Introduction

Animus, and Why It Matters

Which of these situations is not like the others?

1. The federal government requires that persons arriving from foreign nations experiencing dangerous outbreaks of communicable diseases go through special screening before entering the county.
2. A state law imposes fines on persons who cross streets without using crosswalks.
3. A town council denies a zoning permit for a group home for intellectually disabled persons, in response to complaints from nearby residents that they don’t want “those kind of people” in the neighborhood.

In part, this is a trick question. Each of these situations is unlike the others, for different reasons. Most obviously, they differ based on the level of government (national, state, and local) that is acting and the subject matter of the action (public health, traffic safety, and land use). So in a sense, any answer is correct.

But there is an additional axis on which these situations differ—an axis that reflects this book’s topic. The first and second situations respond (at least on their faces) to what we can recognize as legitimate health and safety concerns (respectively, public health and traffic safety). (To be sure, such laws could conceivably be “really” motivated by something more sinister, a possibility we will consider later in the book.) By contrast, the facts of the third
situation identify a different type of motivation—not a concern for some material public good but, instead, what we can identify for now as the public’s simple dislike of a particular group. That situation reflects one version—indeed, the most explicit version—of what constitutional law calls “animus.” That’s the subject of this book.

Why Does Animus Matter?

At one level, asking why animus matters to constitutional law seems silly. After all, if it is a bad thing for private persons to act out of simple dislike of others, then it should be similarly problematic if government does so. And fundamentally that’s right. Indeed, that insight might well strike you as not only right but also important. In other words, among the various differences we can identify between those three situations, this latter difference—the fact that situation number 3 reflects government action taken for a “bad” purpose—may strike us as more profound than the differences concerning which legitimate interest the government is seeking to promote or which level of government is acting.

The intuition that improper government purposes constitute an especially problematic feature of some government actions reflects a great deal of embedded constitutional consciousness. Our constitutional tradition requires that government act only in pursuit of legitimate goals promoting the public good. That’s not to say that the Constitution requires that government achieve such goals perfectly. As we know all too well, government often makes mistakes. But it at least has to try. More precisely, government at least has to seek to promote a public purpose. Stopping the spread of a contagious virus, or ensuring traffic safety, surely counts as such a public purpose. Harming people just because a political majority doesn’t like them does not.

That last insight helps ground in constitutional history our intuition why animus is wrong. The statesmen who gathered in Phila-
delphia in 1787 to draft our Constitution saw many things wrong with the political order under which they were living. One thing that attracted their particular concern was the tendency of state legislatures to enact legislation impairing traditional contract and property rights. Leaders such as James Madison understood such conduct as reflecting the brute political will of the majority faction in power in a particular state. When that faction took power, he observed, it did all it could to enrich and empower itself, even at the expense of the greater public good.¹

The Constitution the framers enacted included many features that sought to limit the ability of factions to act purely in pursuit of their own private goals. For now we do not need to worry about those details. But we do need to recognize two basic truths. First, the concern about faction—and by extension, with privately motivated government action—existed from the very start of our constitutional system. Second, and perhaps paradoxically, it was not until the Fourteenth Amendment, ratified in 1868 as part of post–Civil War Reconstruction, that the Constitution gained its most effective tool in combatting such action. In particular, the Equal Protection Clause eventually became understood as a guarantee against the hijacking of governmental power for purely private ends. Such purely private ends include the suppression of a group for no reason other than the fact that the dominant political faction does not like them. Thus the prohibition on animus reflects a core constitutional commitment, one that is most forcefully expressed in the most important constitutional text to have been added since the founding era.

Animus matters more than ever today. At a very practical level, animus has become one of the Supreme Court’s favorite tools when considering claims that a plaintiff’s equality rights have been violated. As we will see, other approaches to the Equal Protection Clause—in particular, the approach that seeks to determine whether discrimination against a particular group is always suspect and thus always merits more careful judicial scrutiny—have
largely run out of steam. Emerging groups—that is, groups whose equality claims have only relatively recently begun to command serious judicial attention—will likely not benefit from such “suspect class” analysis. Indeed, the prime example of such an emerging group—gays and lesbians—has won a remarkable string of equal protection victories at the Court over the last two decades. But those victories have not been won based on suspect class analysis. Instead, they have been won in large part because the Court has found animus.

Animus also matters for a deeper reason. As we all know, American society is more pluralistic than ever; today, Americans hail from more nations, speak more languages, practice more religions (or irreligion), and embrace more different ways of life than ever before. With that diversity has come what one legal scholar has called “pluralism anxiety”: that is, a growing cultural discomfort with the extraordinary diversity of contemporary American life. Such discomfort is perhaps natural and, at least, understandable: As enlightened as one might try to be, it takes a great degree of confidence in one’s own cultural foundations to accept without reservations persons of vastly differing backgrounds and outlooks. But sometimes that discomfort metastasizes into something more sinister: attempts to legislate social hierarchy by using government power to burden out-groups simply because of who they are. We are right to attach the label “animus” to such actions. But before we do so, we need to make sure we know exactly what we are talking about.

What Does “Animus” Mean?

“Animus” has a lay meaning, partially distinct from its legal usage. In lay terms, “animus” means a strong dislike or hostility. The zoning hypothetical above reflects this meaning: By its terms, the town’s zoning decision was motivated by neighbors’ desire not live around a certain type of person. But even this common-sense
understanding is immediately clouded by ambiguity. There may be lots of reasons people may not wish to live near other types of people. Someone may not wish to live near a fraternity house because the student-residents are prone to playing loud music. Someone else may not wish to live near a family with many children because of the constant activity. Whatever one thinks about the lack of generosity and flexibility inherent in such preferences, we might be willing to accept these explanations as reasonable. But other explanations may not be. For example, we would likely be far less sympathetic to a homeowner’s preference not to live next to persons of a different race because he believes them to be sub-human.

