

CLEANSING ANIMUS: THE PATH THROUGH *ARLINGTON HEIGHTS*

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CLEANSING ANIMUS: THE PATH THROUGH ARLINGTON HEIGHTS

*William D. Araiza**

INTRODUCTION

Among the many difficult questions raised by the concept of equal protection¹ animus,² few are as thorny as determining when animus is cleansed—that is, when an action previously condemned as resting on animus is properly determined to have shed that taint and thus becomes amenable to review on grounds unrelated to its lineage.³ Given animus doctrine’s foundation in the idea of bad intent, the reenactment of a law similar to one previously struck down or otherwise condemned⁴ on animus grounds inevitably raises the question of whether that reenactment suffers from the bad intent that motivated enactment of the original version of the law.⁵ Implicit in that

* Stanley A. August Professor of Law, Brooklyn Law School. This Article grew out of a symposium titled *The End of Animus* at the University of Alabama School of Law that examined the problem of cleansing government actions of previously found animus. Thanks to the organizers of that symposium for including me and to the participants in that symposium for a stimulating dialogue. Thanks as well to Rebecca Aviel for very helpful comments on an earlier draft of this Article. Finally, thanks to Yili Bu, Nathan Gershengorin, Jillian Horowitz, Samantha Imber, Ashton Kittredge, and Lauren Perez for fine research assistance.

1. While this Article confines its analysis to animus doctrine as expressed in equal protection cases, the concept of animus, and of bad intent more generally, has migrated to other areas of law. *See, e.g.*, Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1340 (2019) (stating that “intent requirements are a familiar feature of the constitutional landscape”); Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 191 (2008) (“Despite occasional judicial protestations, motive analysis pervades large parts of constitutional law.”); William D. Araiza, *Regents: Resurrecting Animus/Reneving Discriminatory Intent*, 51 SETON HALL L. REV. 983, 993–97 (2021) (tracing the migration of animus-related concepts from equal protection into the doctrines governing the Religion Clauses). At times, this Article will discuss cases and doctrines from areas other than equal protection. However, for the most part, it confines its gaze to equal protection. Expanding the applicability of this Article’s insights into other doctrinal areas will likely require careful consideration of each doctrine’s peculiarities.

2. The animus concept is controversial, with critics questioning its usefulness for equality advocates, its tendency toward inflaming political debate by its imputation of bad faith or even evil on the part of those responsible for the challenged action, and its alleged methodological incoherence. *See generally* William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 171–76 (2019) (identifying critiques of the animus idea); Steven D. Smith, *Objective Animus?*, 71 FLA. L. REV. F. 51 (2020) (critiquing animus); William D. Araiza, *Objectively Correct*, 71 FLA. L. REV. F. 68 (2020) (responding to Professor Smith).

3. *See* William D. Araiza, *Why Bother (With Animus)?*, 74 ALA. L. REV. 651 (2023) (recognizing the difficulty of this issue).

4. For purposes of this analysis, there is no need to insist that the previous policy has been formally struck down; it is adequate that the previous policy has been conceded or assumed to have been infected with animus. *See, e.g.*, *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1007 (D. Nev. 2021) (performing an animus-cleansing inquiry and noting that the Government had conceded that the previous version of the challenged law was infected with racism).

5. Whether that earlier law was motivated entirely or only partially by bad intent is a question that we can bracket since we are assuming that that law was sufficiently motivated by bad intent that we can consider

question is the mirror-image issue of when, and how, that reenactment may be said to have been “cleansed” of that previous animus.

The general problem raised by legislative reenactments of problematic laws⁶ has not escaped judicial notice. In two recent cases, different Supreme Court Justices have called attention to the invidious histories of state law provisions then under consideration.⁷ Scholars have also begun to devote sustained attention to this question.⁸ Those scholarly analyses range broadly from those that distill insights from across different doctrinal areas⁹ to the institutionally focused¹⁰ to those that heavily emphasize the jurisdiction’s history of relevant problematic conduct.¹¹ Two recent treatments of this issue stand out for their detail and focus on the cleansing question. Professor Rebecca Aviel, describing this phenomenon as “second-bite lawmaking,” identifies strands of Supreme Court doctrine that point in different directions when considering the proper judicial response to such conduct.¹² Professor W. Kerrel Murray, identifying the problem as one of “discriminatory taint,” advocates for an approach that focuses on functional and institutional continuities between the previous policy and the current one being challenged.¹³

it condemned as infected by animus. *Cf.* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68 (1977) (explaining that a law would be ascribed a discriminatory purpose via a “but-for” analysis); N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 235 (4th Cir. 2016) (concluding, after conducting an *Arlington Heights* analysis, that the factual record in an equal protection case “establishes race as a ‘but-for’ cause of [the challenged law]”).

