."¹⁴¹

If a law that disadvantages a class based on societal disapproval of that group as human beings constitutes animus, then identity-based unit cohesion justifications should fail. Categorical exclusion from military service clearly disadvantages the excluded group.¹⁴²

134. WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* 120–33 (2017) [hereinafter ARAIZA, *INTRODUCTION TO BIAS IN THE LAW*].

135. *Id.* at 122.

136. *See id.* at 89–90, 112, 139 (referring to animus consistently as "unconstitutional animus").

137. *Id.* at 142–43.

138. *See id.* at 134–43.

139. *See id.* at 120–33.

140. *See id.* at 121–24 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

141. *Id.* at 124.

142. Excluded persons are denied all the significant opportunities and benefits military service may offer. For example, military service offers tangible benefits, such as technical skills training, education benefits, leadership training, tax advantages not available to other government employees, and paths to citizenship

Therefore, only one question remains: is the exclusion based on disapproval of the group? The idea that one's presence disrupts the military unit simply based on his or her identity is plainly disapproval of people with that identity characteristic. By extension, implementing the exclusion policy is government enforcement of that disapproval. Under Araiza's burden-shifting approach, when the government asserts that an identity-based exclusion from military service is necessary to protect unit cohesion, the government itself satisfies the plaintiff's initial burden of showing animus. Consequently, the burden falls upon the government to demonstrate that legitimate needs motivated the government action. This stage is where a fact-specific inquiry into a particular exclusion from military service, of which unit cohesion was but one claimed justification, would determine the exclusion's constitutionality.

II. EFFECT OF FINDING ANIMUS

As with other classifications, the government rarely offers only one justification for its discrimination,¹⁴³ and the unit cohesion justification is no different. Accordingly, the distinctions among the various jurisprudential approaches regarding the *effect* of a finding of animus are crucial to understanding the significance of accepting that the unit cohesion justification constitutes animus. Specifically, if animus is detected in one justification, does that defeat all of the

not available to other immigrants. Historically, military service and citizenship have been linked. Through the nation's three largest wars, desertion resulted in loss of citizenship and citizenship could be earned through military service. Military service also offers intangible benefits, such as the prestige associated with being a patriot. The association between military service and full status as an American was regrettably demonstrated by the higher rate at which black veterans were targeted for abuse and lynching following World War I. Even after military service, lifelong government benefits accrue to veterans in the form of pensions, disability benefits, medical care, educational benefits, hiring preferences, special recognition through license plates, and other government-sanctioned special statuses. Society, too, accords tangible benefits to veterans in a variety of forms, including military and veteran hiring preferences in private industry and substantial consumer discounts.

143. For example, throughout the *Moreno* litigation, the government offered multiple justifications for excluding Food Stamp benefits from households where unrelated adults lived: alleviating hunger, combatting the increased potential of abuse of the Food Stamp program, the relative instability of households where unrelated persons live together, and the immorality of such living arrangements. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535–37 (1973); ARAIZA, INTRODUCTION TO BIAS IN THE LAW, *supra* note 134, at 29–36. Similarly, in *Cleburne*, the government offered numerous reasons to deny the CLC a permit to operate a group home for intellectually disabled persons, including traffic, proximity to a junior high school, the potential for harassment, overcrowding, and safe evacuation of residents from a floodplain. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449–50 (1985).

government's justifications? The Court's answer to that question has been unclear, and the animus scholars have provided a variety of answers.

A. *Animus Precedent and the Effect of Finding Animus*

Moreno, the progenitor of modern animus jurisprudence, is the Supreme Court's most circumspect approach regarding the effect of a finding of animus. After asserting that a bare congressional desire to harm cannot constitute a legitimate government interest, the Court noted: "[A] purpose to discriminate against hippies cannot, in and of itself and without reference to some independent considerations in the public interest, justify the [discriminatory law]."¹⁴⁴ In other words, the presence of animus as one motivation did not automatically defeat the law; ostensibly, the presence of some independent considerations could have saved it. However, when the Court analyzed the government's other purported rationale—that the amendment to the food stamp program was based on preventing people from defrauding the government—it found that the classification was "without any rational basis."¹⁴⁵ Although the Court did not explicitly state that the presence of animus created skepticism towards the other rationale, it examined the other rationale more critically than expected under the traditional rational basis review.¹⁴⁶ Thus, the finding of animus appears to have discredited the government's other proffered explanations.

In *Cleburne*, as in *Moreno*, the finding of animus did not immediately end the Court's inquiry into whether the classification withstood constitutional scrutiny. After disapproving of the City Council's decision to respond to citizens' dislike of the cognitively disabled, the Court somewhat skeptically considered other justifications for the City Council's action. The Court's approach in *Cleburne* echoed *Moreno*. In her later concurring opinion in *Law-*

144. *Moreno*, 413 U.S. at 534–35 (brackets omitted) (quoting *Moreno v. U.S. Dep't of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)).

145. The Court found the Amendment did not combat fraud:

Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program, *not* those persons who are "likely to abuse the program" but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.

Id. at 538.

146. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488–89 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

rence, Justice O'Connor drew on the reasoning of *Moreno* and *Cleburne* to assert that a finding of animus should prompt a court to apply a "more searching form of rational basis review" to the other asserted justifications.¹⁴⁷ Justice O'Connor's proposed form of review is not at all the same as deciding that a finding of animus automatically renders the challenged classification unconstitutional.¹⁴⁸

In *Palmore*, the unanimous Court invalidated the judge's action not because the government interest was not compelling or the method of accomplishing that interest was insufficiently tailored, but because laws that enforce private bias are invalid, regardless of whether there is an acceptable government interest.¹⁴⁹ *Palmore* thus stands for the proposition that when government action gives effect to private prejudice, it is invalid even if the government action would have otherwise satisfied the traditional tiers-of-scrutiny analysis. Notably, the Court has not followed *Palmore*'s apparent "poisoned well" approach—where the existence of animus defeats alternative justifications, no matter how sufficient—in all of its subsequent animus opinions.¹⁵⁰ However, the Court's apparent aversion to *Palmore*'s approach might be due to the unique nature of the situation in *Palmore*—namely, that the only justification that the government offered constituted animus on its face.¹⁵¹

In *Romer*, the finding of animus invalidated the challenged law.¹⁵² However, the effect of a finding of animus in *Romer* is somewhat circular. The Court detected animus because it concluded no other justification could explain the incredible breadth of the discrimination.¹⁵³ The cause and effect of the animus finding were thus the same: animus existed because no other justifications made sense, and no other justifications could save the law from the finding of animus. Notably, under the Court's approach in *Romer*, as in *Moreno* and *Cleburne*, the Court still considered the govern-

147. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

148. *Id.*

149. Indeed, the Court acknowledged that protecting the interests of minor children is a "duty of the highest order." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

150. For example, in *Romer* and *Cleburne* the Court detected animus and then considered the merits of the government's asserted justifications for the classification. See *Romer v. Evans*, 517 U.S. 620, 635 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447–50 (1985).

151. See *Palmore*, 466 U.S. at 434.

152. *Romer*, 517 U.S. at 635–36 (affirming the state court's order enjoining enforcement of the amendment).

153. *Id.* at 632 ("[Amendment 2's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.").

ment's other justifications after detecting animus and before determining the law was unconstitutional.¹⁵⁴ Once again, animus alone was insufficient to invalidate the law; however, animus plus the failure of the other government justifications proved fatal.

In *Windsor*, the Court took a rather direct route to finding animus. After identifying DOMA's unusual breadth,¹⁵⁵ its disrespect for the traditional notions of federalism,¹⁵⁶ the legislative history,¹⁵⁷ and even the title of the statute itself,¹⁵⁸ the Court announced the law was based on animus and thus unconstitutional.¹⁵⁹ In fact, the Court skipped the rational basis review process of considering the government's justifications altogether. The only mention the Court made to rational basis review occurred in the penultimate sentence declaring the statute invalid because "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."¹⁶⁰ By stating "no legitimate purpose *overcomes*," rather than "no legitimate purpose *can* overcome," the Court suggested that impermissible animus can be overcome.¹⁶¹ On the other hand, the Court also failed to address meaningfully the government's justifications for DOMA. This failure to address the government's justifications suggests either that animus cannot be overcome or that in some instances evidence of intent to disparage and injure is so clear that evaluating the government's purported justifications is unnecessary. Moreover, if animus can be overcome by legitimate purposes, the Court failed to explain how.

