

# PROCEDURAL ANIMUS

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*In a small set of cases, the Supreme Court has declared that state action motivated by animus toward a politically unpopular group is unconstitutional. Animus was rendered newly relevant by Masterpiece Cakeshop v. Colorado Civil Rights Commission. This Article applies the Court's animus doctrine, including Masterpiece, to the Prison Litigation Reform Act (PLRA). The PLRA targets prisoners, who, in the context of federal litigation, are politically unpopular—if not despised. The PLRA's legislative history is replete with hostility for prisoners and their cases. The PLRA codifies this animus by subjecting prisoners' civil rights actions to unique procedural hurdles. Still, the PLRA's constitutionality has been assumed.*

*This Article frames Masterpiece as a case about much more than majoritarian religious beliefs. First, it considers Masterpiece's doctrinal significance, comparing it to United States Department of Agriculture v. Moreno, Palmore v. Sidoti, Romer v. Evans, and United States v. Windsor. Second, it demonstrates how Masterpiece broadened animus's reach by relying upon a wider array of animus evidence. Masterpiece found evidence of animus in unlikely sources, such as statements made by individual members of a civil rights commission. Applying Masterpiece, this Article identifies the animus underlying the PLRA, and labels it "procedural animus." Procedural animus is hostility which hinders an unpopular group's ability to obtain relief for legal wrongs.*

*Masterpiece may extend animus beyond the few contexts in which Justice Kennedy deemed it relevant, reaching as far as the PLRA's punitive procedure. Deploying animus in this fashion is timely: at long last, incarceration is itself suspicious.*

## I. INTRODUCTION

Without a finding of animus, Colorado's Amendment 2, which imposed second-class citizenship based on gender identity, and the Defense of Marriage Act, which stripped same-sex couples of legal status, would have survived rational basis review. Animus invalidates the law in which it is detected and overcomes equal protection's forgiving rational basis review.

The Prison Litigation Reform Act (PLRA) has repeatedly survived constitutional challenges. Prisoners are disliked but are not members of a constitutionally recognized suspect class. No court has held that the PLRA burdens prisoners' fundamental right to access the courts. The PLRA has always

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survived rational basis review. Unlike the laws in *Romer v. Evans*<sup>1</sup> and *United States v. Windsor*,<sup>2</sup> the PLRA's animus has not been rigorously studied. This Article identifies the hostility underlying statutes like the PLRA that purport to govern the rules of practice and labels it procedural animus. Procedural animus focuses its hostility on the means by which an unpopular group vindicates legal injuries.

Justice burdened by onerous process can also be justice denied.<sup>3</sup> The Fifth and Fourteenth Amendments reflect this concern, requiring that when state action deprives an individual of life, liberty, or property, the process through which the deprivation occurs must be adequate. Still, procedure is not always neutral.<sup>4</sup>

*Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>5</sup> the Supreme Court's most recent animus decision, may bridge the gap between the Court's animus cases and punitive procedure. *Masterpiece* has been criticized as a case that protected Christian beliefs at the expense of gay rights.<sup>6</sup> But *Masterpiece* is also an unexpected countermajoritarian tool. In finding that baker Jack Phillips was treated with animus by the Colorado Civil Rights Commission, which was considering a complaint brought by a same-sex couple against Phillips, the Court scoured records of the commission's hearings. It found animus in statements made by individual commissioners. After *Masterpiece*, animus may present itself in an individual legislator's statements hiding in plain sight in the legislative record. *Masterpiece* has layers.

The need to protect prisoners engaged in litigation may seem less urgent than the need to overturn, for example, laws motivated by animus that discredit same-sex couples. But prisoner litigation is also significant. The claims targeted by the PLRA allege the deprivation of constitutional protections, including the Eighth Amendment's ban on cruel and unusual punishment. Most prisoner claims are brought pursuant to 42 U.S.C. § 1983, the federal statute through which civil rights are vindicated.

Prisoner civil rights actions have forced states to acknowledge the consequences of their mandatory sentencing laws. In California, harsh sentencing caused overcrowding, which in turn created prison conditions so grave that they

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1. *Romer v. Evans*, 517 U.S. 620, 623 (1996) (invalidating Colorado's discriminatory Amendment 2).

2. *United States v. Windsor*, 570 U.S. 744, 750–52 (2013) (invalidating the Defense of Marriage Act, which required all federal laws to recognize different-sex marriages but not same-sex marriages).

3. Stephen B. Burbank, *The Chancellor's Boot*, 54 BROOK. L. REV. 31, 34 (1988) (stating that the "power to deny or subvert substance [can be accomplished under] the guise of procedure").

4. Scholars of civil procedure owe a great debt to Judith Resnik's work on this subject. Resnik has examined procedure's impact and the effect of labeling certain outcomes as procedural instead of substantive. See, e.g., Judith Resnik, *Whither and Whither Adjudication?*, 86 B.U. L. REV. 1101, 1126 (2006); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 841 (1984).

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

6. See generally Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 865 & n.187 (2019).

resulted in serious injury and even death.<sup>7</sup> California's overcrowding could not be cured by building additional prisons because the state lacked the funds to do so. As a result of prisoner civil rights litigation, a significant percentage of California inmates were released.<sup>8</sup>

Prisoner civil rights actions have also challenged the denial of medical care to transgender inmates.<sup>9</sup> Orders requiring that states provide gender-confirmation surgery highlight federalism's delicate balance. Federal courts may appear to overreach when, acting pursuant to federal civil rights statutes, they exert control over state prisons. Prisoner civil rights actions can also determine standards of decency, leading to politically unpopular decisions to, for example, control the temperature on death row in Louisiana's Angola prison,<sup>10</sup> possibly giving prisoners an environment more comfortable than that enjoyed by Louisiana's poor.

At the time the PLRA passed, Congress assumed that the high volume of prisoner litigation meant, *ipse dixit*, that prisoner cases were mostly frivolous. But times have changed. In contrast to the antiprisoner and anticriminal fervor that motivated the War on Drugs, public opinion is now surprisingly concerned with conditions of confinement. For example, when Brooklyn's Metropolitan Detention Center went without heat in the middle of winter, the plight of the prisoners confined within was met with outrage, not glee.<sup>11</sup> Also, as of late, most have conceded that the War on Drugs caused mass incarceration but did not decrease drug use. There is talk of reducing, instead of increasing, certain criminal sentences. Imprisonment itself is becoming suspicious.

Following this introduction, Part II builds upon the work of William Araiza and Susannah Pollvogt, who have analyzed the Court's animus canon. Araiza has traced animus's history from the bias embodied by pre-Founding factions to 19th century racial oppression. Pollvogt has detailed how animus offered new hope to individuals who were not members of a suspect class and could not claim a fundamental-rights violation. Filling a gap, the Court labeled certain kinds of discriminatory state action "animus" when the state action expressed a desire to harm a politically unpopular group. This Article explains how *Mastertpiece* extends the impact of animus even further.

In Part III, this Article demonstrates how the PLRA was motivated by animus aimed at prisoners. It identifies the hostility underlying the PLRA as

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7. See *Brown v. Plata*, 563 U.S. 493, 501 (2011).

8. Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 210 (2013).

9. See, e.g., Cynthia Sewell, *Little: Idaho to Appeal Ruling Requiring State to Pay for Transgender Inmate's Surgery*, IDAHO STATESMAN (Jan. 9, 2019, 3:12 PM), <https://www.idahostatesman.com/news/politics-government/state-politics/article224187490.html>.

10. *Ball v. LeBlanc*, 792 F.3d 584, 589 (5th Cir. 2015).

11. Amy B. Wang, *Protestors Swarm Brooklyn Jail that Endured Polar Vortex with No Heat*, WASH. POST (Feb. 3, 2019, 3:04 PM) <https://www.washingtonpost.com/nation/2019/02/03/protesters-swarm-dark-freezing-brooklyn-jail-that-endured-polar-vortex-with-no-heat/>.

procedural animus and explains how other laws governing practice and procedure might be similarly assessed. This Article concludes that *Masterpiece* and its procedural potential may reinvigorate equal protection.

## II. THE EVOLUTION OF ANIMUS

Before its decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court invoked animus in limited instances involving claims brought by groups who had yet to obtain suspect class status.<sup>12</sup> Before *Masterpiece*, the Court had already held that laws motivated by animus lacked a legitimate governmental purpose.<sup>13</sup> Animus was understood to channel government power “to burden out-groups” because of their identity and nothing more.<sup>14</sup> Before *Masterpiece*, a finding of animus could change the outcome in a case involving an equal-protection challenge otherwise doomed by the application of rational basis review.<sup>15</sup> Animus could render either state or federal laws invalid.<sup>16</sup>

The present impact of the Court’s animus doctrine is best understood by unearthing its origins and considering whether it has a new reach after *Masterpiece*. This Part begins by describing the concerns that underlie the Court’s animus jurisprudence and is informed by William Araiza’s seminal animus text.<sup>17</sup> Next, it briefly reviews the Court’s animus cases, beginning with the 1973 decision in *United States Department of Agriculture v. Moreno*.<sup>18</sup> Third, it describes how the Court’s most recent animus decision, *Masterpiece*, might be relied upon to challenge a broader array of government action, even though, unlike prior animus cases, *Masterpiece* relied on animus to protect a member of an in-group.

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12. WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 4 (2017). I served as Professor Araiza’s research assistant in connection with an unrelated book project during the 2005–2006 academic year.

13. *Id.* at 2–3.

14. *Id.* at 4.

15. Louis J. Virelli III, *Symposium Introduction*, 48 STETSON L. REV. 173, 173–74 (2019) (identifying “animus as its own category of discriminatory treatment [situated] in the larger landscape of equal protection law”).

16. With respect to state laws, animus deprives its targets of the equal protection expressly guaranteed by the Fourteenth Amendment. Federal laws motivated by animus violate the Fifth Amendment’s Due Process Clause, which includes an implied equal-protection guarantee.

17. Araiza’s ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW was the subject of a recent symposium. See Virelli, *supra* note 15, at 173 (explaining that the “symposium [brought] together preeminent scholars in the field to offer much-deserved attention to Professor Araiza’s work,” which presented “a novel and nuanced approach to incorporating animus into equal protection law”).

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

*A. Factions, Castes, and Class*

Animus's roots can be traced to the late eighteenth century.<sup>19</sup> *The Federalist Papers* warned that factions motivated by their own passions, as opposed to the public interest, had improperly influenced postindependence state legislatures.<sup>20</sup> A federal constitution and its coequal branches would limit factions' resurrection.<sup>21</sup> Then, in the early nineteenth century, state courts struck down laws that created different rules for different groups. In doing so, they curbed the influence of legislation intended "to enrich or despoil" a certain class of people.<sup>22</sup> The Fourteenth Amendment's obvious purpose was to protect the rights of former slaves and African Americans.<sup>23</sup> But its legislative history indicates that it was also intended to eradicate social castes.<sup>24</sup>

By the late nineteenth century, the *Slaughter-House Cases* and *United States v. Cruikshank* undermined the Fourteenth Amendment's potential impact on racial equality.<sup>25</sup> However, Araiza posits that concern for class legislation did not die during the Amendment's period of dormancy. During the *Lochner* Era, the Court curtailed economic legislation to the extent the legislation aggressively limited the rights of one class of economic actors.<sup>26</sup>

By 1938, the Court was becoming less concerned with laws that targeted economic rights, as illustrated by *United States v. Carolene Products*'s infamous footnote four. Slowly, the Court's concern shifted to prejudicial laws targeting "discrete and insular minorities."<sup>27</sup> This special kind of prejudice, the Court explained, could "curtail the operation of those political processes ordinarily to be relied upon to protect minorities" and, importantly, "may call for a correspondingly more searching judicial inquiry."<sup>28</sup>

Footnote four's concerns evolved into the Court's tiered scrutiny jurisprudence, through which heightened scrutiny was applied to certain kinds of discrimination "because of the nature of the group suffering the discrimination."<sup>29</sup> In considering whether a law targeted a suspect class, the Court looked more closely at laws that classified individuals based on "characteristics, such as sex, alienage, and illegitimacy."<sup>30</sup> But by the mid-1970s, heightened scrutiny

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19. ARAIZA, *supra* note 12, at 11.

20. *Id.* at 12–13.

21. *Id.*

22. *Id.* at 14.

23. *Id.* at 18–19.

24. *Id.* at 19.

25. *Id.* at 19–20.

26. *Id.* at 20–24.

27. *Id.* at 24–25 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

28. *Carolene Prods.*, 304 U.S. at 153 n.4.

29. ARAIZA, *supra* note 12, at 25.

30. *Id.*

faltered.<sup>31</sup> Once strict scrutiny was applied to white students' claims of race-based admission practices in college and graduate school, the standard was "distorted and weakened."<sup>32</sup>

Araiza explains that the Court's animus cases are another example of the Court's focus on class legislation.<sup>33</sup> Like the concerns raised by the influence of political factions and laws that treat different castes and classes differently, animus concerns itself with targeted bias and hostility.

