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The Doctrine of the Same-sex Marriage Cases: A Brief Analysis of Animus  
Samuel G. Gustafson<sup>1</sup>

“The nature of injustice is that we may not always see it in our own times.”  
Obergefell v. Hodges<sup>2</sup>

In the US there is a pattern of animosity against unpopular minorities that has persisted since before the founding. During the establishment of settlements on the continent, minority religious sects were exiled to Rhode Island because they failed to live in the same way as the Puritans to the north. As a legal system was established, similar animosity was codified under the Constitution which legally defined slaves as worth only three-fifths of a person. Even after this animosity against blacks was changed legally, the animosity of the public against blacks was blatant up through the civil rights movement. The difficult passage of the Nineteenth Amendment showed similar animosity against the capabilities of women.<sup>3</sup> While animosity against minority religions, races, and sexes still exists, great strides have been made in the law to remove codified animosity. It has not been easy for many who have fought for equality and there is a similar fight for equality for homosexuals who are looking for protection from laws driven by animosity.

The academic literature and opinions of the courts have frequently addressed what is acceptable and what is not acceptable discrimination.<sup>4</sup> This paper focuses on a specific type of discrimination; discriminatory governmental actions motivated by animosity towards gays. While the political implications of the gay rights debate are crucial to the purposes of our government,<sup>5</sup> this paper focuses specifically on the codification of animosity and its role within the discrimination framework using the gay rights debate as a model to standardize this doctrine.

The definition of animus has been the subject of strong debate in the last five years since the decision in *United States v. Windsor*.<sup>6</sup> The term animus is related to its cousin animosity meaning a strong hostility. When someone acts with animosity, they act with a strong hostility towards someone or something. Animus is closely related to this idea and in its common usage it

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<sup>2</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015)

<sup>3</sup> See Sha-Shana N.L. Crichton, *The Incomplete Revolution: Women Journalists - 50 Years After Title VII of the Civil Rights Act of 1964, We've Come a Long Way Baby, But Are We There Yet?*, 58 HOW. L. J. 49 (Fall, 2014)

<sup>4</sup> See *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Bowers v. Hardwick*, 478 U.S. 186 (1986); Chris Bower, Comment, *Juggling Rights and Utility: A Legal and Philosophical Framework for Analyzing Same-Sex Marriage in the Wake of United States v. Windsor*, 102 CALIF. L. REV. 971 (2014); Noa Ben Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243 (2014); Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (2014); WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017).

<sup>5</sup> See generally THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>6</sup> See *United States v. Windsor*, 570 U.S. 744 (2013).

is closely synonymous; however, its legal definition is broader. For the purposes of this paper, animosity is defined in its common sense as describing a feeling of “ill will or resentment tending toward active hostility”<sup>7</sup> towards someone or some group. Animus is used to refer to the legal doctrine which prohibits the use of animosity towards a group to legislate against them. This paper furthers this distinction between animosity and the legal doctrine of animus by exploring how animus has been defined in past cases and then clarifies the standard by which it can be applied to future cases.

The anti-cannon<sup>8</sup> of the Supreme Court of the United States consists of many decisions that have been based largely on animus, which the justices have allowed either by explicit acceptance or by passive non-interference. In order to prevent repetition of these mistakes in the future, this paper examines recent cases dealing with gay rights and presents the theory that animus should be standardized as a doctrine of constitutional law. Such a standardization would provide an identifiable guideline to the courts to evenly apply this principle. For years, animus has been analyzed on a case by case basis. By applying that analysis in the broader context of gay rights cases, this paper derives a standardized formula for the application of animus in future cases.

This paper begins by examining the historical context for the current discussion of animus. In section II the paper analyzes the proposed method for identifying animus in cases involving same-sex discrimination. Part A of section II identifies the triggering test and part B identifies the test itself. Finally, the paper concludes with a brief acknowledgement of the consequences of the animus test.

## I. Background

### A. *Romer v. Evans*<sup>9</sup>

In 1992, the people of Colorado voted to adopt Amendment 2 to their state constitution. This amendment stated:

“[T]he State of Colorado...shall [not] enact, adopt or enforce any statute...or policy whereby homosexual conduct...be the basis of or entitle any person or class of persons to have or claim any...protected status or claim of discrimination.”<sup>10</sup>

When brought before the Supreme Court of the United States, the majority found the amendment unconstitutional. In the Courts holding, they interpreted this statute to clearly discriminate against homosexuals. Justice Kennedy wrote for the majority, “The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination.”<sup>11</sup> The Court showed then that homosexuals could not be barred as a protected class<sup>12</sup>.