Unit cohesion is rarely offered as the only justification for discriminatory treatment by the military.¹⁶² For example, unit cohe-

154. *Id.* at 635.

155. *United States v. Windsor*, 570 U.S. 744, 765–66, 772–74 (2013).

156. *Id.* at 766–69.

157. *Id.* at 770–71.

158. *Id.* at 771.

159. *Id.* at 770, 775.

160. *Id.* at 775 (emphasis added).

161. *Id.* At a minimum, with his choice of language, Justice Kennedy avoided the opportunity to settle the question of the effect of finding animus.

162. The transgender ban was premised on other justifications. *See supra* notes 5, 11–20 and accompanying text. Don't Ask Don't Tell's precursor ban on homosexual servicemembers was similarly premised not only on unit cohesion, but also on "undue influence in various contexts caused by an emotional relationship between two members; doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands; and possible adverse impact on recruiting." *Beller v. Middendorf*, 632 F.2d 788, 811 (9th Cir. 1980).

sion is one of several justifications that President Trump and the lawyers defending the military's transgender ban offered.¹⁶³

Under the Court's "more searching rational basis review," government assertions that it is excluding persons from military service because their identities affect unit cohesion should lead a court to find animus. Once such a finding is made, a court should then conduct a more skeptical review of the government's other purported bases for exclusion. Alternatively, under the *Palmore* poisoned-well approach, the unit cohesion justification poisons the government's other purported justifications, even those not based on animus.¹⁶⁴

Windsor's lack of clarity regarding whether animus can be overcome produces two interpretations. Under the first interpretation, if government animus—under *Windsor*, an "intent to disparage and harm"—cannot be overcome by other legitimate justifications, the government's identity-based unit cohesion justification should have the same effect as the finding of animus in *Palmore*. Namely, the court should find that the animus underlying one justification causes all other justifications to fail. However, under the second interpretation of *Windsor*, if government animus can be overcome, then examination of the unit cohesion justification should follow the *Moreno-Cleburne-Romer* approach. Namely, the court should skeptically consider the government's other purported justifications.

B. Scholars' Theories Regarding the Effect of Finding Animus

The animus scholars have also articulated various understandings of the effect of finding animus, ranging from a bright-line rule to a more complicated approach. Pollvogt advocates for a "silver bullet" understanding of a finding of animus.¹⁶⁵ Under Pollvogt's approach, evidence of animus "discredits the other purported state interests, regardless of whether they are legitimate on a superficial

163. For example, in addition to a concern over unit cohesion—articulated as "disruption"—President Trump's initial Tweets offered the additional justifications of a "need to focus on overwhelming and decisive victory" and "avoid[ing] exorbitant medical costs." July 26, 2017 Twitter Announcement, *supra* note 5. In early litigation defending the transgender ban, the government argued that transgender individuals could suffer from medical conditions that impede performance of duties; some medical conditions could limit the deployability of transgender individuals and impose financial costs on the armed forces. *See, e.g., Doe v. Trump*, 275 F. Supp. 3d 167, 185–86 (D.D.C. 2017).

164. *See supra* notes 39–40, 149–51 and accompanying text.

165. Pollvogt, *supra* note 22, at 930.

level.”¹⁶⁶ In essence, no justification for a classification can withstand a court’s finding that animus was present in the creation of the classification. Pollvogt argues that this is “appropriate, because if animus is, indeed, constitutionally impermissible, no law found to be based in animus should be permitted to stand.”¹⁶⁷

If one accepts the argument that identity-based unit cohesion justifications are always based in animus, Pollvogt’s “silver bullet” understanding of the effect of a finding of animus would always defeat other purported bases for exclusion from military service. That is, if the government offers identity-based unit cohesion as a justification, the government would fatally poison its attempt to exclude. Pollvogt’s understanding of the effect of a finding of animus might help clarify how unit cohesion is an unconstitutional pretext for disparaging a group. Thus, perhaps Pollvogt’s understanding could educate government actors on the malevolence inherent in unit cohesion arguments. On the other hand, one disadvantage of Pollvogt’s approach is that the government might never again assert identity-based unit cohesion as a justification, making animus more difficult to detect. Indeed, Pollvogt’s silver bullet approach may have this negative effect on all future government classifications; if the presence of animus categorically invalidates classifications, government actors may take extraordinary measures to hide it.

Carpenter’s understanding of the effect of finding animus slightly modifies Pollvogt’s understanding. To Carpenter, the animus must be a “material influence” on the government action to render the action unconstitutional.¹⁶⁸ Under Carpenter’s view, a finding that only some legislators or government actors harbored or acted upon animus would not necessarily invalidate a law. At the same time, an animus-based purpose would not need to be the sole or even dominant purpose to invalidate the law.¹⁶⁹ According to Carpenter, when animus’s material influence is deduced, the presence of animus has a “tainting effect” and the act is unconstitutional even if the government offers legitimate reasons to justify it.¹⁷⁰

166. *Id.*

167. *Id.*

168. Carpenter, *supra* note 22, at 245.

169. *Id.* at 231, 245. “It is likely that any legislative body, and certainly an electorate [of significant size], would act with a multitude of purposes in mind.” *Id.* at 231.

170. *Id.* at 186, 248. Here, the label on Carpenter’s animus approach—“as ‘Windsor Products’”—is further elucidated. In *Carolene Products*, the presumption of constitutionality did not apply when the political process could not be trusted to treat unpopular minorities fairly. *Id.* at 248. Under the *Windsor Prod-*

Carpenter's slightly more nuanced approach means that when unit cohesion is one of several purported justifications, a materiality examination is required.¹⁷¹ If one accepts that unit cohesion is *animus per se*, the remaining question is whether the purported unit cohesion justification was material to the government's exclusionary classification. Arguably, a government assertion of unit cohesion as a basis for the exclusionary classification is itself a material government admission. In other words, if the government admits that a particular consideration provided a reason for the classification, that consideration is *per se* material. Thus, the likely result of a unit cohesion justification under Carpenter's approach would mirror the result under Pollvogt's approach: invalidation of the exclusionary classification. Such a result would likely put an end to the government's use of identity-based unit cohesion justifications. In light of the historical abuses that the government has carried out in the name of "unit cohesion,"¹⁷² perhaps this result would be welcome.

Araiza's theory of the process by which courts should find *animus* informs his understanding of the effect of a finding of *animus*. Araiza argues that the *animus* inquiry parallels, albeit imperfectly, the burden-shifting approach of discriminatory intent jurisprudence.¹⁷³ Under discriminatory intent jurisprudence, a plaintiff must first show that discriminatory intent was a motivating factor in the classification, and then the burden shifts to the government to prove that it would have made the same decision despite the discriminatory intent.¹⁷⁴ Araiza suggests the *animus* inquiry is similar: Once a plaintiff demonstrates that *animus* was a factor in the challenged government action, the burden shifts to the government to prove it would have made the same decision despite the impermissible *animus*.¹⁷⁵

Under Araiza's theory, the challenger must first show *animus* was a factor in the government action.¹⁷⁶ This holistic factual inquiry can be cabined by borrowing from considerations under the traditional discriminatory intent inquiry, including:

ucts approach, the presumption of constitutionality also no longer operates after the court is alerted to possible *animus*.

171. *Id.* at 243.

172. *See, e.g., supra* notes 1–5, 9–10 and accompanying text.

173. ARAIZA, INTRODUCTION TO BIAS IN THE LAW, *supra* note 134, at 89–104.

174. *See, e.g.,* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.20 (1977).