The legal definition of “animus” includes this concept of subjective dislike. But it is not enough to simply transfer the concept of private dislike into the context of government action. Part of the problem is that it is hard to reach confident conclusions about the motivations of a government institution such as a town council. Different legislators have different personal motivations; aggregating those motives into a general legislative “will” is a perilous enterprise. And that attempt assumes that it even makes conceptual sense to think of an institution as having an anthropomorphic, subjective will.

To be sure, this is not a conclusive argument against approaching the question of animus by seeking to determine the intent of the government body that took the challenged action. For example, courts that have struggled with the question of governmental intent have recognized that such intent can be implied, or “constructed,” by examining more objective criteria. But this difficulty—and, indeed, the response of courts in resorting to more objectively grounded “constructed” intent—does suggest that, when we move past our intuitive understanding of animus toward a legally useful one, we need to move beyond a focus on subjective motivation. As far as constitutional law is concerned, subjective motivation is part of the story. But it is not all of it.
The Outline of This Book

This book examines the constitutional law concept of animus in two parts. Part I consists of several chapters that tell the stories of modern Supreme Court cases implicating animus. The stories in these chapters (Chapters 2–5) play multiple roles. First, they humanize what might otherwise come across as an abstract, theoretical legal question. Second, they illustrate important aspects of what constitutes animus. Finally, and relatedly, they help us piece together the components of a coherent legal doctrine addressing animus.

Chapter 1 is different. Chapter 1 rewinds the clock much farther back—in fact, to the framing of the Constitution in 1787. It explains, in a highly summary form, how the framers expressed the concern we mentioned earlier in this Introduction—the concern about what they called “faction”—that can be understood as the eighteenth-century version of our modern concern with animus. Chapter 1 also explains how in the nineteenth century the concern about faction began to work its way into judicial doctrine through a concept called “class legislation.” As one might infer from the label, “class legislation” is a phenomenon in which a private group (a “faction,” in the framers’ terms) attempts to win the enactment of legislation that aims at enriching or despoiling a particular group (or “class”) rather than at promoting the broader public interest. As we will see when we then move on to the cases in Chapters 2–5, this early concern about faction and class legislation echoes distantly, but distinctly, when we examine modern legislation alleged to be grounded in animus.

Together, the cases discussed in Part I provide us with both the raw materials (their fact patterns and conclusions) and the tools (their analysis) that allow us to construct a coherent animus doctrine. This process of construction is a necessary one because the Court has not built that structure itself. Indeed, the cases Chapters 2–5 discuss are often criticized for their extreme opaqueness. Part
II of this book thus takes on the task of using the analysis in those cases to erect the doctrinal structure the Court itself has seen fit to leave unbuilt.

That process begins, in Chapter 6, by explaining how subjective dislike of a group lies at the core of legislation we can legitimately condemn as based in animus. However, it also reminds us of the various problems—both practical and conceptual—that Part I’s cases reveal about exclusive reliance on such subjective motivations. Chapter 7 considers what those cases tell us about more objective indicators of animus. As we will see, those indicators themselves reflect another key concept in equal protection law—the concept of discriminatory intent. Chapter 7 explains this concept and notes the clear connection between it and animus.

Chapter 8 considers in more detail the analogy between animus and discriminatory intent. It concludes that, while this analogy clearly exists, an important difference separates the two ideas. As Chapter 8 explains, a finding of animus, unlike a finding of discriminatory intent, ought to end the case. The broader parallel between animus and nineteenth-century-style class legislation supports the argument that an animus finding ought to be fatal to a statute. By contrast, a finding of discriminatory intent, while certainly raising doubts about a statute, only triggers a closer judicial look at the challenged law.

Chapter 9 returns to the question of how to find animus. While Chapter 7 explains how the factors the Court uses to uncover discriminatory intent also help uncover animus, Chapter 8 points out how the animus investigation is slightly different. Borrowing again from the Court’s discriminatory intent jurisprudence, Chapter 9 explains how those factors are best deployed to uncover, not discriminatory intent, but the distinct phenomenon of animus.

Chapter 10 tackles the final problem: how conclusive the plaintiff’s showing of animus has to be and how persuasive the government has to be when it is put to the test of explaining why its action is not based in animus. These are intensely practical ques-
tions, but also extremely important ones. Once we address them, we are in a position, finally, to apply the structure Part II creates. Chapter 11 does that by considering several concrete examples in which a plaintiff might credibly claim that she has been the victim of animus-based discrimination.

Chapter 12 considers the final case relevant to our topic: *Obergefell v. Hodges*, the 2015 Supreme Court decision striking down same-sex marriage bans across the nation. While that case did not explicitly rely on the animus doctrine, in a fundamental way it represents the culmination of that doctrine, at least so far in our history. Thus it bears examination for what it reveals about our understanding of animus today. Finally, a brief concluding chapter reflects on how animus doctrine can be a useful tool for courts confronting the widely varying discrimination claims that, more and more, mark our ever-more pluralistic—and thus our ever-more group-identity-conscious—society.

Return now to the question with which this Introduction began. It turns out that the government action in situation number 3 is different from the other two for a very special reason—a reason that is relevant as a fundamental matter of constitutional equality. It is different because the action in that fact pattern is infected with animus. The goal of this book is to figure out what that means.