This break from precedent was highly irregular for discrimination cases. In their analysis, they concluded that Amendment 2 did not fulfill a legitimate governmental interest. Because the

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<sup>7</sup> MERRIAM-WEBSTER’S DICTIONARY AND THESAURUS 30 (2007).

<sup>8</sup> See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, (December, 2011).

<sup>9</sup> *Romer v. Evans*, 517 U.S. 620, 623 (1996).

<sup>10</sup> Colo. Const art. II, § 30b (repealed 1996).

<sup>11</sup> *Romer v. Evans*, 517 U.S. 620, at 627.

<sup>12</sup> *Id.*, at 629

Court did not go further and make homosexuals a protected class, they justified their use of strict scrutiny by also advancing a “novel...constitutional doctrine” of animus.

*Romer* marks a clear change in judicial interpretation of homosexual civil rights cases.<sup>13</sup> This is largely due to the shift in the political attitude toward homosexuals. Just ten years earlier, the Court held that sodomy<sup>14</sup> could be made illegal.<sup>15</sup> With that change, the Court introduced a new doctrine that a law established on animus is unconstitutional. This was the first time that animus had played a role in homosexual civil rights litigation and has become the basis for this line of cases.

### *B. United States v. Windsor*<sup>16</sup>

In 2007, Edith Windsor and Thea Spyer were married. As same-sex marriage was prohibited under US federal law, they married in Ontario, Canada before returning to their home in New York. When Spyer died, Windsor sought the federal estate tax exemption for surviving spouses. She was denied that exemption under the Defense of Marriage Act (DOMA), which defines marriage as being between a man and a woman.<sup>17</sup> Her case was brought to the Supreme Court, and DOMA was found to be unconstitutional as a matter of states’ rights - the states have the right to determine the definition of marriage. Justice Kennedy, again writing for the majority, made the leap to animus. According to that opinion, because states recognized same-sex marriage and the federal government purposefully opposed it, the only motive could be animus against homosexuals. The Court could have chosen any of several legal doctrines presented to overturn DOMA, but the fact that the Court used their reasoning further signifies the importance of the animus doctrine within this sphere. In this case, as in *Romer*,<sup>18</sup> the Court does not clearly layout the path to arrive at whether animus is present.

This case has led to great controversy both on its merits and its correct interpretation.<sup>19</sup> Academics have argued that Windsor should be seen as a case that clarifies animus.<sup>20</sup> This proposition is fully supported in the decision itself, which devotes space to the formation of this doctrine, yet leaves the reader unsatisfied. Windsor is the key to understanding the modern animus doctrine.

## **II. Current Standard**

Windsor<sup>21</sup> sets forth two principles. First, “The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group

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<sup>13</sup> See generally, Noa Ben Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243 (2014).

<sup>14</sup> *Sodomy*, BLACK’S LAW DICTIONARY (3rd pocket ed. 2006) (Sodomy is defined as “oral or anal copulation between humans”).

<sup>15</sup> *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (“It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy”).

<sup>16</sup> *United States v. Windsor*, 570 U.S. 744 (2013).

<sup>17</sup> DOMA Citation

<sup>18</sup> *Romer v. Evans*, 517 U.S. 620, 623 (1996).

<sup>19</sup> See Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (2014).

<sup>20</sup> *Id.*, at 183

<sup>21</sup> *United States v. Windsor*, 570 U.S. 744, 768 (2013).

cannot' justify disparate treatment of that group.” And second, “In determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration.” Careful consideration is not descriptive, nor does it help the interpreters to understand what methods should be used to identify animus. Through close analysis, these two phrases establish both the triggering test - when a court should ask whether animus is present - and the test to determine if animus was actually present in the governmental action.

#### A. *Triggers of the Animus Test*

In *Windsor*, the Court established a trigger for animus considerations in the context of discriminatory cases. This baseline is not prohibitive outside of the context of discrimination cases. Animus can be found outside of discrimination cases<sup>22</sup> and the trigger for those cases might be slightly different from those outlined in *Windsor*.

The Animus test is triggered when the unusual character of the discrimination has been established. In typical discrimination cases, the tiered scrutiny test is triggered given the group that is being singled out in the discriminatory act. In animus cases, the test is triggered by the motives behind the discrimination. The distinction in triggering mechanisms further illustrates the difference between animus and regular discrimination cases and why animus should be weighted more heavily in considerations than discrimination. As always, if there is no finding of animus, then there most definitely should be an inquiry into the constitutionality under the tiers of scrutiny as is customary with the Court’s jurisprudence.