175. ARAIZA, INTRODUCTION TO BIAS IN THE LAW, *supra* note 134, at 124–25.

176. *Id.*

[T]he extent and foreseeability of the disparate impact the decision created, the historical background of the decision, the more recent and specific sequence of events leading up to the decision, officials' statements and other legislative history, and the extent to which the challenged decision was marked by procedural or substantive deviations from normal practice.¹⁷⁷

Under Araiza's approach, if a court determines that animus is the sole reason for the classification, the case should end.¹⁷⁸ But as will be the case with most animus challenges, if the plaintiff can only demonstrate that animus "may be lurking," the court should turn to the government for an explanation. A court must carefully examine all of the government's justifications; but rather than engaging a separate inquiry, Araiza's conception suggests that this examination should be woven into the application of the relevant level of scrutiny.¹⁷⁹ Thus, a finding that animus "may be lurking" shifts the burden to the government to prove that the policy meets the appropriate level of scrutiny based on the classification involved. This shift has little effect on the examination of classifications that implicate heightened scrutiny because the government already holds the burden of proving proper ends and means. A finding of animus does have significant impact, however, in cases requiring rational basis review. Typically, when a court applies rational basis review, the government has no burden to prove proper ends and means. In fact, courts may speculate and create rational bases for government action.¹⁸⁰ However, where a court detects animus, the government must prove its purported justification by producing real evidence supporting the rationale.¹⁸¹

While requiring the government to offer "real" justifications seems unremarkable in the context of some levels of heightened scrutiny, it is unusual in the context of traditional rational basis re-

177. *Id.* at 134–35.

178. *Id.* at 42 (explaining that this is what occurred in *Palmore*—animus in the form of private prejudice was the express, and only, justification for the discrimination); see also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

179. ARAIZA, INTRODUCTION TO BIAS IN THE LAW, *supra* note 134, at 124–25.

180. See, e.g., *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (“[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 188 (1980) (clarifying that under rational basis review a law must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification). By contrast, in cases of heightened scrutiny, the government bears the burden of proof. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“The burden of justification is demanding and it rests entirely on the [government].”).

181. ARAIZA, INTRODUCTION TO BIAS IN THE LAW, *supra* note 134, at 140.

view.¹⁸² But requiring the government to provide real justifications allows the court to determine what really underlies a particular discriminatory action. Under Araiza's approach, an initial detection of animus prompts an intent-based inquiry that requires the government to prove that the animus did not "poison the well." A finding of animus can result in invalidation of the government action only after applying this more careful scrutiny. Araiza's approach keeps the focus on the "constitutional wrong" of animus but incorporates a traditional and well-exercised method of investigating improper government motivation. Thus, the animus inquiry begins on the premise that the government's motivations are unknown. The animus inquiry itself is not as concerned with the level of scrutiny or fit between the classification and the government interest as it is with determining whether the government's purported justification is the real one. In fact, the Court demanded to know the government's true purpose in *Moreno*, *Cleburne*, and *Windsor*.

Of the animus scholars' various understandings of the effect of a finding of animus, Araiza's approach requires the most extensive analysis into the context of unit cohesion justifications. If a plaintiff can show that the purported unit cohesion justification is animus,¹⁸³ the government would then have the opportunity to demonstrate that it would have excluded the group from military service absent the animus-based unit cohesion justification. This shifting of the burden will require the government to demonstrate a purpose for the exclusion that is sufficient to meet the appropriate level of scrutiny.¹⁸⁴ But the government must also demonstrate that the exclusion was appropriately tailored to that purpose. This step is where categorical exclusions based on identity—exclusions that are status-based rather than merit-based—will likely fail. The government's typical non-identity based justifications for military service exclusion¹⁸⁵ are usually specific and relate to one's ability to contribute or the cost of service. The discontinuity between these specific justifications and the broad nature of identity-based categorical exclusions will frequently prove that the non-animus based justifications

182. *Id.* at 124–25 (explaining that the government is not ordinarily required to furnish justifications at all); see also *Beach Commc'ns, Inc.*, 508 U.S. at 315 (“[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”).

183. A plaintiff should be able to demonstrate this easily when the unit cohesion-based exclusion focuses on identity.

184. For example, a compelling justification for race-based exclusions, important or substantial justifications for sex-based exclusion, and legitimate justification for classifications meriting only rational basis review.

185. See *supra* note 109 and accompanying text.

are not the real motivation. Thus, the government will be unable to prove that it would not have adopted the classification absent the animus, and the classification will fail.

III. THE TRANSGENDER BAN(S)

The latest identity-based unit cohesion justification centers on the Trump Administration's decision to exclude transgender persons from military service.¹⁸⁶ On July 26, 2017, the President issued a statement via Twitter announcing:

After consultation with my Generals and military experts, please be advised that the United States government will not accept or allow . . . Transgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail.¹⁸⁷

These tweets were followed by a Presidential Memorandum to the Secretaries of Defense and Homeland Security ("Presidential Memorandum I") about one month later.¹⁸⁸ The "tweet order" and Presidential Memorandum I contravened an earlier Department of Defense announcement¹⁸⁹ that allowed openly transgender individuals to enlist in the military and prohibited the discharge of service members based solely on their gender identities. Presidential Memorandum I indefinitely extended the prohibition on transgender individuals entering the military,¹⁹⁰ a process formally referred to as "accession" ("Accession Directive"). Additionally, Presidential Memorandum I required the military to authorize the discharge of transgender service members ("Retention Directive") by no later than March 23, 2018.¹⁹¹

186. As will be explained further, unit cohesion was not the only justification offered for the transgender ban, but it is the justification this Article addresses. See *infra* notes 205–21 and accompanying text.

187. July 26, 2017 Twitter Announcement, *supra* note 5.

188. Presidential Memorandum for the Secretaries of Defense and the Secretary of Homeland Security: Military Service by Transgender Individuals, 2017 DAILY COMP. PRES. DOC. 587 (Aug. 25, 2017) [hereinafter Presidential Memorandum I].

189. See DEP'T OF DEF., IN-SERVICE TRANSITION FOR SERVICE MEMBERS IDENTIFYING AS TRANSGENDER, DoD INSTRUCTION 1300.28 (June 30, 2016), <http://bit.ly/2xhj7wX>; Directive-type Memorandum (DTM) 16-005, Military Service of Transgender Service Members (June 30, 2016), <http://bit.ly/2NJtEKZ>.

190. Presidential Memorandum I, *supra* note 188.

191. *Id.*

In Presidential Memorandum I, the President noted that the military had prohibited accession or service of openly transgender individuals until June 2016.¹⁹² He claimed:

[T]he previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, *disrupt unit cohesion*, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects.¹⁹³

Presidential Memorandum I directed the Secretaries to return to the pre-June 2016 policy until "a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above."¹⁹⁴ Further, the memorandum directed the Secretaries to "maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that [the President finds] convincing."¹⁹⁵

The Secretaries were given until February 21, 2018, to submit a plan to revert to the pre-June 2016 policy, which Presidential Memorandum I described as a policy that "generally prohibited openly transgender individuals" from serving in the military.¹⁹⁶

On February 22, 2018, the Secretary of Defense issued a memorandum to the President relaying his findings and decision regarding military service by transgender persons ("SecDef Memo")¹⁹⁷ and attached a report on military service by transgender persons ("DoD Report").¹⁹⁸ The SecDef Memo defines "transgender" as "those persons whose gender identity differs from their biological sex."¹⁹⁹ The Secretary of Defense further recommended the disqualification from military service of transgender persons who "re-

192. *Id.*

193. *Id.* (emphasis added).

194. *Id.*

195. *Id.*

196. *Id.*

197. Memorandum from Sec'y of Def. James M. Mattis to President Donald J. Trump (Feb. 22, 2018) [hereinafter SecDef Memo], <http://bit.ly/2LcOJNr>.

198. *Id.*; DEPARTMENT OF DEF., DEFENSE REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS (Feb. 2018) [hereinafter DoD REPORT], <http://bit.ly/2LcOJNr>.