### B. *From Suspicion to Animus*

Before animus took hold of the Court's equal-protection jurisprudence, determining what level of scrutiny applied to a law generally determined whether the law would be upheld.<sup>34</sup> A pattern emerged: if the Court found that a law did not differentiate on the basis of a "suspect or quasi-suspect" classification and also did not infringe a fundamental right, then rational basis applied and the party challenging the law lost.<sup>35</sup> If heightened scrutiny applied, the Court would likely invalidate the challenged law.<sup>36</sup>

The Court has been reluctant to create new suspect and quasi-suspect classes, or to identify new fundamental rights.<sup>37</sup> Rational basis became the default and familiar standard of review.<sup>38</sup> At this lowest level of scrutiny, the party challenging the law had to prove that the law served no legitimate government interest.<sup>39</sup> Laws targeting groups that could not point to a fundamental-right violation or membership in a suspect class were subject to rational basis review.<sup>40</sup> Even a law that created a discriminatory impact on members of a suspect class was subject to rational basis review so long as it was rationally related to a legitimate governmental purpose and had no discernible discriminatory intent.<sup>41</sup>

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31. *Id.* at 27.

32. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 970 (2004).

33. ARAIZA, *supra* note 12, at 27–28.

34. Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 894–95 (2012); *see also* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1079 (2011).

35. Pollvogt, *supra* note 34, at 897; *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) (stating that "the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny").

36. Pollvogt, *supra* note 34, at 897.

37. *Id.*

38. *Id.* at 896.

39. *Id.*

40. Rational basis review is abandoned when "a law relies on a problematic classification," such as race, which, "along with alienage and national origin [is] a 'suspect classification'"; instead, strict scrutiny applies. *Id.* at 895; *see also id.* at 896 ("[T]he Court will depart from rational basis review . . . where a law relies on any classifications of persons to regulate access to a fundamental right."); *id.* at 895 (stating that rational basis review is also abandoned when a classification is based on a quasi-suspect classification, such as sex or illegitimacy, and instead, intermediate scrutiny applies).

41. *Id.* at 897.

Of course, the Court's suspect-class framework has not been entirely erased. But when the Court does apply it, it is not used to combat discrimination targeting minorities—those whom *Carolene Products* believed needed protection.<sup>42</sup> In recent cases, when the Court applies strict scrutiny to racial classifications, it does so to protect, as one commentator has noted, “whites claiming reverse discrimination.”<sup>43</sup>

Animus offers a way around rational basis review.<sup>44</sup> In a 2012 study, Susannah Pollvogt summarized the Supreme Court's animus jurisprudence.<sup>45</sup> She described animus as a doctrine through which the Court “patrols all state action relying on status-based classifications for an impermissible animating spirit.”<sup>46</sup> Pollvogt identified four cases in which the Court applied rational basis review but nevertheless found that the government action in question was unconstitutional as a result of animus: *United States Department of Agriculture v. Moreno*, *Palmore v. Sidoti*, *City of Cleburne v. Cleburne Living Center*, and *Romer v. Evans*.<sup>47</sup> These cases are described below.

In *Moreno*, the Court reviewed an amendment to the Food Stamp Act of 1964, which determined food-stamp eligibility.<sup>48</sup> The amendment rendered individuals living in households in which at least one member was unrelated to the rest ineligible for food stamps.<sup>49</sup> Individuals living in households in which each member was related remained eligible.<sup>50</sup>

Individuals ineligible for food stamps argued that they were denied equal protection by the unrelated-person classification, which “create[d] an irrational

42. Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1062 (2014) (“[T]he designation of race as a suspect classification has facilitated civil rights retrenchment, not reform. The principal effect of the Court applying strict scrutiny to racial classifications . . . has not been the protection of blacks . . .” (emphasis omitted)).

43. *Id.* (emphasis omitted).

44. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 61 (1996) (explaining that *United States Department of Agriculture v. Moreno*, *City of Cleburne v. Cleburne Living Center*, and *Romer v. Evans* “reflect the possible use of rationality review as a kind of magical trump card” to “invalidate badly motivated laws”).

45. See generally Pollvogt, *supra* note 34.

46. *Id.* at 937.

47. *Id.* at 901 & n.64 (noting her examination of four “recognized” animus cases: *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Palmore v. Sidoti*, 466 U.S. 429 (1984); and *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973)). Not all scholars include *Palmore* in their list of animus cases. See, e.g., Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195, 196–97 (2019). Pollvogt also identifies related cases in which the Court found laws “unconstitutional because [their] primary function[s] [were] to express and enforce distinctions between social classes.” Pollvogt, *supra* note 34, at 915, 915–24 (identifying *Brown v. Board of Education*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Plyler v. Doe*, 457 U.S. 202 (1982); *Zobel v. Williams*, 457 U.S. 55 (1982); and *Lawrence v. Texas*, 539 U.S. 558 (2003)). This second category of cases is beyond the scope of this Article. In a later essay, Pollvogt added *United States v. Windsor*, 570 U.S. 744 (2013), to the list of the Court's animus cases. See Susannah W. Pollvogt, *Windsor*, *Animus*, and the Future of Marriage Equality, COLUM. L. REV. SIDEBAR 204, 206 (2013). *Windsor* is discussed *infra*.

48. *Moreno*, 413 U.S. at 529.

49. *Id.* at 529–30.

50. *Id.*

classification in violation of the . . . Due Process Clause of the Fifth Amendment.”<sup>51</sup> In considering the law’s equal-protection impact, the Court first examined whether the law rationally furthered a legitimate governmental interest.<sup>52</sup> It looked to the amendment’s legislative history, finding that the law “was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”<sup>53</sup> The Court found “that a bare congressional desire to harm a politically unpopular group [is not] a legitimate governmental interest.”<sup>54</sup> It also rejected the argument that the household-eligibility section of the law was motivated by a legitimate desire to prevent food-stamp fraud. That justification was irrational because other provisions expressly addressed and sought to curtail fraud.<sup>55</sup> Though the *Moreno* Court did not invoke the word *animus*, *Moreno* is treated as the Court’s first animus case,<sup>56</sup> and its concern for hostility aimed at unpopular groups echoes throughout animus jurisprudence.<sup>57</sup>

In *Palmore v. Sidoti*, after Linda Sidoti Palmore and Anthony Sidoti divorced, Palmore married a person who, unlike Palmore and Sidoti, was not white.<sup>58</sup> Palmore was originally awarded custody over Palmore and Sidoti’s daughter, Melanie.<sup>59</sup> The *Palmore* litigation began when Sidoti sought custody of Melanie because Palmore was living with a black man—whom she later married.<sup>60</sup> The Florida trial court faulted Palmore because she chose “a life-style unacceptable to the father and to society” for herself and for Melanie.<sup>61</sup> The trial court believed Melanie would surely suffer “social stigmatization.”<sup>62</sup> However, the trial court did not find Palmore unfit.<sup>63</sup> Instead, the decision awarding custody to Sidoti was based entirely on race.<sup>64</sup> If Palmore had married a white man, “it is clear that the outcome would have been different.”<sup>65</sup> The Court acknowledged

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51. *Id.* at 532–33.

52. *Id.* at 534.

53. *Id.*

54. *Id.* (emphasis omitted).

55. *Id.* at 534–38.

56. Catherine E. Smith, *State Action That Penalizes Children as Evidence of a Desire to Harm Politically Unpopular Parents*, 51 SUFFOLK U. L. REV. 439, 444 (2018) (arguing that in *Moreno*, the Court “depart[ed] from the traditionally more rigid constitutional approach of according deference to state decisions that rely on non-suspect classifications,” invalidating a law “driven by animus against ‘hippies’”).

57. See *United States v. Windsor*, 570 U.S. 744, 770 (2013); *Romer v. Evans*, 517 U.S. 620, 634 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985).

58. *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984).

59. *Id.*

60. *Id.*

61. *Id.* at 431 (emphasis omitted).

62. *Id.* For an excellent description of the procedural history of *Palmore* and why the Supreme Court intervened in a state custody dispute, see Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 558–66 (2014).

63. *Palmore*, 466 U.S. at 432.

64. *Id.*

65. *Id.*

that racial prejudice is real and that it may very well hurt a “racially mixed” household.<sup>66</sup> But it emphatically rejected government endorsement of private racial biases: “the law cannot, directly or indirectly, give them effect.”<sup>67</sup>

Like *Moreno*, *Palmore* does not expressly mention animus, but it is a “recognized progenitor[] . . . relied on in subsequent animus decisions.”<sup>68</sup> Whereas *Moreno* invalidated private bias directly attributable to state actors, *Palmore* reached even further, invalidating private bias reinforced by a state actor—the state trial court.<sup>69</sup>

Private bias sanctioned by government action was also deemed unconstitutional in *Cleburne*.<sup>70</sup> There, the Court reviewed a city council’s denial of a special-use permit sought by the Cleburne Living Center, which intended to operate “a group home for the mentally retarded.”<sup>71</sup> The Court rejected the Court of Appeals’s conclusion that classifications targeting individuals with intellectual disabilities required something more than rational basis review.<sup>72</sup> Still, laws targeting such individuals had to be based on a legitimate state interest. Quoting *Moreno*, the Court reiterated that “a bare . . . desire to harm a politically unpopular group” was an illegitimate state interest.<sup>73</sup>

The Court considered whether the city could require a group home for individuals with intellectual disabilities to obtain a special-use permit.<sup>74</sup> The city could only do so if the group home in question, unlike “other care and multiple-dwelling facilities” that did not need a special-use permit, posed a special threat to the city’s legitimate interests.<sup>75</sup> The Court rejected each of the city’s arguments that the special-use permit was necessary.

First, the Court held that the city council could not base the special-use permit requirement on its concern for nearby property owners’ negative attitudes and fears.<sup>76</sup> *Cleburne* quoted *Palmore*’s admonition that the law cannot give effect to private biases.<sup>77</sup> Second, the Court rejected the city’s explanation that

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66. *Id.* at 433.

67. *Id.*

68. Pollvogt, *supra* note 34, at 906.

69. *Id.*

70. *See* ARAIZA, *supra* note 12, at 48.

71. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985). “Retarded” is a slur. I use it only when quoting directly from the *Cleburne* opinion. Everywhere else, I use the person-first phrase “individuals with intellectual disabilities.”

72. *Id.* at 446 (“Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.”).

73. *Id.* at 447 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

74. *Id.* at 448.

75. *Id.*

76. *Id.*

77. *Id.* (quoting *Moreno*, 413 U.S. at 433).

it feared junior high school students would harass the group home's residents because "vague, undifferentiated fears" cannot be validated by a state actor.<sup>78</sup> Third, the Court rejected claims that the city was concerned with the group home's location on a flood plain and issues regarding legal responsibility for the group-home residents' actions.<sup>79</sup> The Court noted that there was no reason to be more concerned about flooding or legal responsibility with respect to the group home.<sup>80</sup> Fourth, the Court rejected the city council's concern with the number of people that would occupy the group home, finding there was no rational reason to treat a home for individuals with intellectual disabilities differently from any other home occupied by the same number of individuals.<sup>81</sup>

The special-permit requirement served no legitimate purpose. Instead, it "rest[ed] on an irrational prejudice against the mentally retarded."<sup>82</sup> The city's actions endorsed its constituents' dislike of persons with intellectual disabilities.<sup>83</sup>

In *Romer v. Evans*, the Court reviewed an amendment, Amendment 2, to Colorado's constitution enacted following a state referendum.<sup>84</sup> The referendum undercut city ordinances which had recently extended antidiscrimination protection "to persons discriminated against by reason of their sexual orientation,"<sup>85</sup> repealing the ordinances' anti-sexual-orientation-discrimination provisions.<sup>86</sup> It also repealed or rescinded "all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons or gays and lesbians."<sup>87</sup>

The Court rejected the argument that Amendment 2 simply established that the affected class would not receive special treatment. Rather, the Court found that members of the affected class were subjected to a change in legal status that deprived them of certain protections in their private and public lives,<sup>88</sup> imposing "a special disability."<sup>89</sup> Additionally, Amendment 2 swept so broadly that it was impossible to rationally connect "the reasons offered for it" with its effects.<sup>90</sup> It could only be explained by "animus" aimed at the affected class.<sup>91</sup> Once again, the Court invoked *Moreno's* holding that "a bare . . . desire to harm

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78. *Id.* at 449; see ARAIZA, *supra* note 12, at 46.

79. *Cleburne*, 473 U.S. at 449.

80. *Id.*

81. *Id.* at 449–50.

82. *Id.* at 450.

83. See ARAIZA, *supra* note 12, at 46–47.

84. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

85. *Id.* at 624.

86. *Id.*

87. *Id.*

88. *Id.* at 627.

89. *Id.* at 631.

90. *Id.* at 632.