Discrimination is usual and necessary in legal systems. The penal code, for example, is designed to distinguish those who have committed crimes from those who have not. Similar, minorities are treated differently than majorities. These types of distinctions are perfectly acceptable and even promote the very goals of a legal system. A legal system must be able to discriminate without being subject to an animus inquiry and there are other tests and competing standards which limit discrimination without needing to appeal to an animus test. For that reason, it is only when discrimination is unusual that it should be brought before the court as an animus claim.

The ordinary contexts of discrimination are complex and not the purpose of this paper. Very generally though, the tiers of scrutiny for discrimination cases are the framework traditionally used by the Court to determine whether discrimination is constitutional or not.<sup>23</sup> As part of that framework, there is no traditional standard which allows certain types of discrimination to be permitted in current discriminatory practice. Such a clause would allow all sorts of problems including an inability to adapt to changing public views and strong arguments by minorities. If usual character were to be read to mean that any discrimination that has occurred is immune from an animus claim, the doctrine would be rendered useless. Even *Romer* would not have passed this standard. Although there had been recent changes to the laws allowing same-sex marriage in New York, there is a strong history in the US of discrimination against homosexuals, including a denial of rights to homosexuals.<sup>24</sup> Discrimination was more a norm than was equal treatment. Therefore, in that case the Court wanted a distinction from past discrimination in detecting animus.

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<sup>22</sup> Cf. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018).

<sup>23</sup> See Katie R. Eyer, *Not Equal Yet: Building Upon Foundations of Relationship Equality*, 48 U.C. DAVIS L. REV. 527, (December, 2014)

<sup>24</sup> Cf. *Romer v. Evans*, 517 U.S. 620 (1996).

Animus should not be used as a fix-all solution for any discrimination that is unsatisfactory to the person discriminated against. It should only apply to cases which are clearly discriminatory outside of the ordinary contexts as defined above. This limit will prevent animus from becoming an overreaching destroyer of discrimination.

In the Court's analysis in *Windsor*, the majority found that it had traditionally been left up to the states to decide how they would define marriage. It then follows that any deviation to that traditional pattern is unusual. In this case the breach of traditional federalist principles is a triggering mechanism to apply the animus test. More generally, the standard then would be to determine when the federal government deviates from the normal, or traditional, course of action.

In order to bring an animus claim, the substantial result of the deviation and the traditional course must be in disagreement. A federal act which deviates from tradition to achieve the same result should not by itself raise the question of animus. That question could be raised as one of federalism or any other number of structural arguments against the deviation. This general limitation helps prevent the overrunning of the court system by claims of animus that are arguments of a different nature.

The concept of animus is such that tradition, or the typical method, must be assumed to not be currently motivated by animus. This could be problematic if the typical or traditional method was designed based on a concept motivated by animus; however, animus is not a one-stop solution for all problems in the legal world, nor should it be. The animus doctrine can provide real solutions for certain legal principles, but it does not fix everything.

In order to determine that a governmental act is a "discrimination of an unusual character,"<sup>25</sup> a court must ask whether that unusual discrimination was motivated by animus. This triggering test only applies to cases of discrimination. There are other types of animus which will be more difficult to identify. It would be dangerous for the Court to expand the animus doctrine beyond the discrimination context because of the difficulty in identifying motive.

### *B. Animus Test*

In his opinion in *Windsor*, Justice Kennedy lists the elements which constitute a finding of animus. He writes, quoting *Dep. of Agriculture v. Moreno*, "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." The three elements of animus then are: (1) a bare congressional desire to harm, (2) a politically unpopular group, (3) the disparate treatment of that group. When those three elements are found to be present the finding of animus will follow.

#### *i. Bare Congressional Desire to Harm*

The first element of the animus test, a bare congressional desire to harm, is probably the most difficult piece of this test to standardize. Clearly, the test does not mean to analyze the actual intentions of those who make law. Even when a law is made by a single person, i.e. an executive order, the motives are difficult to identify and almost impossible to separate from the other pressures which would surround such a decision.<sup>26</sup> Even more impossible is the task of trying to ascertain the individual motives of a legislative body. In such a case, a court would have to answer questions about the amount of animus needed to invalidate the statute. This

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<sup>25</sup> *United States v. Windsor*, 570 U.S. 744, 768 (2013).