199. SecDef Memo, *supra* note 197.

quire or have undergone gender transition.”²⁰⁰ He also recommended the disqualification from military service of transgender persons with “a history or diagnosis of gender dysphoria.”²⁰¹ The SecDef Memo asserts: “A subset of transgender persons diagnosed with gender dysphoria experience discomfort with their biological sex, resulting in significant distress or difficulty functioning. Persons diagnosed with gender dysphoria often seek to transition their gender through prescribed medical treatments intended to relieve the distress and impaired functioning associated with their diagnosis.”²⁰² The SecDef Memo suggests allowing persons with a history or diagnosis of gender dysphoria to serve, but only under the following limited circumstances:

(1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration’s policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.²⁰³

The SecDef Memo prohibits transgender people—including those who have neither transitioned nor been diagnosed with gender dysphoria—from serving, unless they are “willing and able to adhere to all standards associated with their biological sex.”²⁰⁴ Importantly, the SecDef Memo also notes that exempting transgender persons from the mental health, physical health, and sex-based standards that apply to all service members, including transgender service members without gender dysphoria, “could undermine readiness, *disrupt unit cohesion*, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.”²⁰⁵

The ban implemented in March 2018²⁰⁶ effectively excludes nearly all transgender persons from the military and defends that

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*; see also *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018).

205. SecDef Memo, *supra* note 197 (emphasis added).

206. Presidential Memorandum I, *supra* note 188.

exclusion with clearly articulated, specific bases. The DoD Report suggests several issues could cause unit cohesion problems, including: unit readiness, perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy at the unit and sub-unit levels.²⁰⁷ The readiness concern relates to deployability, which is itself a separate justification that the Trump Administration offered for excluding transgender persons.²⁰⁸ To the extent that unit cohesion concerns based on readiness are ability-based rather than identity-based, readiness may be a legitimate basis for classification. But given that many transgender persons are deployable—in fact, there is no evidence suggesting that transgender service members are any more non-deployable than non-transgender service members—and many non-transgender service members are non-deployable, the complete exclusion of transgender persons belies the assertion that the exclusion is based on ability rather than identity.²⁰⁹ Moreover, the “perceptions of fairness and equity”²¹⁰ concern returns to the familiar ground of identity-based prejudice, as does the “reasonable expectations of privacy”²¹¹ concern. As a valid concern,²¹² personnel safety is a basis not for complete exclusion of transgender persons, but rather for more requirements to ensure safety. Notably, the fact that the military does not seem concerned with significant physical differences within the same sex—for example, the military can force both a large man and small man to engage in violent training activities against each other—suggests this “safety” concern is a mere subterfuge. Responding to these concerns by implementing a complete exclusion, rather than tailored rules, suggests what underlies the exclusion is animus.

Some of the Department of Defense’s justifications are identity-based and therefore demonstrate animus. But there is a constitutionally significant difference between identity-based exclusions and ability-based exclusions. Namely, the latter might not be based on dislike and may be therefore constitutional. Ability-based exclusions should be carried out in the same way that all performance-

207. DoD REPORT, *supra* note 198.

208. *Id.*

209. Alex Ward, *Trump Wants to Kick Trans Troops Out. “Deployability” Might Keep Them In*, VOX (Aug. 31, 2017), <http://bit.ly/2pbXppD> (noting that in July 2016, approximately 148,000 soldiers were “non-deployable,” while only 29 to 129 active service members were non-deployable due to seeking gender transition-related medical care in a given year).

210. DoD REPORT, *supra* note 198.

211. *Id.*

212. The arguments usually suggest that allowing biological males to engage in violent activities with biological females due to the gender identity of one could result in physical mismatches that could lead to injury. *See id.*

based unit cohesion exclusions are carried out: by enforcing the capability requirements rather than imposing a complete ban on all people with a particular characteristic that might affect ability.²¹³

The government initially offered empty explanations for the transgender ban's relationship to unit cohesion. In early litigation, the government attempted to defeat the challenge to the unit cohesion justification by asserting that "the President could reasonably conclude that the accessions policy furthers 'unit cohesion.'" ²¹⁴ Notably, the government explained neither how the transgender ban was necessary for unit cohesion, nor why the President concluded that allowing transgender persons in the military would disrupt unit cohesion. Instead, the government merely asserted that the President's view could have reasonably differed from that of the military's 2016 conclusion that the presence of transgender persons would not affect unit cohesion.²¹⁵ Thus, when given the opportunity, the government initially offered no non-identity-based justification for the President's conclusion that the presence of transgender troops would adversely affect unit cohesion.²¹⁶ It took the government more than six months to offer specific arguments regarding how the presence of transgender troops might affect unit cohesion.²¹⁷ This delay strongly suggests that the unit cohesion justification was based on identity rather than ability.

After receiving the Secretary of Defense's recommendation, the President issued a new memorandum ("Presidential Memorandum II"), in which he authorized the Secretaries of Defense and Homeland Security to "implement any appropriate policies concerning military service by transgender individuals" and revoked

213. For example, the "inability to adapt to the military environment" during training, which can be based on the inability to complete training requirements, can serve as a basis for discharge, as can repeated fitness test failures. *See, e.g.*, Army Regulation 635-200, Active Duty Enlisted Administrative Separations, Chapter 11; Air Force Instruction 36-3208, *Administrative Separation of Airmen*, ¶ 5.65.

214. Defendants' Motion to Dismiss and Opposition to Plaintiffs' Application for a Preliminary Injunction at 33, *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (No. 17-1597).

215. *Id.*

216. In attacking the RAND Report's conclusions on unit cohesion, the government did suggest that it should have considered whether deployability would affect unit cohesion, but this was a hypothetical assertion rather than an explanation for President Trump's conclusion that unit cohesion would be affected. *See id.*

217. These examples first appeared in the DoD Report. *See* DoD REPORT, *supra* note 198, at 35-40.

Presidential Memorandum I.²¹⁸ Thus, Presidential Memorandum II effectively approved the Secretary of Defense's implementation plan.

The government has argued that the March 2018 revision is a "new policy."²¹⁹ Opponents of the ban, and at least one federal district court, have rejected this argument.²²⁰ The idea that the DoD Report and SecDef Memo constituted an entirely new policy is laughable, especially in light of the fact that both were prepared at the direction of the President when he initially announced the ban.²²¹ On the other hand, it is also inaccurate to say the revised ban and the original ban are the same, as the revised version allows some transgender people to serve, whereas the original ban allowed none. Further, the revised ban includes much more detailed explanations of the government's interests and justifications for the exclusion.

A. *The Various Forms of Animus and the Transgender Ban*

Because the Supreme Court has identified a variety of forms of animus without articulating a coherent animus doctrine, the transgender ban should be evaluated under each approach.

1. *Palmore, Cleburne, and the Transgender Ban*

The animus articulated in *Palmore* and *Cleburne*—that the government cannot adopt or give effect to private bias or prejudice—invalidates any identity-based unit cohesion justification for the transgender ban. The notion that the presence of transgender persons in the military disrupts unit cohesion is, in essence, the notion that unit-member reactions to the presence of transgender persons will disrupt the unit's ability to accomplish its mis-

218. Memorandum for the Secretary of Defense and the Secretary of Homeland Security Regarding Military Service by Transgender Individuals, 83 Fed. Reg. 13, 367 (Mar. 23, 2018) [hereinafter Presidential Memorandum II].

219. See SecDef Memo, *supra* note 197, at 2.

220. The United States District Court for the Western District of Washington concluded the March 2018 revision was the same ban threatening the same constitutional violations. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *5-6 (W.D. Wash. Apr. 13, 2018) ("[T]he 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place.").

221. Presidential Memorandum I, *supra* note 188, at § 3 ("By February 21, 2018, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall submit to me a plan for implementing both the general policy set forth in section 1(b) of this memorandum and the specific directives set forth in section 2 of this memorandum.").

sion. District courts have observed that the military has recently produced evidence that contradicts this notion.²²² While correct, that observation is unnecessary.²²³ Based on the understanding of animus expressed in *Palmore* and *Cleburne*, service members' personal prejudices and the potential for disruption are impermissible grounds for exclusionary classifications. As *Cleburne* instructs, the government may not avoid the Equal Protection Clause by deferring to the prejudices of some members of the community.²²⁴ The government may neither exclude transgender persons simply because it does not like them for who they are, nor base its exclusion on the assertion that some service members may dislike them or find the accommodations they receive "unfair."