91. *Id.*

a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>92</sup> The effects of Amendment 2, including “immediate, continuing, and real injuries,” belied a legitimate governmental interest.<sup>93</sup> Instead, Amendment 2 made certain individuals unequal to others as a result of their sexual orientation—“deem[ing] a class of persons a stranger” to Colorado’s own laws.<sup>94</sup> *Romer* found evidence of animus<sup>95</sup> but only after “more legitimate justifications” for Amendment 2 were examined and rejected.<sup>96</sup> Amendment 2 failed rational basis review.<sup>97</sup>

In assessing the impact of *Moreno*, *Palmore*, *Cleburne*, and *Romer*, Pollvogt does not land on a unifying definition of animus.<sup>98</sup> After all, “the Court has not clearly defined the concept of animus, stated what exactly counts as evidence of animus, or identified the doctrinal significance of finding the presence of animus in any given case.”<sup>99</sup> Pollvogt instead describes the kind of animus evidence a plaintiff must present: affirmative evidence that demonstrates “the presence of unconstitutional animus through close examination of the connection between the identifying trait and the interests—both individual and governmental—implicated by the law.”<sup>100</sup> She also identifies the effect of animus: “it discredits the other purported state interests, regardless of whether they are legitimate on a superficial level,” and “acts as a doctrinal silver bullet.”<sup>101</sup>

In a 2013 essay, Pollvogt added *United States v. Windsor* to the animus canon.<sup>102</sup> Edith Windsor, who married Thea Spyer in Canada, wanted to claim the surviving-spouse exemption to the estate tax after Spyer’s death.<sup>103</sup> Spyer had left her entire estate to Windsor,<sup>104</sup> but the Defense of Marriage Act (DOMA) prohibited a same-sex partner like Windsor from being recognized as

92. *Id.* at 634 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

93. *Id.* at 635.

94. *Id.*

95. See ARAIZA, *supra* note 12, at 58.

96. *Id.* at 62.

97. *Id.*

98. Pollvogt, *supra* note 34, at 924–26. Pollvogt does highlight the limits of Akhil Amar’s objective definition of animus. *Id.* at 925–26, 925 n.242.

99. *Id.* at 890.

100. *Id.* at 928.

101. *Id.* at 930.

102. Pollvogt, *supra* note 47, at 210–14 (comparing the Justices’ differing approaches to animus in *Windsor*). Dale Carpenter has argued that although its holding rests on substantive due process, *Lawrence v. Texas* also sheds light on the animus doctrine. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 214–15 (2013). In addition to holding that a Texas law impermissibly infringed on the right to intimacy, *Lawrence* also concluded that the law stigmatized and demeaned a class of persons. *Id.*; see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State.”).

103. *United States v. Windsor*, 570 U.S. 744, 749–50 (2013).

104. *Id.* at 750.

a spouse for purposes of all federal statutes.<sup>105</sup> The Court struck down DOMA because of its “avowed purpose and practical effect of . . . impos[ing] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”<sup>106</sup> DOMA injected inequality into all federal law.<sup>107</sup> *Windsor* repeated the *Moreno* rule that a “desire to harm a politically unpopular group” cannot motivate differential classification.<sup>108</sup>

Pollvogt’s 2013 scholarship returned to her pre-*Windsor* inquiries: has the Court defined animus, what kind of evidence supports a finding of animus, and what is “the relationship between animus and rational basis review”?<sup>109</sup> With respect to the definition of animus, the *Windsor* majority opinion, authored by Justice Kennedy, “characterized animus as something akin to unconscious bias as opposed to malicious intent.”<sup>110</sup> With respect to the kind of evidence sufficient to find animus, Kennedy considered (1) “DOMA’s deviation from the tradition of state regulation of marriage,” and “unusual’ discrimination”; (2) “the fact that DOMA deprived an entire class of persons of substantial rights”; and (3) the deprivation of “the dignity associated with those rights.”<sup>111</sup> Rather than focusing on direct evidence of animus, “Kennedy . . . placed more emphasis on the improper function of DOMA (deprivation of rights and dignity).”<sup>112</sup> With respect to the effect of animus, “Justice Kennedy treated [it] as a doctrinal silver bullet”; if present, animus “discredited any purported justifications for the law such that those justifications did not even merit discussion.”<sup>113</sup>

In a 2018 article describing how the absence of a legitimate governmental purpose is what characterizes unconstitutional discrimination, Brandon Garrett argues that the Court *has* defined animus, even when it does not expressly use the word.<sup>114</sup> Garrett contends that, in *Moreno*, the Court defined animus through its oft-repeated statement “that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>115</sup> In *Cleburne*, animus was also defined by reference to *Moreno*’s “desire to harm” language.<sup>116</sup> In *Romer*, “imposing a broad and undifferentiated disability on a single

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105. *Id.* at 751.

106. *Id.* at 770.

107. *Id.* at 771.

108. *Id.* at 770 (quoting U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973)).

109. Pollvogt, *supra* note 47, at 205.

110. *Id.* at 210–11.

111. *Id.* at 212.

112. *Id.*

113. *Id.* at 213. Pollvogt also compares Justice Kennedy’s definitional and evidentiary holdings, and his views on the effect of animus, with the opinions held by Chief Justice Roberts and Justice Scalia. *Id.* at 210–14. While acknowledging the importance of the Justices’ different positions, this Article focuses on the Court’s majority opinions.

114. Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1501 (2018).

115. *Id.* (quoting U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973)).

116. *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985)).

named group [was] animus toward the class it affects.”<sup>117</sup> Garrett likens animus to the discriminatory intent the Court is concerned with in classic equal-protection analyses, as well as the improper purpose of discriminating against a particular religion present in Establishment Clause cases like *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>118</sup>

Garrett treats animus as a form of discriminatory intent. He is interested in discriminatory intent’s ability to demonstrate the absence of a legitimate government interest in animus cases.<sup>119</sup> Discriminatory intent can undermine a government’s claim of acting legitimately and “help with an argument that the government has exceeded the bounds of its structural power to act.”<sup>120</sup> Garrett contends that an intent-focused doctrine encourages legitimate state action.

As Garrett highlights, the Court did consider whether state action was premised upon a legitimate purpose in *Moreno*, *Cleburne*, *Romer*, and *Windsor*. In surveying the animus cases, he concludes that animus might simply refer to cases “in which the justifications for targeting a group are extremely weak.”<sup>121</sup> This understanding of animus explains the outcome in *Trump v. Hawaii*, where the Court “almost entirely focused on the legitimacy of the national security justification for the executive orders in question,” even though “[t]he evidence of animus alleged by the plaintiffs . . . was far more express and stark than in cases like *Moreno* and *Romer*.”<sup>122</sup>

Russell K. Robinson’s study of animus cases presents a nuanced examination of their effect on equal-protection jurisprudence.<sup>123</sup> He cautions against overstating the impact of *Palmore*, *Cleburne*, *Romer*, and *Windsor*. Writing soon after the *Obergefell v. Hodges* decision,<sup>124</sup> Robinson reminds us that even though the Court has outlawed bans on gay marriage, it has also abandoned its concern for gender equality and abortion rights, and it has rejected challenges to

117. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

118. *Id.* at 1500; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (voiding ordinances that suppressed Santeria religious practice because the ordinances “stem[med] from animosity to religion”).

119. Garrett, *supra* note 114, at 1501.

120. *Id.* at 1507–08.

121. *Id.* at 1502.

122. *Id.* at 1495, 1501.

123. See generally Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016).

124. Scholars are divided as to whether *Obergefell* is an animus case. Compare Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 953 (2016) (“*Obergefell* invokes liberty, not equality, as the principal foundation of its holding.”), and Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1240 (2017) (contending that in *Obergefell*, the Court “mostly shifted from equality to liberty,” emphasizing same-sex couples’ right to marry without “holding or implying that proponents of traditional marriage in state after state had an invidious purpose”), with Robinson, *supra* note 123, at 192 (arguing that *Obergefell* embraces a broad conception of animus in which “prejudice can exist” even when laws are enacted in good faith and not based on hatred). The Court’s own words offer no clear answer. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (holding that “the liberty of the person” includes a fundamental right to marry and that “under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty”).

“racialized mass incarceration” because the disparate impact on people of color cannot be neatly categorized as a racial classification.<sup>125</sup> Robinson concludes that LGBT rights represent “the only site of vitality in equal protection jurisprudence,”<sup>126</sup> because “the last thirty years” of antidiscrimination jurisprudence show that the “Court has steadily diminished the vigor of the Equal Protection Clause.”<sup>127</sup>

Robinson convincingly argues that the Court no longer follows its tiered scrutiny framework. Instead,

[t]he Court has developed divergent frameworks: the traditional model for race and sex claims, which typically leads to people of color and women losing the most contested Supreme Court cases; a distinct “animus”/“contextual intent” model for sexual orientation cases such as *Windsor*, which has proved quite protective for gays and lesbians; and minimum rational basis review for the remainder of cases, which offers virtually no protection.<sup>128</sup>

Robinson’s hesitation was prescient. *Masterpiece* used the animus doctrine to protect the rights of a religious majority in the same term that it upheld executive action impacting members of a religious minority in *Trump v. Hawaii*.

Can the scholarship be reconciled? Though Garrett’s straightforward animus definition is appealing, the animus cases are factually far apart. Pollvogt’s acknowledgment that animus is defined on a case-by-case basis is a better definitional fit. As a result, in *Moreno*, animus was a congressional desire to harm “hippies.” In *Palmore*, animus was a trial court’s reliance on private racial bias in its custody decision. In *Cleburne*, animus was a city council’s reliance on private biases and fears about individuals with intellectual disabilities. In *Romer*, animus was a law’s bare desire to harm gay men and women. In *Windsor*, animus was Congress’s avowed desire to deny recognition to same-sex couples. But in *Windsor*, animus was also implicit bias against same-sex couples, to the extent Congress did not consciously intend to harm them. If animus is different in each of

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125. Robinson, *supra* note 123, at 154.

126. *Id.*

127. *Id.*

128. *Id.* at 155. Robinson’s description of the vitality of equal-protection jurisprudence surrounding LGBT rights is undercut in certain respects by *Masterpiece*. *Masterpiece* might support the legality of still-untested religious-refusal laws, such as those that govern “assisted reproductive technologies and other matters of LGBT concern.” Douglas Nejaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J.F. 201, 222–23, 223 n.94 (2018). Such laws “authorize refusals by an ever-expanding universe of individuals and organizations who object to being made complicit in conduct they deem sinful,” which may result in the denial of services, such as reproductive technologies, that would otherwise be provided to all. *Id.* at 223; cf. Paul Barker, Note, *Religious Exemptions and the Vocational Dimension of Work*, 119 COLUM. L. REV. 169, 184 (2019) (explaining that “*Masterpiece Cakeshop* also recognized the severe harm that a too-expansive right of exemption would cause to gay people and to the government’s ability to protect against discrimination,” warning of the “‘community-wide stigma’ that could be inflicted if an existing, generally accepted religion-based exemption—excusing clergy members from performing same-sex weddings—were ‘not confined’”).

these cases, then maybe animus can be any of the above examples, if the context fits.

What about evidence of animus? Before *Windsor*, animus evidence, according to Pollvogt, had to be affirmative. After *Windsor*, however, evidence of animus could also be inferential, based on the Court's recognition of the effect of implicit bias. On this point, Garrett agrees.<sup>129</sup>

With respect to animus's effect, Pollvogt concludes that animus is a "silver bullet": a law found to rest upon animus will be defeated.<sup>130</sup> Robinson is more cautious, cabining animus to cases involving sexual-orientation discrimination. Robinson highlights the Court's recent reluctance to protect other minority groups, even those that the Court once protected in cases like *Palmore* and *Cleburne*.<sup>131</sup>

Garrett contends that animus and discriminatory intent have the effect of incentivizing government to act legitimately as opposed to irrationally. This is a desired outcome but not necessarily a realized one. Consider, for example, the recent spate of state action permitting individuals to claim exemptions from antidiscrimination laws if their own sense of morality opposes, for example, uncloseted gay existence. We do not live in an era in which antiprejudicial government action is the norm.

Also, contrary to Garrett's conclusion, not every animus case is based on a rejection of a purportedly legitimate governmental interest. In *Palmore*, the Court did not engage in a searching review of the record to find a potentially legitimate purpose. It held only that private biases cannot be endorsed by state actors. The Court did not reject proffered rationales. Likewise, as described below, *Masterpiece* also avoided assessing the Colorado Civil Rights Commission's rational basis; instead, the Court focused on the Commission's impermissible religious hostility. Thus, animus's effect is more akin to the silver bullet described by Pollvogt, supplemented by Robinson's warning that its importance not be overstated.

With a unified understanding of the definition and effect of animus, as well as the kind of evidence relevant to finding animus, this Article next incorporates *Masterpiece* into animus scholarship.

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129. Garrett, *supra* note 114, at 1501–02.

130. Pollvogt, *supra* note 34, at 930.

131. See Robinson, *supra* note 123, at 215.

C. Masterpiece Cakeshop *Animus*

Animosity is referenced once in the Court's *Masterpiece* opinion.<sup>132</sup> Still, its examination of religious hostility has pushed *Masterpiece* into the animus pantheon.<sup>133</sup> It is the latest addition to a series of cases in which the Court has prohibited government action based on "prejudice, hatred, or the 'bare . . . desire to harm' others."<sup>134</sup> This Subpart describes the *Masterpiece* decision. Next, it adds *Masterpiece's* definition of animus, identification of the kind of evidence that proves animus, and its formulation of the effect of animus to the pre-*Masterpiece* understanding of the same.