<sup>26</sup> *Cf. Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (explanation of the intent problems faced)

question should not even be attempted. As we widen the field even more to consider some process like a state referendum, that question of how much animus is needed becomes even more convoluted. That does not make those motives irrelevant to the discussion, it simply requires that there be some way to determine motive without being able to read the mind of the person or people involved.<sup>27</sup>

There are two possible solutions for the problem of identifying legislative intent. The first is to attempt to actually understand what the legislative intent was. There are several constitutional doctrines which attempt to determine the intent of a legislative action. The basic framework for discrimination cases takes into account other possible motives. The tiers of scrutiny ask whether the action could have had other possible motives. This method is flawed, as it is always easier to find a motive in hindsight or to generate a motive which does not correspond to the actual motive.

This debate was one of the primary reasons for the disagreement in *Windsor*. One response to the majority's decision was that the majority had slighted everyone with a legitimate non-animus related purpose in the passing of DOMA. This argument carries for *Romer* and those with a legitimate interest in the passage of Proposition 2. The debate, however, follows only the strict view of the definition of animus as it is commonly used. The legal definition cannot be meant to find the motives of the legislators or the people who voted for Prop. 2. The broader legal definition should instead ask if there was any desire to do harm to a group. That desire to harm involves any legal action which seeks to treat a group to their disadvantage. That definition is further explained in the following parts, which discuss politically unpopular groups and disparate treatment.

#### *ii. Politically Unpopular Group*

The term "politically unpopular group" establishes a grouping different from that which is traditionally used in discriminatory cases.<sup>28</sup> This change in terminology was first used in this context in *Department of Agriculture v. Moreno*.

Animus has not been used in cases involving "suspect classes" where strict scrutiny has been a more defined protection. Animus cases generally involve other groups. Justice Kennedy uses the term "politically unpopular group" to define the groups to which animus can be applied - this definition does not disregard groups classified as suspect class, but instead opens equal protection to more groups who would be subject to the animus of society.

A problem with *Windsor* is that there is no definition of a politically unpopular group. The majority characterizes homosexuals as a political group which has been treated as second-class, while a dissent claims that homosexuals are a "politically powerful minority." This would suggest that it is important to look to the history of the group in question. Homosexuals for years have been forced by societal norm and law to hide their identity. With an advance in societal compassion for this group of people came a change to their political status as a group with some political power, but because of their years of repression, they still were a politically unpopular group. Looking at *Windsor*, homosexuals were targeted by DOMA. They were told that marriage was not for them and categorized as "second class citizens." They did not have the political clout to overturn DOMA, so the only way to seek their rights was through the courts. The legal

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<sup>27</sup> *Palmore v. Sidoti*, 466 U.S. 429 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

<sup>28</sup> Protected class, *United States v. Carolene Products*, 304 U.S. 144 (1938) ("Discrete and insular minorities").

treatment of gays in the past along with their lack of ability to act in congress shows that they are a politically unpopular group.

*iii. Disparate Treatment*

Disparate treatment is, by definition, the treatment of one group differently than another group. In Windsor, this was the politically hot issue. Does the definition of marriage as being between a man and a woman treat homosexuals differently? The majority said yes, but there were strong arguments on the other side that, no, it was the same treatment without the addition of new rights.

**III. Conclusion:**

The passage of the Fourteenth Amendment led to the development of equal protection doctrines in the Constitution. That doctrine has come to have a very broad meaning. This paper does not make a merits judgement about that broadening of power, but does advocate that the current interpretation of the equal protection doctrine does provide relief when laws violate the animus test outlined above.

The doctrine of animus has the potential to do a great deal of good as it is applied correctly to the law. This is true in future civil rights cases involving gay marriage and gay rights in general. There is the possibility that this test, or a similar test, can be applied to other areas of the law not explored in this paper. Looking back in time, it is also possible that the animus doctrine would have saved this country from some of the Court's most disturbing decisions. Many decisions of the Court's anti-cannon<sup>29</sup> would never have passed through the court intact with this doctrine firmly in place. This paper does not explore that idea but mentions it simply to illustrate the benefits of the animus doctrine to the court's decision-making ability.

Animosity is a virus in society which, when directed by those in power towards those groups which are unpopular, results in the failure of any legal system to establish justice. The legal doctrine of animus is another tool that has been developed within the Constitution to provide protections for minorities which have long been abused by the majority.

The animus doctrine as defined above removes much of the difficulty of interpretation provided in Windsor. With a clearer understanding of what the animus doctrine is and how it should be adjudicated, judges will be bound to that test, unable to use animus as an overarching label to strike down whatever law the current political climate is disavowing. Animus can be a protection when limited but a dangerous weapon when left open without definition.

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<sup>29</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214; *Plessy v. Ferguson*, 162 U.S. 537.