The revised transgender ban offers some non-identity-based rationale for the proposition that the presence of transgender personnel might adversely affect unit cohesion.²²⁵ Nevertheless, identity-based justifications that implicate private prejudices remain. For example, the proposition that some military members might find it "unfair" or "inequitable" to hold transgender personnel to the standards and requirements set for their gender identity rather than their biological sex is based on requirements that those members deem appropriate for a certain "type" of person.²²⁶ That is private prejudice.

Concern that one's unit is not ready to accomplish its mission because personnel might be medically disqualified from deployment for a period of time may give rise to legitimate, non-prejudice-based concerns of potential lack of unit cohesion. However, the possibility that some unit member will be non-deployable is always a concern. Dental problems, training injuries, pregnancy,²²⁷ and other medical conditions can occur in any military unit. But the fact that a member of the unit might break an ankle during a training exercise is never cited for having a negative impact on unit co-

222. See, e.g., *Doe v. Trump*, 275 F. Supp. 3d 167, 213 (D.D.C. 2017); see also *Karnoski*, 2018 WL 1784464, at *2–4.

223. See *supra* notes 206–21 and accompanying text.

224. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

225. See *supra* notes 206–21 and accompanying text.

226. See DoD REPORT, *supra* note 198, at 31 ("By allowing a biological male to adhere to female uniform and grooming standards it creates unfairness for other males who would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity."); see also *id.* at 36 ("[P]olicy that permits a change of gender without requiring any biological changes risks creating unfairness, or perceptions thereof, that could adversely affect unit cohesion and good order and discipline.").

227. The possibility of pregnancy was once voiced as a basis for categorical exclusion of women from military service.

hesion. Importantly, the revised transgender ban does not tailor exclusion to the non-deployability concern in any meaningful way: It still excludes transgender persons who are well past medical procedures that could temporarily render them non-deployable. In light of this reality, asserting that the non-deployability of transgender persons—but not those who have teeth, ankles, or a womb—could adversely affect unit cohesion suggests that the non-deployability rationale is offered as a pretext for prejudice.

2. *Moreno and the Transgender Ban*

Applying the animus articulated in *Moreno* to the transgender ban demonstrates the difficulty of proving an affirmative desire to harm. As of this writing, the government actor primarily responsible for the ban—President Trump—has neither stated a desire to harm transgender persons nor referred to transgender persons pejoratively as the legislators in *Moreno* referred to “hippies.” Nevertheless, indirect evidence of a desire to harm may still exist.

District courts have observed that the unit cohesion claim expressed by President Trump contradicts military evidence that demonstrates the presence of transgender individuals in fact does not disrupt unit cohesion.²²⁸ However, that observation is unnecessary under *Palmore* and *Cleburne* because identity-based unit cohesion claims are inherently claims based on private prejudice. However, under *Moreno* animus—where a plaintiff must show that a desire to harm the group exists—the inconsistency between President Trump’s policy announcement and the military’s findings is relevant because it evinces—albeit indirectly—a desire to harm the group. Specifically, a 2016 study commissioned by the military concluded that allowing transgender persons to serve would not create unit cohesion problems,²²⁹ while President Trump asserted that it would. This inconsistency alone at least suggests that President Trump’s exclusionary policy is based on a desire to harm transgender people.

Other actions taken by the Trump administration also suggest a possible desire to harm transgender persons. For instance, Vice President Mike Pence participated in efforts to reverse the Obama administration’s “trans-friendly” military policies.²³⁰ In 2017, the

228. See, e.g., *Doe v. Trump*, 275 F. Supp. 3d 167, 213 (D.D.C. 2017); see also *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *2–4 (W.D. Wash. Apr. 13, 2018).

229. See AGNES GEREBEN SCHAEFER ET AL., *ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY* (2016), <http://bit.ly/2NLwdMq>.

230. Paul McLeary, *Pence Working to Reverse Pentagon’s Transgender Policies*, *FOREIGN POLICY* (July 25, 2017), <http://bit.ly/2xf0sBY> (reporting Vice Presi-

Trump Administration rescinded both transgender protections for students in federally funded schools and a Department of Justice memo that protected transgender workers.²³¹ These actions suggest that the transgender ban was less concerned with military effectiveness and more concerned with harming a politically unpopular group.

Although the *Moreno* Court did not explore why the legislators sought to harm “hippies,” it did not foreclose such exploration. In *Moreno*, direct evidence of the legislators’ desire to harm a particular group existed. When such evidence is absent, an investigation into what might motivate a particular government actor to attempt harming a particular group might prove that the government actor is in fact doing so.²³² Various motivations to harm may exist, and not all rely on personal bigotry. President Trump may believe that he will gain political advantage by instituting the ban. In fact, significant evidence demonstrates that President Trump announced the transgender ban to appease conservative members of Congress.²³³ Moreover, the assertion that President Trump is a politician “playing to his voter base” through anti-transgender policies seems plausible.²³⁴ In *Moreno*, the Court found that the legislators’

dent Pence had been reaching to House Republicans to push for legislation barring use of appropriated funds to provide medical treatment related to gender transition).

231. See German Lopez, *Trump’s Ban on Transgender Troops, Explained*, VOX (Dec. 11, 2017), <http://bit.ly/2NQcbjO>; see also *The Discrimination Administration: Trump’s Record of Action Against Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <http://bit.ly/2MCd239> (last visited July 17, 2018).

232. This is similar to criminal law, where demonstrating motive can help prove the defendant committed a crime. See, e.g., *State v. Hampton*, 855 P.2d 621, 625 (Or. 1993) (clarifying how motive makes the fact that the defendant committed the crime more probable than if such a motive were not established).

233. See, e.g., Rachel Bade & Josh Dawsey, *Inside Trump’s Snap Decision to Ban Transgender Troops*, POLITICO (July 26, 2017), <https://politi.co/2Ots2Sq> (“White House officials . . . noted that conservatives had pushed for the ban, including in a May letter that was signed by dozens of right-leaning groups.”). Interestingly, some accounts of the story suggest the most immediate trigger for President Trump’s decision was a request from House Republicans like Rep. Vicky Hartzler, a Republican representative from Montana, who requested that the defense budget not include money for gender reassignment surgery. Trump’s response to ban all service by transgender individuals in response to that more limited request, while welcomed by some, could also suggest animus. Another theory suggests that President Trump’s ban was in exchange for funding for his border wall proposal. *Id.*; see also Michael A. Cohen, *Trump’s Transgender Ban Is Based on Hate*, BOST. GLOBE (Aug. 24, 2017), <http://bit.ly/2NM9sbm> (“[T]he real reason Trump initially announced it is that he thought it would help him get congressional Republican support for a bill appropriating money for his border wall.”).

234. See, e.g., Joe Garofoli, *Transgender Ban Is All About Trump Shoring Up His Base*, S.F. CHRON. (July 26, 2017), <http://bit.ly/2NhP2aH> (suggesting Trump deliberately reignited a culture war for political gain). Thus, although President

desires to harm hippies, regardless of their personal feelings toward hippies, rendered the statute unconstitutional.²³⁵ Similarly, political motivations for harming transgender service members and recruits should invalidate the transgender ban, even if the President's personal feelings toward transgender persons are not apparent.

In contrast to the initially tweeted policy, the revised ban contains no expressions of dislike on behalf of the policymakers. To the contrary, the DoD Report goes out of its way to avoid connotations of disrespect or disapproval by explicitly referring to transgender persons as “valued members of our Nation.”²³⁶ Indeed, had the DoD Report and the revised ban initiated without the President's initial animus-based conclusion, *Moreno* animus would likely not be implicated at all.