*Masterpiece* is a case about religious animus. The Court held that the Colorado Civil Rights Commission treated Jack Phillips's religious beliefs with "impermissible hostility."<sup>135</sup> His beliefs informed his refusal to bake a cake to be used in connection with a same-sex marriage celebration.<sup>136</sup>

Phillips alleged that the Commission violated his freedom of speech and his right to the free exercise of religion.<sup>137</sup> Through his free-exercise claim, Phillips sought to be exempt from a Colorado statute prohibiting sexual-orientation discrimination in public accommodations.<sup>138</sup> The Colorado Court of Appeals relied on *Employment Division v. Smith*<sup>139</sup> in concluding that Phillips could not evade compliance with "a valid and neutral law of general applicability."<sup>140</sup> Under *Smith*, a neutral law of general applicability applies without exception.<sup>141</sup> Because of the *Smith* barrier, Phillips's briefing focused mostly on his free-speech claim.<sup>142</sup>

Though *Masterpiece* presented the Court with a chance to add to its compelled-speech jurisprudence, it decided that Phillips's speech claim was

132. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("The Constitution 'commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.'" (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993))).

133. See, e.g., Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 550 (2018); Robert C. Farrell, *Richard Posner: A Class of One*, 71 SMU L. REV. 1041, 1070–71 (2018); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 134 (2018).

134. Kendrick & Schwartzman, *supra* note 133, at 134.

135. *Masterpiece*, 138 S. Ct. at 1729.

136. *Id.* at 1724.

137. *Id.* at 1726.

138. See Abner S. Greene, "Not in My Name" *Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1488 n.68 (2018).

139. *Emp't Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 890 (1990) (rejecting a claim that the state criminalization of peyote, even for religious ceremonies, violated the Free Exercise Clause).

140. *Masterpiece*, 138 S. Ct. at 1727 (quoting *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 289 (Colo. App. 2015)).

141. *Smith*, 494 U.S. at 880–86.

142. See Greene, *supra* note 138, at 1488 n.68.

“difficult.”<sup>143</sup> Its holding was limited to a consideration of Phillips’s free-exercise claim.<sup>144</sup> With free exercise in mind, the Court scrutinized the actions of Colorado’s Civil Rights Commission and the Commission’s determination that Phillips violated the Colorado Anti-Discrimination Act by engaging in sexual-orientation discrimination when he refused to create a cake for a same-sex couple’s wedding.<sup>145</sup> The Court held that the Commission considered Phillips’s actions and his faith-based motivations without the required religious neutrality. Instead, the Commission rendered its decision based on religious hostility.<sup>146</sup>

The Court painstakingly reviewed the facts underlying Phillips’s refusal. Phillips would not make a cake for Charlie Craig and Dave Mullins’s wedding reception.<sup>147</sup> Craig and Mullins planned to marry in Massachusetts, where gay marriage was legal, and then host a reception in Colorado, where, in 2012, it was not.<sup>148</sup> Phillips based his refusal on his religious belief that marriage “should be the union of one man and one woman” and that “creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration [offensive] to his most deeply held [religious] beliefs.”<sup>149</sup>

Craig and Mullins filed a complaint with the Colorado Civil Rights Division alleging that Phillips denied them “full and equal service” at his bakery when he refused to make a cake for their reception and that Phillips had a standard practice of refusing to make such cakes.<sup>150</sup> The division agreed and referred the case to the Civil Rights Commission, which in turn sent the case to a state administrative law judge (ALJ) for a formal hearing.<sup>151</sup> The ALJ held, *inter alia*, that Phillips discriminated against Craig and Mullins in a place of public accommodation on the basis of their sexual orientation.<sup>152</sup> The ALJ rejected Phillips’s argument “that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion.”<sup>153</sup>

Phillips appealed the ALJ decision to the full commission, a seven-member body that holds hearings and then deliberates together before voting.<sup>154</sup> The commission upheld the ALJ’s decision and “ordered Phillips to ‘cease and desist from discriminating against . . . same-sex couples’” with respect to wedding-cake orders; undergo “comprehensive staff training on the Public

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143. *Id.*

144. *Masterpiece*, 138 S. Ct. at 1724.

145. *Id.* at 1723.

146. *Id.* at 1724.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1725.

151. *Id.* at 1726.

152. *Id.*

153. *Id.*

154. *Id.* at 1725.

Accommodations section” of the Colorado law; make changes to company policies relevant to the Commission’s order; and submit “quarterly compliance reports.”<sup>155</sup>

The Court reminded the State of Colorado that it had a duty “not to base laws or regulations on hostility to a religion or religious viewpoint.”<sup>156</sup> The Commission had to approach Phillips’s religious beliefs with neutrality and tolerance.<sup>157</sup> Instead, it gave the appearance of ruling on “Phillips’ religious objection” and the religion underpinning it by making a “negative normative ‘evaluation’” of both.<sup>158</sup> He was not afforded neutral consideration.<sup>159</sup>

In reversing the Colorado Court of Appeals, the Court set out “[f]actors relevant to the assessment of . . . neutrality includ[ing] ‘the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.’”<sup>160</sup> The Court focused on statements made by the Commission, an “adjudicatory body.”<sup>161</sup>

In *Masterpiece*, the Court found evidence of antireligious hostility in several key sources. First, it focused on two comments made by one commissioner at a Colorado Civil Rights Commission hearing on May 30, 2014. The commissioner:

[S]uggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.”<sup>162</sup>

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155. *Id.* at 1726.

156. *Id.* at 1731.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993)). The opinion notes that “[m]embers of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion.” *Id.* at 1730; Kendrick & Schwartzman, *supra* note 133, at 148–49 (explaining that Justice Kennedy, writing for the *Masterpiece* majority, “was referring to a dispute in *Lukumi*,” where “writing only for himself and Justice Stevens, [he] had invoked equal protection doctrine as support for considering circumstantial evidence of official intent” but “Justice Scalia wrote separately to reject this inquiry into the subjective motivations of legislators, at least for purposes of finding violations of the Free Exercise Clause”). Justice Kennedy explained that the remarks at issue in *Masterpiece* “were made in a very different context—by an adjudicatory body deciding a particular case.” *Masterpiece*, 138 S. Ct. at 1730; *see also* Kendrick & Schwartzman, *supra* note 133, at 148–49 (stating that *Masterpiece* “adopt[ed] a totality-of-the-circumstances approach to determin[e] whether officials have acted with animus” and examined the statements of individuals to determine the bias of an administrative commission as a whole).

161. *Masterpiece*, 138 S. Ct. at 1730.

162. *Id.* at 1729 (citations omitted).

On July 25, 2014, another commissioner disparaged Phillips's religion by stating:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.<sup>163</sup>

The Court treated the May 30, 2014, comments as demonstrative of a “lack of due consideration for Phillips’s free exercise rights.”<sup>164</sup> The May 30 comments might also have been interpreted as reflecting a neutral belief that businesses cannot discriminate.<sup>165</sup> Yet, because of the hostile comments made on July 25, 2014, the Court decided to infer that the May 30, 2014, comments were also hostile.<sup>166</sup>

Second, the Court concluded that the commissioners’ statements “cast doubt on the fairness and impartiality of the Commission’s adjudication of Phillips’ case” because (1) other commissioners did not object to the comments; (2) the Colorado Court of Appeals’s ruling did not mention or “express concern” with them; and (3) Colorado did not disavow the comments in its Supreme Court briefs.<sup>167</sup> The Court acknowledged that “[m]embers of the Court have disagreed” as to the relevance of lawmakers’ statements regarding religious discrimination.<sup>168</sup> It explained its reliance on individual commissioners’ statements on the grounds that the remarks were made not by legislators but by a “an adjudicatory body deciding a particular case.”<sup>169</sup>

Third, the Court found “[a]nother indication of hostility” in the way Phillips’s case was treated in light of other cases involving bakers’ conscience-based objections to cake requests.<sup>170</sup> In three other cases, the Civil Rights Division held that bakers acted lawfully in refusing to create cakes that “conveyed disapproval of same-sex marriage.”<sup>171</sup> The difference in outcomes was further evidence that Phillips’s religious objection was treated with disfavor.<sup>172</sup>

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163. *Id.* (citations omitted).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1730.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* Weeks after the Court’s *Masterpiece* decision, the Colorado Civil Rights Commission filed another complaint against Phillips as a result of his alleged discrimination against a transgender customer. Order at 2, *Masterpiece Cakeshop v. Elenis*, No. 1:18-CV-02074-WYD-STV (D. Colo. Jan. 4, 2019). On August 14, 2018, Phillips filed an action in the District of Colorado against members of the commission, the Colorado

After *Masterpiece*, the definition of animus is still case-specific. The meaning of animus now includes hostility toward a baker's religion. Animus, after *Masterpiece*, still has the effect of a magic wand: it invalidates the state action that animus infects.

*Masterpiece's* most important contribution to animus doctrine is its broadened description of the kind of animus evidence the Court will consider. Before *Masterpiece*, *Windsor* demonstrated the Court's willingness to consider evidence of express and implicit prejudice. *Masterpiece* goes even further. First, it examined one commissioner's statements regarding religion and concluded, despite a possibility that the statements were neutral, that they were hostile. But the Court did so by stacking one commissioner's statements on top of a second commissioner's statements, whose comments also were amenable to a neutral interpretation. It also found that other commissioners' silence regarding the comments reflected a lack of neutrality. Because the Colorado Court of Appeals did not address the commissioners' comments or express concern with them, that too supported a finding of hostility.

*Masterpiece* had to confront precedent in which the Court was unwilling to impute one legislator's hostility to an entire legislative body, and it distinguished the commissioners, who reached decisions, from legislators. But the distinction is thin. Both are state actors, and the problematic conduct engaged in by the commissioners were statements. Legislators also make statements when they consider whether to pass a bill, both in hearings and through reports.

Finally, *Masterpiece* concluded that Phillips's case was treated so differently than other bakers' objections that the difference in treatment was further evidence of hostility.

After *Masterpiece*, several additional categories of evidence are relevant to finding animus. And that evidence can be subject to both an innocent and a problematic interpretation. The Court will aggregate evidence to tip the scales in favor of an animus conclusion.

*Masterpiece* arises in the free-exercise context, in which state action need be both neutral and devoid of animus. However, *Masterpiece* is still persuasive for the purpose of equal protection. Its concern for animus speaks generally to the question of whether government actors "acted for the wrong reasons." Araiza's definition of animus, "individualized or institutionalized intent to oppress or exclude," sweeps in both equal-protection and religion-clause examples.<sup>173</sup>

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attorney general, and the Governor of Colorado. Complaint at 1, *Masterpiece Cakeshop v. Elenis*, No. 1:18-CV-02074 (D. Colo. Aug. 14, 2018). He seeks damages and declaratory and injunctive relief. *Id.* at 48–50. Defendants moved to dismiss. Order, *supra*, at 3. The damage claims brought against the commissioners were dismissed. *Id.* at 53. All claims against the Governor were dismissed. *Id.* The defendants moved for reconsideration of the order. State Officials' Motion for Partial Reconsideration of the Order Denying Motion to Dismiss [Doc. 94] Pursuant to Fed.R.Civ.P. 59(e) and 60(b)(1), *Masterpiece Cakeshop v. Elenis*, No. 1:18-CV-02074-WYD-STV (D. Colo. Feb. 1, 2019). The parties are currently briefing Phillips's motion for a preliminary injunction.

173. William D. Araiza, *Call It by Its Name*, 48 STETSON L. REV. 181, 185 (2019).

Finally, in his study of animus, Garrett treats the kind of discriminatory intent the Court is concerned with in equal-protection cases and religion-clause cases as equivalent.<sup>174</sup>

With *Masterpiece* in mind, this Article proceeds to evaluate the kind of evidence found relevant to *Masterpiece*'s animus conclusion.

### III. PROCEDURAL ANIMUS

*Masterpiece* has potential. It could support a wide array of equal-protection challenges. Yet after *Masterpiece*, state actors may be disinclined to record any arguably discriminatory adjudicative reasoning or legislative purpose, fearing that their statements will be picked apart. Indeed, evidence of discriminatory conduct that gives rise to legal liability dissipates once there is awareness of the potential for legal ramifications. Individuals who discriminate often do so without expressly announcing what they are doing.<sup>175</sup> *Masterpiece* will be most useful with respect to challenges in which the state action predates its holding.

One notorious federal law, in existence since 1996, was inspired by well-publicized hostility. As Susan Herman explains, the PLRA was motivated by the notion that prisoners “should not be consuming the federal courts’ time, because they are not worthy of attention, except in extreme instances.”<sup>176</sup> The law’s deceptively innocent litigation label and its procedural provisions arose out of a legislative history in which senators openly conveyed their hatred for prisoners and their claims. Courts have interpreted the PLRA in a way that signals their own disdain for prisoners and sets their cases apart from those brought by other civil rights plaintiffs.