3. *Romer and the Transgender Ban*

The *Romer* Court's concern with discrimination that is “at once too narrow and too broad”²³⁷ was explicitly implicated by President Trump's tweet announcing the transgender ban, which stated: “[T]he United States government will not accept or allow transgender individuals to serve in any capacity in the U.S. military.”²³⁸ In so tweeting, the President identified “persons by a single trait and then denied them [the ability to serve in the military] across the board.”²³⁹ Admittedly, the injury in *Romer* may have been more severe than the injury here. Amendment 2 precluded homosexual persons from securing protection from discriminatory mistreatment, whereas the transgender ban simply precludes military service. But so long as one accepts that exclusion from military service is an injury, the distinction is immaterial to the more important point—the ban uses the single, narrow trait of being transgender to deny participation in the military across the board. This demonstrates animus.

Trump's motivation may not be personal bigotry, it may rely on the bigotry or prejudice of some of his political supporters.

235. U.S. Dep't of Agric. v. *Moreno*, 413 U.S. 528, 534–36 (1973).

236. See, e.g., DoD REPORT, *supra* note 198, at 6 (“[N]othing in this policy should be viewed as reflecting poorly on transgender persons who suffer from gender dysphoria, or have had a history of gender dysphoria, and are accordingly disqualified from service.”); see also *id.* (“Transgender persons with gender dysphoria are no less valued members of our Nation than all other categories of persons who are disqualified from military service.”).

237. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

238. July 26, 2017 Twitter Announcement, *supra* note 5.

239. An important difference between the transgender ban and the law in *Romer* is highlighted by my replacing “protections” with the phrase “military service.”

In essence, President Trump's tweet said: If you are transgender, we don't want you in the military under any circumstances. That statement is the sort of caste- or class-based legislation that the animus doctrine prohibits. Unit cohesion asserts that a service member's status as transgender is itself "disruptive," without accounting for potentially legitimate considerations—such as medical readiness to deploy or high health care costs—associated with one's transgender status. In *Romer*, the Court used the animus doctrine to ascertain what was "really going on" with the classification. The President's use of unit cohesion to justify a total bar on service based on a single identity characteristic demonstrates what is really going on: animus.

Turning to *Romer*'s application to the transgender ban, the Department of Defense's attempt to revise the policy must be addressed because although the policy prevents service by most transgender persons, it no longer serves as a blanket ban on *all* transgender persons. Specifically, the revised ban relates to medical conditions and individual behaviors more than the original tweet policy did.²⁴⁰ The revised ban even includes an exception that allows military members caught between the two presidential administrations' policies to continue serving in their preferred genders.²⁴¹ Thus, the revised policy can no longer be fairly characterized as identifying persons by a single trait and then denying them military service across the board.

The Trump Administration's decision to allow a few already-serving transgender members to continue serving in their preferred genders may be a nod to justice for those caught between the two administrations' policies. However, that decision also critically undercuts the Trump Administration's position that the mere presence of transgender troops so adversely affects unit cohesion that near total exclusion is appropriate.²⁴² If some transgender troops can serve without adversely affecting unit cohesion, the across-the-board ban on all other transgender persons suggests that animus, not actual concern for unit cohesion, continues to motivate the actions of the Trump Administration.

240. Compare Presidential Memorandum I, *supra* note 188, with July 26, 2017 Twitter Announcement, *supra* note 5.

241. Presidential Memorandum I, *supra* note 188; see also DoD REPORT, *supra* note 198, at 43.

242. The DoD Report anticipates this argument about the untenability of its position by attempting to claim the limited exception is severable from other portions of the policy if courts attempt to use the exception "as a basis for invalidating the entire policy." DoD REPORT, *supra* note 198, at 43.

4. *Windsor and the Transgender Ban*

Windsor animus is also present in the transgender ban, because the ban is unusually broad, of an unusual character, and causes dignitary harm. The unit cohesion justification for the transgender ban broadly discriminates against all transgender persons, regardless of the excluded person's status, expression of gender identity, or ability to contribute to the military. Like the persons harmed in *Windsor* and *Romer*, the disadvantaged transgender recruits and service members are identified by a single trait and then harmed "across the board" because of it.

This exclusion from military service also constitutes discrimination of an "unusual character," especially given how the policy was initially announced. As one of the district courts addressing the ban noted:

The discrimination in this case was certainly of an unusual character. As explained above, after a lengthy review process by senior military personnel, the military had recently determined that permitting transgender individuals to serve would not have adverse effects on the military and had announced that such individuals were free to serve openly. Many transgender service members identified themselves to their commanding officers in reliance on that pronouncement. Then, the President abruptly announced, via Twitter—without any of the formality or deliberative processes that generally accompany the development and announcement of major policy changes that will gravely affect the lives of many Americans—that all transgender individuals would be precluded from participating in the military in any capacity. These circumstances provide additional support for Plaintiffs' claim that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.²⁴³

The court further noted that the ban contradicted the military's own recent study that concluded unit cohesion would not be a problem.²⁴⁴

The transgender ban's "ready, fire, aim" sequencing further demonstrates the ban's unusual character: President Trump banned transgender personnel from service without any apparent policy de-

243. *Doe v. Trump*, 275 F. Supp. 3d 167, 213 (D.D.C. 2017).

244. *Id.* ("[T]he military concerns purportedly underlying the President's decision had been studied and rejected by the military itself.").

liberation. Though the Constitution²⁴⁵ does not require presidents to first consider all of the potential ramifications before making policy decisions, President Trump's conclusion included animus. Animus cannot be quelled by subsequent policy considerations when an initial animus-based conclusion gives rise to the subsequent policy discussions.

As in *Windsor*, where the unusual breadth and character of the discrimination demonstrated intent to cause dignitary injury,²⁴⁶ the unusual breadth and nature of the transgender ban demonstrates that the unit cohesion justification is actually just intentional harm.

5. *Scholarly Unifying Theories and the Transgender Ban(s)*

Pollvogt's approach to animus—where law is used to create and enforce distinctions between people based on status rather than conduct²⁴⁷—dooms all identity-based unit cohesion justifications, and the transgender ban is no exception. Unit cohesion claims exclude transgender persons from military service based on their identities. Thus, the ban enforces social distinctions between groups based on identity rather than ability or conduct. It is again worth noting here that the revised ban also contains ability-based justifications.²⁴⁸ But the continued presence of identity-based justifications, such as the assertion that some military members will perceive unfairness if transgender persons compete or dress according to their gender identities rather than their biological sexes,²⁴⁹ poisons the classification. The animus that motivated the ban “discredits the other purported state interests, regardless of whether they are legitimate.”²⁵⁰

The transgender ban also fails under Carpenter's theory of animus. Under Carpenter's approach, if the desire “to disparage and to injure” is a “material influence” on the government's classifica-

245. This Article does not address whether it is consistent with statutory administrative law requirements for policy consideration to precede policy conclusions.

246. *United States v. Windsor*, 570 U.S. 744, 768–69 (2013).

247. See Pollvogt, *supra* note 22, at 942.

248. See, e.g., Presidential Memorandum II, *supra* note 218; DoD REPORT, *supra* note 198, at 20–21 (“[Gender dysphoria] is associated with clinically significant distress or impairment in social, occupational or other important areas of functioning.”); DoD REPORT, *supra* note 198, at 23 (discussing members recovering from gender reassignment surgery being unable to deploy).

249. See, e.g., DoD REPORT, *supra* note 198, at 31 (“By allowing a biological male to adhere to female uniform and grooming standards, it creates unfairness for other males who would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity.”).

250. Pollvogt, *supra* note 22, at 930.

tion decision, the classification is unconstitutional.²⁵¹ Carpenter suggests that determining whether this improper motivation is present requires examining several factors.²⁵²

First, the text of the classification must include the President's initial tweets, which contained neither pejorative references to transgender persons that might indicate a desire to harm nor a satisfying explanation for unit cohesion that might demonstrate there was no desire to harm.