This Part turns its attention to laws like the PLRA that are infected with procedural animus—hostility which hinders an unpopular group’s ability to obtain relief for legal wrongs. Here, the Article introduces a two-part test to determine whether a law is motivated by procedural animus. First, it explains why a law is procedural. Next, it uses *Masterpiece*'s broadened understanding of animus evidence to highlight how a procedural law might be challenged in the

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174. Garrett, *supra* note 114, at 1476 (labeling cases in which the Court identified animus, religious hostility, and voting-rights discrimination as cases in which the Court identified discriminatory intent).

175. Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMP. RTS. & EMP. POL'Y J. 1, 3–4 (1999) (explaining that the decrease in the evidence of bias in the workplace may be the result of employers’ litigation-prevention efforts instead of a decrease in bias); Brock A. Johnson, *Voting Rights and the History of Institutionalized Racism: Criminal Disenfranchisement in the United States and South Africa*, 44 GA. J. INT'L & COMP. L. 401, 427 (2016) (describing evidence of racially discriminatory animus as “rare”). The lack of discriminatory-intent evidence has hindered equal-protection challenges even when there is evidence of significant discriminatory impact. See generally Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

176. Susan N. Herman, *Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1231 (1998); see also Julie M. Riewe, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 141–42 (1997); Colin O’Connor Udell, *Parading the Saurian Tail: Projection, Jung, and the Law*, 42 ARIZ. L. REV. 731, 768 (2000).

same way Phillips challenged the actions of Colorado's Civil Rights Commission and its Court of Appeals.

After using the PLRA as a case study, this Part moves on to considering how other procedural laws might also be studied through the lens of animus.

### A. Prisoner Procedure

By the mid-'90s, a ballooning prison population created a corresponding boom in prisoner litigation, most of which was pro se. The PLRA purported to respond to the perceived excesses of “frivolous” prisoner litigation by imposing barriers to prisoner litigation.<sup>177</sup> The PLRA's target was prisoner civil rights claims,<sup>178</sup> including those that challenged conditions of confinement and sought to cure prison overcrowding.<sup>179</sup> The PLRA changed federal civil procedure—but only with respect to prisoner litigation.<sup>180</sup> It is a prisoner-targeted “weapon” that limits prisoners' access to the courts.<sup>181</sup>

The PLRA's procedure has shaped prisoner litigation, rendering it a complex maze. The PLRA requires indigent inmates to pay filing fees up front,<sup>182</sup> to exhaust administrative remedies before suits may be filed,<sup>183</sup> and to survive a judicial screening that could result in immediate sua sponte dismissal before a motion to dismiss or answer is filed.<sup>184</sup> The PLRA also includes a three-strikes

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177. Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 299–301 (2007). The PLRA also purported to respond to federal micromanagement of state correctional facilities. See Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 489 (2001). This Article focuses on the law's desire to curtail prisoner litigation. However, even when characterized as a response to federal overreach, the PLRA is still a law that treats prisoners' federal constitutional claims as pointless. Rejecting federal intervention in cases that might literally preserve a prisoner's life is a particularly visceral form of animus.

178. Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, Casey, and Iqbal Combine with Implicit Bias to Eriscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 182 (2015).

179. See *Lyon v. Krol*, 127 F.3d 763, 764 (8th Cir. 1997) (stating that the PLRA was intended to curb prisoners' civil claims); Branham, *supra* note 177, at 489. Prisoners' civil rights actions may also implicate their rights to free exercise and privacy. Stacey Heather O'Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189, 1201–09 (1997).

180. Cindy Chen, *The Prison Litigation Reform Act of 1995: Doing Away with More Than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203, 206–07 (2004); Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 103 (2000).

181. Elizabeth Alexander, *Isn't It Ironic? The "Particular Plaintiffs" Provision of the PLRA*, 24 FED. SENT'G REP. 229, 234 (2012).

182. 28 U.S.C. § 1915(b)(1) (2018).

183. 42 U.S.C. § 1997e(a) (2018).

184. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c)(1).

provision preventing future filings after three dismissals,<sup>185</sup> a limitation of attorney's fees,<sup>186</sup> and a restriction on courts' ability to grant equitable relief.<sup>187</sup>

Consider how the PLRA reaches the following aspects of litigation, from filing to relief. The first procedural barrier it imposes is the exhaustion requirement,<sup>188</sup> the most extensively litigated aspect of the PLRA. It prohibits a prisoner from bringing an action under any federal law unless they have first exhausted all available administrative remedies provided by the prison system in which the inmate is incarcerated.<sup>189</sup> That is, if the prisoner is injured in or by a prison, the prisoner must first use the prison's own grievance process before resorting to federal litigation.

The PLRA's exhaustion requirement is strictly construed.<sup>190</sup> If a prisoner does not follow an administrative grievance process by, for example, missing a filing deadline, the result is procedural default, and his or her claim will be permanently barred from federal court.<sup>191</sup> Further, even if a prisoner seeks a remedy that is unavailable through the institution's administrative process, like monetary relief, the prisoner is still required to follow the administrative grievance procedure to its end.<sup>192</sup> The PLRA's exhaustion requirement is an exception to the general rule that there is no exhaustion prerequisite to filing an action arising under § 1983.<sup>193</sup>

Next, assuming the exhaustion requirement is met, a prisoner must comply with the PLRA's filing-fees provisions, which require that prisoners proceeding *in forma pauperis* as a result of their inability to finance their case must still pay a portion of their filing fees.<sup>194</sup> A prisoner must pay the greater of 20% of either the prisoner's average monthly deposits to his or her account<sup>195</sup> or the average monthly balance in the prisoner's account in the six months preceding the complaint or appeal.<sup>196</sup> Further, the PLRA requires that filing fees be paid in full, and after the initial "down payment," a prisoner proceeding *in forma pauperis* must continue to make monthly payments equivalent to 20% of the balance of their account (so long as that balance is greater than \$10) until the fees are paid

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185. 28 U.S.C. § 1915(g).

186. 42 U.S.C. § 1997e(d).

187. 18 U.S.C. § 3626 (2018).

188. 42 U.S.C. § 1997e(a).

189. *Id.*

190. Jacqueline Hayley Summs, *Grappling With Inmates' Access to Justice: The Narrowing of the Exhaustion Requirement* in *Ross v. Blake*, 69 ADMIN. L. REV. 467, 479–80 (2017).

191. *Woodford v. Ngo*, 548 U.S. 81, 92–93 (2006).

192. *Booth v. Churner*, 532 U.S. 731, 740–41 (2001).

193. Keri E. McCrary, *Taking A Toll on the Equities: Governing the Effect of the PLRA's Exhaustion Requirement on State Statutes of Limitations*, 47 GA. L. REV. 1321, 1333 (2013).

194. 28 U.S.C. § 1915(a)–(b)(1) (2018).

195. Julia Colarusso, Comment, *Out of Jail...But Still Not Free to Litigate? Using Congressional Intent to Interpret 28 U.S.C. § 1915(b)'s Application to Released Prisoners*, 58 AM. U. L. REV. 1533, 1543 (2009).

196. 28 U.S.C. § 1915(b)(1)(A)–(B).

in full.<sup>197</sup> Though a prisoner with no assets or means of paying the initial filing fee will not be prohibited from bringing or appealing a civil action,<sup>198</sup> the prisoner will, at some point, be required to pay the entire fee.<sup>199</sup> Moreover, “[a] prisoner with even the smallest amount of money in his prisoner account can be assessed a partial filing fee.”<sup>200</sup> The PLRA amended the federal statute governing *in forma pauperis* status, imposing “unique burdens” on prisoner litigants.<sup>201</sup>

Assuming a prisoner exhausts available administrative remedies and complies with filing-fee provisions, the PLRA next allows judges to sua sponte dismiss prisoner cases before a motion to dismiss is filed by the defendant.<sup>202</sup> In fact, the PLRA requires courts to screen prisoner complaints before docketing and allows them to dismiss the entire complaint or portions of the complaint if it finds that complaint, or portions of it, frivolous, malicious, or failing to state a claim.<sup>203</sup> A court may also dismiss any action which seeks monetary relief from an immune party.<sup>204</sup> The PLRA allows for sua sponte dismissal upon a finding that a claim is frivolous or malicious, fails to state a claim for relief, or seeks monetary relief from an immune party.<sup>205</sup>

The PLRA does not define the grounds for sua sponte dismissal.<sup>206</sup> Courts have determined that frivolous complaints are those that “lack[] an arguable basis either in law or in fact.”<sup>207</sup> Malicious actions are complaints that abuse the judicial process.<sup>208</sup> The “failure to state a claim” language has been interpreted to be synonymous with the standard set out by Federal Rule of Civil Procedure 12(b)(6).<sup>209</sup> Taken together, the screening provisions give judges the ability to dismiss prisoner complaints on the above categories “before docketing . . . or

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197. *Id.* § 1915(b)(2).

198. *Id.* § 1915(b)(4).

199. Riewe, *supra* note 176, at 130 n.79.

200. *Id.*

201. Walker Newell, *An Irrational Oversight: Applying the PLRA’s Fee Restrictions to Collateral Prisoner Litigation*, 15 CUNY L. REV. 53, 57 (2011).

202. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. 1997e(c) (2018).

203. 28 U.S.C. § 1915A(b).

204. *Id.*

205. Michael Zachary, *Dismissal of Federal Actions and Appeals Under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)*, 42 U.S.C. § 1997e(c) and the Inherent Authority of the Federal Courts: (A) Procedures for Screening and Dismissing Cases; (B) Special Problems Posed by the “Delusional” or “Wholly Incredible” Complaint, 43 N.Y. L. SCH. L. REV. 975, 980 (1999).

206. *Id.*

207. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

208. *See Willis v. Bates*, No. 03-20420, 2003 WL 22427405, at \*1 (5th Cir. Oct. 27, 2003) (dismissing a prisoner complaint as malicious because it duplicated previous litigation); *Brown v. Lyons*, 977 F. Supp. 2d 475, 485 (E.D. Pa. 2013) (dismissing a prisoner complaint as malicious because its allegations had already been rejected on several previous occasions).

209. Zachary, *supra* note 205, at 980.

as soon as practicable” even before any responsive briefing has been filed by the defendant.<sup>210</sup>

Any kind of *sua sponte* action marks a departure from the common law’s adversarial tradition.<sup>211</sup> The default rule in federal civil litigation is that defendants raise their own affirmative defenses, and if they fail to do so, the defenses are waived.<sup>212</sup> The PLRA’s *sua sponte* dismissal provisions permit the federal district courts to do the work that is otherwise assigned to civil defendants, a shift in responsibility unique in federal litigation and the common law in general.

The PLRA doubles down on the impact of *sua sponte* dismissals through what has become known as its three-strikes provision. A prisoner who has had three complaints dismissed for being frivolous or malicious or for failing to state a claim is barred from proceeding *in forma pauperis* in a subsequent action.<sup>213</sup> The three-strikes provision is retroactive, meaning that prisoner complaints dismissed before enactment of the PLRA still count as a strike.<sup>214</sup> Further, dismissals of either an initial complaint or an appeal both count as strikes.<sup>215</sup> The only statutory exception to the three-strikes provision allows a prisoner to litigate a claim alleging that she is in imminent danger of serious physical injury.<sup>216</sup> For the exception to apply, a prisoner must show imminent danger at the time the complaint is filed, not at the time of an alleged incident.<sup>217</sup> Merely alleging past harms will not result in an imminent-danger exception.<sup>218</sup>

Even if a prisoner survives the pleading stage, the relief available is curtailed by the PLRA.<sup>219</sup> The PLRA requires that prospective and preliminary injunctive relief be “narrowly drawn,” constitute “the least intrusive means necessary to correct the violation,” and “extend[] no further than necessary” to protect the

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210. Jones v. Bock, 549 U.S. 199, 213–14 (2007) (quoting 28 U.S.C. §§ 1915(A)(a), (b) (2006)).

211. Katherine A. Macfarlane, *Adversarial No More: How Sua Sponte Assertion of Affirmative Defenses to Habeas Wreaks Havoc on the Rules of Civil Procedure*, 91 OR. L. REV. 177, 180–81 (2012).

212. See FED. R. CIV. P. 8(c).

213. 28 U.S.C. § 1915(g) (2018).

214. See, e.g., Welch v. Galie, 207 F.3d 130, 132 (2d Cir. 2000); Tierney v. Kupers, 128 F.3d 1310, 1311 (9th Cir. 1997).

215. 28 U.S.C. § 1915(g).

216. *Id.*

217. Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (3d Cir. 2001).