Second, the "political and legal context" of the ban's implementation suggests a desire to harm.²⁵³ The Trump Administration's other discriminatory acts demonstrate, at a minimum, a desire to roll back protections for transgender persons. Moreover, the "fire, aim, ready" approach of first announcing a policy decision that contradicted readily available evidence and then later commissioning a study is a clear departure from "the usual substantive considerations governing the decision."²⁵⁴

Third, Carpenter suggests examining the legislative proceedings, including any evidence of animus that can be gleaned from the events that led to the classification.²⁵⁵ The President's transgender ban announcement followed calls by numerous conservative groups for such a ban.²⁵⁶ The ban may have been a response to a congresswoman's proposal for a similar, albeit less extensive, discriminatory policy²⁵⁷ or a bargaining chip for other policy negotiations.²⁵⁸ Either way, the suspicious procedure through which the Administration passed the ban could show animus motivated the decision. In conjunction with the fact that President Trump's decision preceded the military's examination of the issue—indeed, it preceded any Department of Defense request to change the policy—the legislative record demonstrates animus.

Fourth, the effects of the transgender ban are significant. The ban excludes an entire group of persons from the military, a profession that many in society consider noble and worthy. In modern America, societal and governmental benefits are heaped upon mili-

251. Carpenter, *supra* note 22, at 185–86.

252. *Id.* at 245–46.

253. *Id.*

254. *Id.* at 246.

255. *Id.*

256. *See* Lopez, *supra* note 231. Notably, there is no evidence that the ban was requested by the Department of Defense.

257. *See* Bade & Dawsey, *supra* note 233 (describing how Representative Vicky Hartzler originally proposed a ban on funding for gender reassignment surgeries and treatments for transgender active-duty personnel only).

258. *See id.* (reporting that the transgender ban was an effort to obtain border wall funding).

tary members and veterans.²⁵⁹ Additionally, telling a group of people that they are not worthy of defending the nation because of who they are causes significant dignitary harm.

Carpenter's fifth and final consideration—the failure of alternative explanations to offer legitimate ends and means that really advance those ends—cuts in both directions when it comes to the transgender ban. The DoD Report,²⁶⁰ and even President Trump's initial tweets,²⁶¹ articulated legitimate ends in addition to unit cohesion. Reducing medical expenditures and ensuring service members are medically able to deploy and fight are legitimate ends. But again, the disparity between those legitimate ends and the means of total exclusion raises the question of whether the ban was motivated by animus. If the Department of Defense had issued the DoD Report before the policy announcement and if the exclusion had been tailored to the legitimate ends, a bar on some transgender persons from service may have been justified, just as exclusion of others with particular medical or mental health issues has been justified in the past. However, the Administration would have needed to base such justifications on the legitimate end sought, and not on a person's transgender status.

Under Araiza's approach, it is important to determine whether the Administration's actions constitute one ban or two before turning to the government's opportunity to prove that it would have made the decision to exclude transgender persons from military service absent the animus-based unit cohesion justification. If the combined announcements and policy changes comprise a singular ban, then the government's inability to prove that a sufficient justification or legitimate motive existed at the time of President Trump's original tweets condemns the policy. On the other hand, if the Department of Defense's version of the policy constitutes a second, separate ban, the government may be able to prove that it had legitimate justifications for the revised policy. In other words, the government may be able to demonstrate that it would have implemented the latter ban absent animus against transgender persons.

The most relevant consideration to the animus analysis is the motive behind the classification.²⁶² Animus is less apparent in the

259. See *supra* note 142 and accompanying text.

260. DoD REPORT, *supra* note 198.

261. July 26, 2017 Twitter Announcement, *supra* note 5.

262. See, e.g., U.S. Dep't Agric. v. Moreno, 413 U.S. 528, 534 (1973) (finding bare desire to harm unacceptable basis for classification); see also Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018) (finding that the revised transgender band was the "same" ban).

more nuanced unit cohesion justification set forth in the DoD Report, but it is not entirely absent.²⁶³ Moreover, even if the DoD Report had removed animus from the unit cohesion justification—for example, if none of the justifications for unit cohesion were based on identity—the animus that motivated the initial articulation of the ban was still the proximate cause of the DoD Report and revised policy.²⁶⁴ Stated simply, the revised ban and its near-total exclusion of transgender persons exists as a result of the animus that motivated the first version of the ban which 44 categorically excluded all transgender persons.

The revised transgender ban raises the question of what effect the initial unit cohesion justification should have on the second installment of accession and retention policies, which no longer asserted unit cohesion.²⁶⁵ Accepting that the initial unit cohesion justification was animus, subsequent justifications should be assessed similar to the way in which a court would have assessed alternative justifications in the first instance: with a skeptical approach to the alternative justifications. In the transgender ban case, the unit cohesion claim set forth in the initial policy announcement should have invalidated the other justifications; the claim of unit cohesion raises suspicion that what truly underlies the policy is

263. The DoD Report articulated the unit cohesion argument in a way that at least partially did not rely on animus. Rather, the DoD Report suggested the perceived unfairness of allowing biological males to compete in physical requirements with biological females was unfair. Similarly, the DoD Report cited concerns about privacy expectations in communal showering situations, where biological females might be uncomfortable with the presence of biological males in the same open shower or locker room. Thus, the DoD Report attempted to show how the presence of transgender persons could affect unit cohesion by referring to biological realities rather than relying on members' dislike of, or discomfort with, transgender persons. Nevertheless, even as it attempted to divorce transgender identity from the unit cohesion justification, animus against transgender persons remains, as the unit cohesion arguments are based on assumptions of how persons of a certain biological sex *should* perform or behave. See DoD REPORT, *supra* note 198.

264. The DoD Report was prepared at the direction of the President as part of his articulation of the transgender ban in Presidential Memorandum I. Ostensibly, but for the initial articulation of the ban and its underlying animus, the DoD Report would not have been created. In fact, it appears as though Secretary of Defense Mattis was hoping to avoid the issue of transgender service altogether. See, e.g., Bade & Dawsey, *supra* note 233.

265. Carpenter explicitly considered the possibility that a government actor might “try again” after initially using impermissible animus. He noted that in many cases there would not be an alternative legitimate explanation for the challenged action and that reasons that led a court to conclude the initial action was based on animus will make subsequent courts skeptical of claims of a change of heart. Carpenter, *supra* note 22, at 235.

a desire to harm a disliked group.²⁶⁶ If the effect of animus is taken seriously, the government's mere removal of identity-based unit cohesion from subsequent policy iterations cannot on its own save the classification. A court should examine the revised justifications with the same skepticism that it would have applied had those justifications been present in the initial iteration of the ban. A court could even use Araiza's approach and require the government to show, using real evidence, that animus does not underlie the policy. When a policy classifies individuals based on a certain trait, the court should ask: "[I]s the law really aimed at burdening a group for its own sake, out of simple disapproval of that group as human beings?"²⁶⁷ This inquiry should be context-specific and should not ignore the government's previous actions on the matter.

In the second iteration of the transgender ban, not only did the government replace much of the identity-based unit cohesion justification, but it also tailored the other justifications more narrowly. The other justifications included specific medical-based exclusions that mirror the hundreds of other medical exclusions that apply to everyone.²⁶⁸ The first iteration of the ban excluded all transgender persons from military service. Because the revised version excludes transgender persons on a somewhat less categorical basis and for somewhat different reasons, the government could plausibly argue that the classification itself is no longer the same, thus there should be no reason to evaluate the government's justifications skeptically. However, the case law currently comprising the animus doctrine suggests that this argument should be insufficient to overcome the stain of impermissible animus.

B. Where's the Animus? Initial Transgender Ban Litigation

Given the significance of a finding of animus, one might expect the lower federal courts to address animus in all equal protection challenges. Yet the early district court opinions in the string of transgender ban cases typify the federal courts' apprehensiveness toward animus jurisprudence.²⁶⁹ Of the three district courts that have issued substantive opinions on the transgender ban, only one

266. See *supra* notes 237–42 and accompanying text.

267. ARAIZA, INTRODUCTION TO BIAS IN THE LAW, *supra* note 134, at 142–43.

268. DoD REPORT, *supra* note 198, at 2–3.

269. This apprehensiveness is not related solely to the transgender ban cases. District courts have long been wary of relying on animus, even in same-sex marriage cases after *Windsor*. See, e.g., Carpenter, *supra* note 22, at 184 n.3.

addressed animus.²⁷⁰ However, even that court’s treatment of animus is somewhat marginal.