218. Akassy v. Hardy, 887 F.3d 91, 96 (2d Cir. 2018).

219. Alison Brill, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 658 n.74 (2008); Kyle T. Sullivan, *To Free or Not to Free: Rethinking Release Orders Under the Prison Litigation Reform Act After Brown v. Plata*, 33 B.C. J.L. & SOC. JUST. 419, 432 (2013) (stating that “the PLRA’s restrictions on judicial remedies form ‘a whole range of obstacles and pitfalls’ for prisoners seeking vindication of their Eighth Amendment rights”); cf. Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1049 (2017) (stating that despite the PLRA, prisoner litigation is “resilient” and “prisoner class actions remain sites of doctrinal vitality, with major decisions and consent decrees addressing solitary confinement of juveniles, the mentally ill, and general prison conditions”).

implicated right.<sup>220</sup> Further, courts are instructed to give considerable weight to the impacts that the ordered relief may have on public safety or the operation of the criminal justice system.<sup>221</sup> Any preliminary injunctive relief automatically terminates ninety days after it is ordered, unless the court enters a final order for prospective relief during that time.<sup>222</sup>

The PLRA restricts courts from ordering the release of prisoners unless they have previously entered a less intrusive form of relief that failed and the defendant has had a reasonable amount of time to comply with the previous orders.<sup>223</sup> In addition, an order to release prisoners may only be entered by a three-judge court, which must find by clear and convincing evidence that overcrowding is the primary cause of the violation and a release order is necessary to correct it.<sup>224</sup>

Like injunctions, consent decrees can only be entered if the relief “is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”<sup>225</sup> Consent decrees that do not meet these criteria can be terminated.<sup>226</sup> The PLRA’s limits on injunctive relief and consent decrees are unique to prisoner litigation.<sup>227</sup>

Finally, even if a prisoner’s case results in a favorable outcome, the PLRA also circumscribes attorney’s fees awards.<sup>228</sup> The PLRA provides that an award of fees may not exceed 150% of a damages award.<sup>229</sup> In addition, it mandates that up to 25% of the damages awarded to a successful prisoner litigant be used to pay attorney’s fees.<sup>230</sup> Consider the result: if a prisoner is awarded \$10,000 in damages, attorney’s fees arising out of the related litigation may not exceed \$15,000, and up to \$2,000 of the damages award may be used to pay those fees.

The most common type of prisoner civil rights litigation arises under 42 U.S.C. § 1983, which authorizes suits against state actors, including state

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220. 18 U.S.C. § 3626(a)(1)(A) (2018).

221. *Id.*

222. Kiira J. Johal, Note, *Judges Behind Bars: The Intrusiveness Requirement’s Restriction on the Implementation of Relief Under the Prison Litigation Reform Act*, 114 COLUM. L. REV. 715, 721 (2014).

223. 18 U.S.C. § 3626(a)(3)(A)(i)–(ii).

224. *Id.* § 3626(a)(3)(E)(i)–(ii).

225. *Id.* § 3626(a)(1)(A).

226. Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL’Y 743, 771 (2012).

227. Alexander, *supra* note 181, at 231 (describing the PLRA’s injunctive relief standards as examples of politically motivated, ad hoc procedure and stating that the PLRA had a “cataclysmic effect on the scope of injunctive relief in prison and jail cases”); Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U.L. REV. 767, 792 (2017).

228. 42 U.S.C. § 1997e(d) (2018); 18 U.S.C. § 3626.

229. 42 U.S.C. § 1997e(d).

230. *Id.* § 1997e(d)(2).

correctional officers.<sup>231</sup> Only prisoner-brought § 1983 cases are subject to the fee limits imposed by the PLRA.<sup>232</sup>

The PLRA also caps hourly rates.<sup>233</sup> The rate is set by the Criminal Justice Act (CJA), the law governing the rate at which attorneys representing federal criminal defendants are compensated. The PLRA caps the prisoner litigation hourly rate to 150% of the CJA rate.<sup>234</sup> The CJA rate is currently \$148 per hour.<sup>235</sup> As a result, attorneys representing prisoner plaintiffs may only recover \$222 for every hour of work. Additionally, only certain kinds of attorney work can be recovered through fees awards. The fees must be “‘directly and reasonably incurred’ in proving an ‘actual violation’ of the prisoner’s rights provided that they also either meet a proportionality requirement or were ‘directly and reasonably incurred’ in enforcing the court-ordered relief.”<sup>236</sup>

There are tremendous practical difficulties involved in representing a prisoner in civil litigation, the least of which pertains to finding a way to meet with a client face-to-face.<sup>237</sup> The PLRA’s cap on attorney’s fees is a further disincentive. In § 1983 litigation not brought by prisoners, even a \$1 nominal damages award may justify a fees award of over \$100,000.<sup>238</sup> Why would a § 1983 expert represent a prisoner?

The PLRA has reduced the number of prisoner filings. It might have resulted in the dismissal of meritorious as well as frivolous suits, leaving vulnerable plaintiffs with no means for redress.<sup>239</sup> The PLRA does not burden a fundamental right, and prisoners are not a suspect class.<sup>240</sup> Therefore, rational basis applies. Courts have consistently held that the PLRA has a rational basis—

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231. Samantha Bennett, Note, *What Happens Behind Bars Should Not Stay Behind Bars: The Case for an Exhaustion Exception to the Prison Litigation Reform Act for Juveniles*, 86 GEO. WASH. L. REV. 587, 590 n.17 (2018); Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act’s Disparate Restrictions on Attorney’s Fees*, 89 CALIF. L. REV. 999, 1007 (2001).

232. Branham, *supra* note 231, at 1007 n.63.

233. 42 U.S.C. § 1997e(d) (2018).

234. Branham, *supra* note 231, at 1006.

235. Memorandum from James C. Duff, Dir., Admin. Office of the U.S. Courts, to Judges, U.S. Courts of Appeal et al., Implementation of Increases Under the Criminal Justice Act of Hourly Rates and Case Compensation Maximums (Feb. 22, 2019), <https://www.fpdscdot.org/images/pdfs/DIR19-029.pdf>.

236. Branham, *supra* note 231, at 1005 (footnotes omitted).

237. Katherine A. Macfarlane, *Predicting Utah v. Streiff’s Civil Rights Impact*, 126 YALE L.J.F. 139, 146–47 (2016) (describing the practical difficulties of representing an incarcerated civil rights plaintiff, including the expense of traveling to and from prison; the difficulty of obtaining discovery; the motion practice required to secure an incarcerated plaintiff’s presence at trial; the lack of handcuffing the plaintiff at trial; and the question of whether the plaintiff will be allowed to don a suit when in the presence of the jury).

238. Thomas A. Eaton & Michael L. Wells, *Attorney’s Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 832 & n.20 (2016).

239. Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 944 (2009).

240. Peter Hobart, Comment, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981, 993 (1999).

“relieving the pressure of excessive prisoner filings on our overburdened federal courts.”<sup>241</sup>

### B. Prisoner Animus

The PLRA’s animus has not gone unnoticed. Scholars have observed that underlying the PLRA is the sense that prisoners should not take up the federal courts’ time.<sup>242</sup> The fact that the PLRA has such a limited legislative history has itself been treated as evidence of animus.<sup>243</sup> One scholar has suggested that the PLRA was motivated by politicians’ desire to appear “tough on crime” during an election year.<sup>244</sup>

Still, there is no body of scholarship surrounding the PLRA’s animus.<sup>245</sup> The federal courts, similarly, have mentioned the PLRA’s animus only in dicta. Though courts have occasionally distinguished the PLRA from *Romer’s* Amendment 2, they have not addressed any more recent animus precedent.<sup>246</sup>

This Subpart proceeds by demonstrating how a *Masterpiece*-directed search of the PLRA legislative record and federal decisions applying the PLRA uncover the kind of animus that renders a law constitutionally invalid.

The PLRA is now considered part of the 1990s’ Republican legislative promise known as the “Contract with America.”<sup>247</sup> Prisoners were an easy

241. *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997); *see, e.g., Hampton v. Hobbs*, 106 F.3d 1281, 1284 (6th Cir. 1997) (stating that PLRA fee requirements do not deprive prisoners of their fundamental right to enjoy “adequate, effective, and meaningful access to the courts”); *Carson v. Johnson*, 112 F.3d 818, 822 (5th Cir. 1997) (quoting *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (per curiam)) (holding that prisoners are not a suspect class and the PLRA does not burden a fundamental right); *Branham*, *supra* note 231, at 1016 (prisoners are not a suspect class); *Lindy K. Lucero & Jeffery P. Bernhardt, Substantive Rights Retained by Prisoners*, 90 GEO. L.J. 2006, 2039 n.2837 (2002) (collecting cases in which courts have held that the PLRA does not violate the Fifth Amendment Due Process Clause’s equal-protection guarantee); *Newell*, *supra* note 201, at 62–63 (the PLRA has been found to satisfy the rational basis test).

242. *Erwin Chemerinsky, The Inescapability of Constitutional Theory*, 80 U. CHI. L. REV. 935, 950–51 (2013) (book review) (describing prisoners and other minorities who are unpopular and “cannot protect themselves through the political process”); *Herman*, *supra* note 176, at 1231; *Brian K. Landsberg, Does Prison Reform Bring Sentencing Reform? The Congress, the Courts, and the Structural Injunction*, 46 MCGEORGE L. REV. 749, 768 (2014) (“Prisoners’ rights are a paradigm of unpopular rights that the elected branches are unlikely to protect.”); *Miller*, *supra* note 239, at 946 n.97; *Udell*, *supra* note 176, at 768.

243. *Riewe*, *supra* note 176, at 142.

244. *Id.*; *see also James E. Robertson, The Jurisprudence of the PLRA: Inmates As “Outsiders” and the Counter-majoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187, 188 n.7 (2002) (“[T]he PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves.” (citing 142 CONG. REC. S2296 (daily ed. March 19, 1996) (statement of Sen. Kennedy))).

245. *Herman*, *supra* note 176, at 1231 (“*Romer* might seem to suggest that the legislation amounts to a denial of equal protection.”).

246. *Id.* at 1291; *see also Benjamin v. Jacobson*, 935 F. Supp. 332, 352 (S.D.N.Y. 1996), *aff’d in part, rev’d in part*, 124 F.3d 162 (2d Cir. 1997), *opinion vacated on reh’g en banc*, 172 F.3d 144 (2d Cir. 1999), and *aff’d in part, rev’d in part*, 172 F.3d 144 (2d Cir. 1999) (refusing to consider whether the PLRA as a whole was motivated by animus because only the prospective relief provisions were at issue); *William C. Duncan, The Legacy of Romer v. Evans-So Far*, 10 WIDENER J. PUB. L. 161, 168–75 (2001).

247. *Geraldine Doetzer, Note, Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth*, 14 WM. & MARY J. WOMEN & L. 363, 375 (2008).

legislative target, representing “arguably the most unpopular and politically vulnerable bloc of American citizens.”<sup>248</sup> At the time of the PLRA’s adoption, prisoners were unpopular and disadvantaged.<sup>249</sup> Not only were prisoners unpopular, but so were their constitutional rights.<sup>250</sup>

Senators Bob Dole, Jon Kyl, and Orrin Hatch first introduced the PLRA in 1995, but because that version did not yield enough votes, it was later incorporated into an appropriations bill, which was itself vetoed by President Clinton on December 19, 1995.<sup>251</sup> The PLRA was reintroduced by Senator Hatch in 1996 “as a rider to an omnibus appropriations bill that President Clinton signed into law on April 26, 1996.”<sup>252</sup> The law is consistent with Clinton’s desire to appear “tough on crime.”<sup>253</sup>

The PLRA passed quickly without great debate.<sup>254</sup> There was no committee markup.<sup>255</sup> Statements regarding the PLRA spoke to the effect the PLRA would have on the avalanche of frivolous prisoner lawsuits. “Proponents of the PLRA noted in statements made on the Senate floor that the ‘civil justice system [is] overburdened by frivolous prisoner lawsuits’ that ‘clog[ ] the courts and drain[ ] precious judicial resources.’”<sup>256</sup>

When Hatch introduced the original version of what would become the PLRA, he was chair of the Senate Judiciary Committee. Imbued with all the gravitas that the position afforded him, he characterized the PLRA as a landmark law that would “bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little better to do are tying our courts in knots with an endless flow of frivolous litigation.”<sup>257</sup> Senator Hatch

248. *Id.* at 374–75.

249. Robyn D. Hoffman, Note, *Adding Insult to Injury?: The Untoward Impact of Requiring More Than De Minimis Injury in an Eighth Amendment Excessive Force Case*, 77 *FORDHAM L. REV.* 3163, 3174 (2009); Karen M. Klotz, Comment, *The Price of Civil Rights: The Prison Litigation Reform Act’s Attorney’s Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 *TEMP. L. REV.* 759, 776 (2000).

250. *The Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act: Implications for Federal District Judges*, 115 *HARV. L. REV.* 1846, 1867 (2002).

251. Ann H. Mathews, Note, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 *N.Y.U. L. REV.* 536, 546 n.56 (2002).

252. *Id.*

253. *Id.* President Clinton’s “tough on crime” position has been linked to the mass incarceration of African-American men, a consequence that would haunt presidential candidate Hillary Clinton as recently as 2016. Andrew Harnik, *Bernie Sanders Has Dodged Criticism for Crime Bill Vote While Others Have Not*, *NBC NEWS* (June 23, 2019, 11:30 AM), <https://www.nbcnews.com/politics/2020-election/bernie-sanders-has-dodged-criticism-crime-bill-vote-while-others-n1020726>.

254. Mathews, *supra* note 251, at 560.

255. *Id.*

256. *Id.* at 560 (alteration in original) (footnotes omitted) (first quoting 141 *CONG. REC.* 35,797 (1995); and then quoting 141 *CONG. REC.* 14,572 (1995)).