I. Doe v. Trump

Of the current challenges to the transgender ban, *Doe v. Trump*²⁷¹ is the only case in which the court discussed animus. There, the court noted that the plaintiffs acknowledged that unit cohesion is an “important or at least legitimate government” interest but concluded that the government had offered no evidence showing transgender persons harm unit cohesion.²⁷²

Notably, the court in *Doe* did not acknowledge animus as an independent constitutional violation of the “silver bullet” variety.²⁷³ The *Doe* court’s only reference to animus arose in its application of traditional intermediate scrutiny.²⁷⁴ In a footnote citing *Palmore*, the court stated:

To the extent this [harm to unit cohesion] is a thinly-veiled reference to an assumption that other service members are biased against transgender people, this would not be a legitimate rationale for the challenged policy. “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”²⁷⁵

This limited reference unduly obscures the importance of animus because it rejects one purported government interest—unit cohesion—in isolation on the basis of animus. *Palmore* did more than that. The court should have cited *Palmore* for the idea that even if the appropriate level of scrutiny is otherwise satisfied, animus, in the form of government action giving effect to private bias, poisons that conclusion.²⁷⁶ In other words, a finding of animus should invalidate the otherwise acceptable government interests, just as it did in *Palmore*.

270. See *Doe v. Trump*, 275 F. Supp. 3d 167, 213 (D.D.C. 2017).

271. *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017).

272. *Id.* at 211.

273. *Id.* at 213. The court found that “even if none of the reasons discussed above alone would be sufficient for the Court to conclude that Plaintiffs were likely to succeed on their Fifth Amendment claim, taken together they are highly suggestive of a constitutional violation.” *Id.*

274. The court did consider “discriminations of an unusual character,” though not as part of a comprehensive review of animus. See *id.*

275. *Id.* at 212 n.10 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

276. Recall that in *Palmore*, the Court invalidated the trial court’s decision because it constituted giving effect to private bias, even where strict scrutiny was otherwise overcome. *Palmore*, 466 U.S. at 433–34.

Under Araiza's approach, once the court concludes that some animus exists, it should apply the appropriate level of scrutiny to determine whether the animus is fatal. The *Doe* court had this backward: it stated that animus is not a legitimate interest.²⁷⁷ While true, the court should have moved beyond that conclusion to assess the other purported government interests to determine whether those interests actually motivated the government's action.

In its ruling on the plaintiff's request for preliminary injunction, the *Doe* court cited other cases in the animus canon,²⁷⁸ but not for their comprehensive contributions to the animus analysis. For example, the court cited *Moreno* and *Windsor* for the proposition that "a bare . . . desire to harm a politically unpopular group cannot justify disparate treatment of that group," but it did not engage a full analysis to determine whether such a bare desire to harm existed in the transgender ban's development.²⁷⁹ Further, the court cited *Cleburne* only for the proposition that a classification must be rationally related to a legitimate state interest.²⁸⁰ Finally, the court cited *Romer* only for the concept that an equal protection violation occurs when the government withdraws rights from a disfavored group.²⁸¹

2. Karnoski v. Trump

In *Karnoski v. Trump*,²⁸² the district court did not mention animus in either of its substantive opinions on the plaintiffs' equal protection claims. In reviewing the plaintiffs' request for preliminary injunction, the court failed to cite *Moreno*, *Cleburne*, *Palmore*, or *Romer*, despite having conducted an equal protection analysis.²⁸³ As in *Doe*, the *Karnoski* court applied the traditional tiers-of-scrutiny analysis and addressed whether the transgender ban burdens a suspect class. In its first substantive opinion, the *Karnoski* court applied intermediate scrutiny,²⁸⁴ but by its second opinion—on summary judgment—the court found it more appropriate to apply

277. See *Doe*, 275 F. Supp. 3d at 208–10.

278. See *id.* at 212–13.

279. *Id.* at 211. To be fair to the court, the procedural posture of the opinion may have limited the court's ability and willingness to make factual determinations necessary for a full animus analysis.

280. See *id.* at 209.

281. See *id.* at 215.

282. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 6311305 (W.D. Wash. Dec. 11, 2017).

283. *Id.* The court did cite *Windsor* to establish the right to equal protection. *Id.* at *7.

284. *Id.* at *9.

strict scrutiny.²⁸⁵ In the second opinion, the *Karnoski* court finally mentioned *Cleburne* and *Windsor*, but not for their contributions to animus.²⁸⁶ The court's failure to address animus in either opinion is even more striking given the Ninth Circuit's treatment of animus in *Perry v. Hollingsworth*.²⁸⁷ There, the Ninth Circuit struck down California's Proposition 8, which prohibited same-sex marriage, on the basis that Proposition 8 was founded upon animus.²⁸⁸

3. *Stone v. Trump*

As in *Karnoski*, the district court in *Stone v. Trump*²⁸⁹ also failed to mention animus in its initial substantive opinion. Moreover, the court failed to cite *Cleburne*, *Palmore*, or *Romer* at all. Although the court cited *Moreno* for the proposition that a "lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members . . . , cannot possibly constitute a legitimate governmental interest,"²⁹⁰ the court failed to engage in any further discussion of animus. The court also cited *Windsor* only for the proposition that the Fifth Amendment does not permit the government to demean its citizens.²⁹¹ Ultimately, the district court applied intermediate scrutiny to determine whether the plaintiffs' equal protection claims were likely to succeed.²⁹² In so doing, the court ignored the last three decades in which the Supreme Court has applied animus in lieu of identifying new suspect classifications.²⁹³

CONCLUSION

The opinions in *Doe*, *Karnoski*, and *Stone* were all issued at preliminary stages of litigation; thus, each case will likely see fur-

285. *Id.* at *10–13.

286. *Cleburne* and *Windsor* were cited to establish the appropriate level of scrutiny. *Id.* at *10.

287. As Pollvogt has noted, in *Perry v. Brown*, the Ninth Circuit addressed the question of "whether the Equal Protection Clause permitted [enactment of a law] the sole purpose of which was to deprive a designated group of rights that they previously possessed." Pollvogt, *supra* note 22, at 932 (citing *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012)). *Perry* was vacated and remanded on other grounds. See *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

288. *Perry*, 671 F.3d at 1064, *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

289. *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017).

290. *Id.* at 768–69.

291. *Id.* at 770.

292. *Id.* at 768.

293. The court did cite gender as one of its bases for applying intermediate scrutiny, which does not require identification of a new suspect or quasi-suspect class.

ther developments in the facts and legal analyses. The district courts' general avoidance of animus does not appear to be based on hostility toward the plaintiffs' equal protection arguments. Indeed, the judicial opinions issued on the transgender ban have all agreed that the ban violates the Equal Protection Clause. But the courts' general failures to address animus are missed opportunities to address a policy that potentially discriminates against a group based on a bare desire to harm. The lower courts' collective failure to address animus also demonstrates the problems that arise from the Supreme Court's failure to clearly articulate animus's role in equal protection jurisprudence. Future judicial opinions regarding the transgender ban should, at minimum, address whether the exclusion of a group of people based, at least initially, upon their identity implicates the various forms of animus.

The context of the initial transgender ban, justified in part by identity-based "unit cohesion," demonstrates that the ban was premised upon unconstitutional animus. The revised ban, while less overt, still includes features of animus in its unit cohesion justification and thus cannot escape its genesis. The decision to allow transgender members who have never experienced gender dysphoria to "serve . . . in their biological sex"²⁹⁴ is at least partially based on concerns that some service members will feel uncomfortable around a person who presents in a way that does not conform to his or her biological sex. Whether based on perceived unfairness or discomfort, the unit cohesion justification is identity-based animus: the dislike of certain people because of who they are. Members of society are free to hold prejudices. Members of the military are free to hold private prejudices. The government is not.

294. DoD REPORT, *supra* note 198, at 32.