257. Allen E. Honick, Comment, *It’s “Exhausting”: Reconciling a Prisoner’s Right to Meaningful Remedies for Constitutional Violations with the Need for Agency Autonomy*, 45 *U. BALT. L. REV.* 155, 165 (2015) (quoting 145 *CONG. REC.* 27,042 (1995)). Congress was particularly concerned with the consequences brought about by population caps, which could result in the release of prisoners. Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 *U. MIAMI RACE & SOC. JUST. L. REV.* 1, 27 (2016) (stating that “[t]he prisoner

relied on fear to argue that the PLRA was necessary to stop “imprisoned criminals who churn out frivolous and excessive prison litigation.”<sup>258</sup>

On September 27, 1995, Senator Dole introduced the PLRA in the Senate.<sup>259</sup> He characterized prisoner litigation as lawsuits which “can involve such grievances as insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety.”<sup>260</sup> He expressed his desire that “prisons should be just that—prisons, not law firms” and that the PLRA “would go a long way to take the frivolity out of frivolous inmate litigation.”<sup>261</sup>

Senator Hatch added, “It is time to stop this ridiculous waste of the taxpayers’ money. The huge costs imposed on State governments to defend against these meritless suits is another kind of crime committed against law-abiding citizens.”<sup>262</sup>

Senator Kyl noted, “Many people think of prison inmates as spending their free time in the weight room or the television lounge. But the most crowded place in today’s prisons may be the law library.”<sup>263</sup> Kyl also stated that “suing has [become] recreational activity for long-term residents of our prisons.”<sup>264</sup> Kyl explained that prisoners “are victimizing society twice—first when they commit the crime that put them in prison, and second when they waste our hard-earned tax dollars while cases based on serious grievances languish on the court calendar.”<sup>265</sup>

During a September 27, 1995, press conference, Senator Dole described prisoner litigation as an example of the “litigation explosion now plaguing America.”<sup>266</sup> Arizona’s attorney general explained that prisoners who “rape[] somebody, . . . murder somebody, . . . sell drugs to somebody, they shouldn’t get special privileges.”<sup>267</sup> Senator Harry Reid stated that prisoner litigation “is the most inane litigation I’ve ever experienced” and that prisoners “should have

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release order provision was mentioned quite a few times—throughout [the PLRA’s] one hearing, in the only committee report, and on the floor of the House and Senate”). This specific legislative history seemed to target federal courts’ intrusion into the administration of state prisons as opposed to prisoners themselves, a kind of hostility that is not this Article’s focus.

258. Terri LeClercq, *Rhetorical Evil and the Prison Litigation Reform Act*, 15 LEGAL COMM. & RHETORIC: JALWD 47, 53 (2018).

259. Eleanor Umphres, Note, *150% Wrong: The Prison Litigation Reform Act and Attorney’s Fees*, 56 AM. CRIM. L. REV. 261, 266 (2019).

260. 141 CONG. REC. 26,548 (1995).

261. *Id.* at 26,548–49.

262. *Id.* at 26,553.

263. *Id.*

264. *Id.*

265. *Id.*

266. News Conference, Fed. Document Clearing House, Senator Dole et al., Senators Dole, Harry Reid, Orrin Hatch and Others Hold News Conference on Legislation Concerning Prisoner Lawsuits (Sept. 27, 1995) (1995 WL 570604).

267. *Id.*

to work and they should have to live in conditions that certainly aren't punitive in nature, but certainly don't deserve what they have in our federal prison system."<sup>268</sup>

The PLRA was the subject of only one hearing, which lasted less than an hour.<sup>269</sup> During that hearing, Senator Hatch characterized prisoner litigants as jailhouse lawyers "with little else to do [who] are tying our courts in knots with an endless flood of frivolous litigation."<sup>270</sup> Senator Reid referred to prisoner litigation in his home state's District of Nevada as "garbage."<sup>271</sup>

Federal courts are no fans of prisoner litigation.<sup>272</sup> In *Jones v. Bock*, Chief Justice Roberts reminded readers that prisoner cases categorically lack merit.<sup>273</sup> In addition to Congress's hostility, the courts are also hostile to prisoner litigation.<sup>274</sup>

The PLRA has a clear target. Just as the Food Stamp Act at issue in *Moreno* was amended to ban "hippies" from the food-stamp program,<sup>275</sup> the PLRA is aimed at prisoners. The law's own name announces this fact. Moreover, as in *Moreno*, the animus underlying the PLRA is not private bias endorsed by state actors—it is state actors' own bias brought to life by federal legislation. To the extent that the legislation was pandering to the electorates' disdain for prisoners, as *Palmore* teaches,<sup>276</sup> state action cannot endorse private bias.

The PLRA also shares similarities with the permit procedure in *Cleburne*: both gave private fears a state voice. Finally, the PLRA's broad reach is like the impact of Colorado's Proposition 2 and DOMA.<sup>277</sup> Though, after *Windsor*, it would be sufficient to identify examples of implied animus, the PLRA's bias is express.

*Masterpiece* only strengthens the conclusion that the PLRA is motivated by animus. Whereas in *Masterpiece*, the commissioners' statements were amenable to a neutral interpretation regarding the need to prevent sexual-orientation discrimination, the Court chose to interpret the statements as hostile. With respect to the PLRA, it is difficult to discern any neutral explanation with respect to

268. *Id.*

269. Anh Nguyen, Note, *The Fight for Creamy Peanut Butter: Why Examining Congressional Intent May Rectify the Problems of the Prison Litigation Reform Act*, 36 SW. U. L. REV. 145, 150 (2007).

270. 141 CONG. REC. 26,553 (1995).

271. *Id.* at 27,043.

272. Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97, 141 n.66 (2016) (citing decisions from the Second, Third, Seventh, and Eighth Circuits disparaging prisoner litigation).

273. *Id.* at 115 n.70 (citing *Jones v. Bock*, 549 U.S. 199, 203 (2007)) (stating that prisoner-brought conditions of confinement claims mostly "have no merit").

274. Alexander, *supra* note 181, at 234.

275. *See supra* notes 48–57.

276. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

277. Senator Spencer Abraham, a PLRA proponent, referred to it as a "far-reaching" bill. Jennifer Winslow, Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1662 n.30 (2002).

statements that prisoners' civil rights litigation drains judicial resources and ties the judicial system up in knots for no valid reason. Though prisoner civil rights claims can, and often do, speak to issues like religious discrimination, prison violence, and the denial of essential medical care, the litigation was belittled, reduced to complaints about peanut butter sandwiches and haircuts. Senator Hatch referred to prisoners' litigation as a "ridiculous waste of the taxpayers' money."<sup>278</sup> Forcing the states to defend prisoner lawsuits constituted "another kind of crime."<sup>279</sup>

Senator Kyl also emphasized that prisoner litigation was another way in which criminals victimized society. During a related press conference, politicians described prisoner litigants as rapists, murderers, and drug dealers.<sup>280</sup> The PLRA's only hearing featured the Senate Judiciary Committee chairman referring to prisoner litigation as "garbage."<sup>281</sup>

*Masterpiece* also concluded that other commissioners' failure to denounce their fellow commissioners' religious hostility was evidence of bias. With respect to the PLRA, "[t]he debate and legislative processes leading to the passage of the PLRA were hasty, one-sided, and did not give much thought to the possible ramifications on prisoners' constitutional rights."<sup>282</sup> Only one senator, Joe Biden, participated in the Senate's September 29, 1995, debate, and he offered but two examples of what he considered to be meritorious prisoner litigation.<sup>283</sup> Biden expressed his concern for the barriers that meritorious litigation would face but also endorsed the idea that prisoner litigation was frivolous and that it caused problems.<sup>284</sup> Given the volume of animus directed at prisoners, Biden's meager opposition is not the kind of rejection of animus that *Masterpiece* requires.

Congress also grossly mischaracterized the cases used to highlight the frivolity of prisoner litigation. One commentator took a closer look at the cases in question, reviewing their dockets. He found that:

In the "chunky peanut butter" case, the prisoner did not sue because he received the wrong kind of peanut butter. He sued because the prison had incorrectly debited his prison account \$2.50 under the following circumstances. He had ordered two jars of peanut butter; one sent by the canteen was the wrong kind, and a guard had quite willingly taken back the wrong product and assured the prisoner that the item he had ordered and paid for would be sent the next day. Unfortunately, the authorities transferred the prisoner that night

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278. 141 CONG. REC. 26,553 (1995).

279. *Id.*

280. News Conference, *supra* note 266.

281. 141 CONG. REC. 27,043 (1995).

282. Chen, *supra* note 180, at 209.

283. Winslow, *supra* note 277, at 1667. Several other senators objected to the PLRA, but only once its passage was imminent. *See id.*

284. Jennifer A. Puplava, Note, *Peanut Butter and Politics: An Evaluation of the Separation-of-Powers Issues in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329, 331–32 (1997).

to another prison, and his prison account remained charged \$2.50 for the item that he had ordered but had never received.<sup>285</sup>

What may seem like an insignificant amount of money could, in fact, be a prisoner's lifeline. Nevertheless,

[t]he "chunky peanut butter" case has become the favorite canard of those who wish to ridicule prisoner litigation. Many journalists have reported it, using the inaccurate description of the case popularized by the attorneys general. Their misleading characterization of the case was repeatedly cited during congressional consideration of proposals to limit prisoner litigation.<sup>286</sup>

Finally, *Masterpiece* was concerned with the Colorado Court of Appeals's silence with respect to the commissioners' religious hostility.<sup>287</sup> As explained above, the federal courts share Congress's disdain for prisoners and their litigation. Moreover, courts that have examined the PLRA's legislative history have repeatedly determined that the PLRA was informed by a rational basis.<sup>288</sup> Not only have courts failed to decry Congressional animus, but they have failed to confront it.

When considered in light of pre-*Masterpiece* cases, in conjunction with *Masterpiece's* willingness to infer animus, the PLRA's enactment and enforcement evidences unconstitutional hostility toward prisoners and their claims. The result is procedure tailored to hinder prisoners' ability to obtain relief for cognizable constitutional injuries.

### C. Procedural Law and Procedural Animus

Like the PLRA, federal procedural law has been difficult to attack, even when its motivation is suspicious. This Subpart first describes the difficulties involved in challenging federal procedure and then examines how procedural animus might support a constitutional challenge.

Congress's power to regulate procedure in the lower federal courts is construed broadly. The power derives from two sources: its Article I power to establish the federal courts and its Necessary and Proper Clause powers, which

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285. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 521 (1996).

286. *Id.* at 522 (footnotes omitted).

287. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1730 (2018).

288. *Inmates of Suffolk City Jail v. Rouse*, 129 F.3d 649, 661 (1st Cir. 1997) (stating that "an objective reading of the legislative history demonstrates that the plaintiffs' inability to obtain prospective relief does not spring from Congress's wish to do them harm, but from its desire to minimize the occasion for federal courts to administer state prisons"); *Morrison v. Davis*, 88 F. Supp. 2d 799, 808 (S.D. Ohio 2000) (informing a prisoner that Congress may burden prisoners as it did under the PLRA and that animus arguments are better aimed at legislators than judges), *amended in part*, 195 F. Supp. 2d 1019 (S.D. Ohio 2001). *But see* *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 603 (E.D. Pa. 1998), *aff'd sub nom.* *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999).

permit Congress to legislate federal-court procedure.<sup>289</sup> Not only can Congress regulate procedure, but it can also “make rules . . . falling within the uncertain area between substance and procedure, [which] are rationally capable of classification as either.”<sup>290</sup> The Court has upheld the validity of a venue statute because it was “doubtless capable of classification as a procedural rule.”<sup>291</sup> Without more, federal procedural law is likely to continue surviving this deferential level of scrutiny.<sup>292</sup> In other words, constitutional challenges to federal procedural statutes—challenges alleging that Congress acted beyond the scope of its enumerated powers—are subject to rational basis review.

Like constitutional challenges to federal procedural statutes, challenges to the Federal Rules of Civil Procedure have failed. Not one has been invalidated.<sup>293</sup>

Still, the Federal Rules of Civil Procedure are often critiqued because they have not fulfilled their promise. Modern federal procedure, including the rules, is the result of early twentieth-century innovation.<sup>294</sup> In the 1930s, Congress responded to the decades-long call for procedural reform by passing the 1934 Rules Enabling Act, which resulted in the promulgation of uniform and transsubstantive Federal Rules of Civil Procedure.<sup>295</sup>

Uniformity begat neutrality—at least in theory. Transsubstantivity was intended to ensure that no type of claim—and, therefore, no type of litigant—would receive special treatment.<sup>296</sup> Indeed, to ensure political neutrality, the Rules Enabling Act delegated rulemaking authority to the Supreme Court, “the

289. *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992). Through the Rules Enabling Act (REA), Congress has delegated some of its rulemaking authority to the Supreme Court. 28 U.S.C. § 2072 (2018). The Court has used that power to prescribe federal rules of civil procedure. *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 5 n.3 (1987). The REA expressly provides that substantive rulemaking authority is retained by Congress, 28 U.S.C. § 2072(b), and that Congress may “veto proposed Rules,” “enact its own procedural rules,” “repeal Court Rules,” and “rescind the Court’s delegated procedural rulemaking authority.” Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 689 (2002). In practice, the Judicial Conference, assisted by several committees, “takes the lead in Rule amendment or promulgation.” *Id.* at 689–90. The REA also contains a “supersession clause,” found in § 2072(b), which provides that federal rules may “supersede conflicting federal statutes.” *Id.* at 692. Whether the supersession clause permits the Supreme Court to amend federal legislation, creating a separation of powers problem, is an open question. *Id.* at 739 n.297. That debate is beyond the scope of this Article.

290. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

291. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988).

292. See also Cameron T. Norris, *One-Way Fee Shifting After Summary Judgment*, 71 VAND. L. REV. 2117, 2143 (2018) (“[T]he Supreme Court has never invalidated a Federal Rule under the Rules Enabling Act.”).

293. Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 910 (2011).

294. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 601 (2005) (grouping the Federal Rules of Civil Procedure with New Deal legislation, through which “national government regulation” was welcome and “fact-based inquiries” were perceived as “as useful methods to achieve just results”).

295. Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 314 (2001).

296. Genetin, *supra* note 289, at 690.

institution [Congress] perceived to be least responsive to interest group politics.”<sup>297</sup> Federal procedure was meant to be free from political influence.<sup>298</sup>

However, amendments to the Federal Rules of Civil Procedure are arguably influenced by special interests. Defendants, including businesses and others with status and power, have sought procedural changes “such as heightened pleading standards and reduced access to discovery.”<sup>299</sup> The changes prevent less advantaged plaintiffs from obtaining relief.<sup>300</sup> The most recent example of how special interests shape the Federal Rules arose out of the 2010 Duke Conference, organized by the civil rules’s advisory committee.<sup>301</sup> The Duke Conference was held at Duke University and was purportedly organized to identify “litigation problems” and explore “‘the most promising opportunities to improve federal civil litigation,’ spurred on by ‘complaints about the costs, delays, and burdens’ of civil litigation in the federal courts.”<sup>302</sup> The amendments effective in December 2015 were highly influenced by the Duke Conference.<sup>303</sup>

Commentators have suggested that the Duke Conference’s work, which included studies about litigation costs, “were tailor-made to bolster the sort of anti-access amendments that those who oppose private enforcement through litigation have long desired.”<sup>304</sup> One such amendment proposed changes to Federal Rule of Civil Procedure 26(b), which governs the scope of federal discovery. The proposed addition added a requirement that discovery be “proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>305</sup>

The proposed Rule 26 amendment was criticized in part because of the identity and affiliation of the committee members responsible for shaping the rules. Most of the judges on the standing committee and advisory committee were appointed by Republican presidents, and most of the practitioner–

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297. Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2075 (1989).

298. Genetin, *supra* note 289, at 690.

299. Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 15 (2016).

300. *Id.* When discovery standards were more permissive, they did not service only the powerful. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2939 (2015) (describing discovery and class actions as “the scourge of corporate and governmental malefactors” (quoting Benjamin Kaplan, *A Toast*, 137 U. PA. L. REV. 1879, 1881 (1989))).

301. Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J. C.R. & C.L. 121, 133 (2015) (explaining that the Judicial Conference considers amendments to rules of practice and procedure after a standing committee on rules of practice and procedure and an advisory committee devoted to practice and procedure in civil cases have made recommendations regarding amendments).

302. Steinman, *supra* note 299, at 17–18.

303. *Id.*

304. *Id.* at 19.

305. *Id.* at 20–21.

members had a civil-defense and business-interest background.<sup>306</sup> Moreover, four of the six chairpersons of the advisory committee devoted to rules of practice and procedure were affiliated with the Federalist Society.<sup>307</sup> The Federalist Society's conservative positions regarding constitutional interpretation are well-known. Less known is its role as a key player in advancing tort reform, commonly understood to advance big-business interests at the expense of underprivileged plaintiffs.<sup>308</sup>

Proposed changes to Rule 26 appeared to benefit only one side of civil litigation. Brooke Coleman has labeled the result of one-sided rulemaking “one percent procedure,” within which “the metaphorical ninety-nine percent of relatively small cases that are the bread and butter of federal and state dockets are governed by a set of rules made by and for the elite.”<sup>309</sup> The proportionality amendment to Rule 26 is an example of one percent procedure.<sup>310</sup> But despite significant opposition to the amendment,<sup>311</sup> the proportionality language was added to Federal Rule of Civil Procedure 26.<sup>312</sup> Criticizing rulemakers' biases has not changed the content of federal procedure.

Challenges to federal procedural law need more bite. Procedure is often a back door to substantive change—cloaked in neutrality, procedural law can obscure the underlying desire to alter rights and remedies. The PLRA is not the only example of a hostile procedural law. Consider recent attempts to amend Title III of the Americans with Disabilities Act (ADA), which requires accessibility in places of public accommodation.<sup>313</sup> Even though Title III is underenforced,<sup>314</sup> barrier-removal cases have been pejoratively termed “drive-by lawsuits” that result in windfall settlements for greedy plaintiffs' attorneys and their shameless clients. A bill proposing to amend Title III by adding onerous prelitigation procedural requirements, the ADA Education and Reform Act (hereinafter AERA), passed the House of Representatives in February of 2018.<sup>315</sup> The proposed amendment was not introduced in the Senate, but it did receive bipartisan support.<sup>316</sup>

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306. *Id.* at 25.

307. Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1146 (2015).

308. *See id.* at 1153.

309. Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1008 (2016).

310. *Id.* at 1041–42.

311. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 34–35 (2015).

312. *See* FED. R. CIV. P. 26(b).

313. *See, e.g.,* Helia Garrido Hull, *Vexatious Litigants and the ADA: Strategies to Fairly Address the Need to Improve Access for Individuals with Disabilities*, 26 CORNELL J.L. & PUB. POL'Y 71, 96 (2016).

314. Kelly Johnson, Note, *Testers Standing Up for Title III of the ADA*, 59 CASE W. RES. L. REV. 683, 706–07 (2009).

315. ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2018).

316. *Id.*; Lorrie Rendle, *Opposing Additional Barriers to a Barrier-Free World: The Case Against Pre-Litigation Notification Under Title III of the Americans with Disabilities Act*, 50 U. TOL. L. REV. 135, 137 (2018) (explaining

Would it be possible to challenge a law like the AERA? It would be futile to challenge it by arguing that it exceeded Congress's power to regulate practice and procedure. Criticizing a law because it is influenced by special interests will not invalidate it. After all, most federal laws are just that—the product of influence wielded by special interests. But procedural animus could be the basis of a successful challenge.

First, procedural animus looks to whether a procedural law impairs the targeted group's ability to vindicate legal wrongs by creating onerous procedure. If the AERA became law, evidence of procedural hurdles would be easy to locate.

Under the AERA, an individual seeking an injunction that would require the removal of an architectural barrier in a place of public accommodation because it is not accessible to individuals with disabilities cannot commence the action until the putative plaintiff has first “provided to the owner or operator of the accommodation a written notice specific enough to allow such owner or operator to identify the barrier.”<sup>317</sup> The notice must “specify in detail the circumstances under which an individual was actually denied access to a public accommodation, including the address of property, whether a request for assistance in removing an architectural barrier to access was made, and whether the barrier to access was a permanent or temporary barrier.”<sup>318</sup>

The owner has sixty days to provide “a written description outlining improvements that will be made to remove the barrier.”<sup>319</sup> After the description is received, the owner has another sixty days to make “substantial progress in removing the barrier.”<sup>320</sup>

The AERA also singled out plaintiffs' Title III actions for early alternative dispute resolution and a related stay of discovery.<sup>321</sup> Forcing parties into early alternative dispute resolution without the benefit of full discovery will help defendants and hurt plaintiffs, who generally have access to less information than the business being sued.

Next, pursuant to a procedural-animus framework, consider whether the law was motivated by animus. *Masterpiece* informs this inquiry. Animus evidence can be direct or inferred from silent acquiescence. Judicial silence can also be evidence of animus. And importantly, individual statements are relevant to the finding that collective action, like passing a bill or reaching a decision in a civil rights commission, was made with animus.

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that the bill is “the seventh iteration of similar legislation pushed forward by right-wing lobbyists and business interest groups in the last 18 years”).

317. H.R. 620 § 3.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* § 5.

Despite performative celebrations of the ADA's twenty-fifth anniversary, "[d]iscrimination against people with disabilities is widespread throughout America."<sup>322</sup> The prejudice faced by individuals with disabilities is ongoing. Almost thirty years after the ADA was passed, businesses still fail to provide wheelchair access.<sup>323</sup> The ADA itself represents Congress's understanding that "the fears, prejudice, and animus toward individuals with disabilities are so pervasive."<sup>324</sup> Numerous state laws that reach individuals with disabilities are often "based on outmoded perceptions, stigma, and prejudice."<sup>325</sup>

The AERA's legislative record is laced with animus. In identifying the wrong that the AERA purported to fix, supporters claimed that barrier-removal lawsuits identified "minor" ADA infractions, "such as telephone volume controls needing adjustment."<sup>326</sup> Of course, a telephone set at the incorrect volume is a pointless device for individuals with hearing impairments.

Barrier-removal lawsuits were also characterized as a "Google lawsuit . . . where . . . the [subject public accommodation] was spotted on Google, Google Earth, Google Maps, whatever the case may be, and you could see certain things from Google,' including pool lifts at motels and hotels."<sup>327</sup> The parties bringing barrier-removal lawsuits were characterized as "'serial' plaintiffs" who serve as "professional pawns in an ongoing scheme."<sup>328</sup>

A House report quotes from a federal district court order categorically critical of barrier-removal claims and sympathetic to the defendants who must defend them:

Haling [business owners] into court regardless of their willingness to comply voluntarily with the ADA solely to vest plaintiffs' attorneys with an entitlement to fees provides very little societal benefit. After all, if ADA litigation achieves no result beyond that which would have been obtained had pre-suit notice been given, what value was added by the decision to sue?<sup>329</sup>

The same report also concludes that the ADA has gone from being "a remedial statute aimed at increasing accessibility into a way for lawyers to make money."<sup>330</sup>

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322. Sarah D. Bruce, *Project Life, Inc. v. Glendening: Seeking Sanctuary for Women Recovering from Substance Abuse Problems*, 33 U. BALT. L. REV. 257, 257 (2004).

323. *Id.* at 257.

324. Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes"*, 55 VAND. L. REV. 481, 484 (2002).

325. Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 580 (2014).

326. H.R. REP. NO. 115-539, at 4 (2018) (quoting Carri Becker, *Private Enforcement of the Americans with Disabilities Act Via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN'S L.J. 93, 99 (2006)).

327. *Id.* at 5.

328. *Id.* at 6 (quoting *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1280–81, 1285 (M.D. Fla. 2004)).

329. *Id.* (quoting *Investco*, 305 F. Supp. 2d at 1280–81).

330. *Id.*

The AERA, should it ever return to Congress, might also be vulnerable to a challenge based on its procedural animus. Animus lives in different places than it did in the 1970s, when Congress targeted hippies, but it has not disappeared.

#### IV. CONCLUSION

The PLRA had a “neutral air”<sup>331</sup> despite the congressional animus underlying its enactment—animus that legislators did not pretend to hide. It created procedural hurdles that were intended to limit prisoners’ ability to recover for their allegations of civil rights violations. Courts have overlooked the PLRA’s hostility. In fact, they have often endorsed it.

Procedural animus is present in the PLRA and in a recent attempt to amend the ADA. The effects of procedural hurdles are not mysterious. It is understood that they render recovery rare if not impossible. Yet procedural obstacles and animus have not been considered in tandem. This Article applies animus doctrine to procedural law. After *Masterpiece*, evidence of animus is easier to find. *Masterpiece* offers new ways to challenge entire categories of laws previously subject to rational basis review—a review with no bite.

The PLRA is ripe for animus review. Despite prisoners’ disfavored status, there may finally be a shift with respect to how the public, legislators, and courts approach crime and the individuals that commit it. Congress seems to be aware of the effects of mass incarceration and has passed legislation to combat it. Michelle Alexander’s *The New Jim Crow*, which analogized the present mass incarceration of black men to *de jure* segregation post-Reconstruction, was a best-seller. In a recent decision, the Court granted criminal procedural protections a rare win, holding that an attorney performed deficiently by failing to follow a client’s instructions to appeal, even though the client had signed an appeal waiver.<sup>332</sup> The Eighth Amendment’s prohibition against cruel and unusual punishment now applies to states’ civil-forfeiture practices.<sup>333</sup> And finally, when inmates in Brooklyn were deprived of heat in the middle of a brutal winter, for once people cared.

If the PLRA’s animus becomes suspicious, perhaps other kinds of punitive procedure will too.

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331. Udell, *supra* note 176, at 768.

332. *Garza v. Idaho*, 139 S. Ct. 738, 749 (2019).

333. *Timbs v. Indiana*, 139 S. Ct. 682 (2019).