6. At times, this Article will refer to “legislatures” “reenacting” problematic “laws.” Such references should be understood more generally to include the actions taken by any government actor in reenacting, reapplying, or otherwise reiterating a problematic policy, law, or course of conduct, as appropriate to the particular factual context. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228 (2019) (considering the case of a particular district attorney repeatedly violating the prohibition against using race for peremptory strikes of jurors over the course of several unrelated trials).

7. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020) (noting the racist history of the decisions by the only two states to not require unanimous verdicts in criminal trials); Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246, 2259 (2020) (acknowledging the anti-Catholic “checkered past” of the state constitutional provision at issue restricting government assistance to religion); *id.* at 2268–70 (Alito, J., concurring) (considering that same history).

8. *See* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1195 (2022) (“Commentators . . . have noted the . . . thorny [problem described in this Article], but almost invariably in passing.”); Rebecca Aviel, *Second-Bite Lawmaking*, 100 N.C. L. REV. 947, 947 (2022) (stating that “[t]his article is the first” to “understand second-bite lawmaking as a pervasive and trans-substantive phenomenon”).

9. *See* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 89 GEO. L.J. 2331, 2394 (2000) (suggesting that the “cruel[ty]” or “immoral[ity]” of a policy should weigh heavily when determining how receptive courts should be to claims of a legislative change of heart).

10. *See* Murray, *supra* note 8, at 1196 (referring to his proposal as “a species of institutional temporal realism”).

11. *See* Gabriel J. Chin, *Rehabilitating Unconstitutional Statutes: An Analysis of Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), 71 U. CIN. L. REV. 421 (2002) (relying heavily on Mississippi’s racist history in general to argue that its longstanding felon disenfranchisement law should be reviewed skeptically in light of its disparate racial impact).

12. *See* Aviel, *supra* note 8.

13. *See* Murray, *supra* note 8.

This Article contributes to this growing literature by focusing on a single legal doctrine. Building on my earlier work connecting the Court's slowly emerging but still-undertheorized animus doctrine to equal protection's more general discriminatory intent requirement,¹⁴ I consider whether that requirement's building blocks—the discriminatory intent factors identified in the seminal case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁵—shed light on the cleansing question. This Article reasons that if an animus determination can be constructed by using those same building blocks,¹⁶ then perhaps it can also be dismantled—or the challenged law “cleansed”—by reference to those same materials. In turn, if discriminatory intent doctrine provides insights into the cleansing question, then those insights can be combined with Professor Aviel's discussion of the Court's more explicit statements on that question, Professor Murray's functional and institutional-based insights, and statements of other scholars to create a more comprehensive approach to the cleansing issue.¹⁷

This Article assumes the existence of the discriminatory intent requirement as announced in *Washington v. Davis*¹⁸ and elaborated on in *Arlington Heights*.¹⁹ Thus, it does not engage with any post-*Arlington Heights* alterations to the Court's discriminatory intent doctrine.²⁰ Instead, it takes *Arlington Heights* as the Court originally offered it. It begins with that assumption precisely to allow an examination of how equal protection law's fundamental insistence on

14. See generally WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017).

15. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

16. Scholars have argued that post-*Arlington Heights* developments, most notably the Court's decision two years later in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), have rendered the discriminatory intent requirement a much higher burden for equal protection plaintiffs challenging facially neutral but allegedly discriminatory laws. For a helpful summary of those claims, see Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 529–41 (2010); see also *infra* note 20 (describing those arguments). This Article does not engage that important question. Instead, it takes the *Arlington Heights* factors as a given and considers how they may play a useful role in the animus cleansing inquiry.

17. This Article is not the first to consider how the *Arlington Heights* factors and its burden-shifting structure can apply in a case where a concededly unconstitutional law is reenacted but a plaintiff alleges that that reenactment did not remove the earlier iteration's unconstitutional taint. See Chin, *supra* note 11. Professor Chin's analysis focuses on the situation presented by the reenactment of one particular law, while this Article takes a broader view of the cleansing question.

18. *Washington v. Davis*, 426 U.S. 229 (1976).

19. *Arlington Heights*, 429 U.S. 252.

20. Most notably, scholars have argued that two years after *Arlington Heights*, in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), the Court altered its approach to discriminatory intent by insisting on an understanding of intent that focused on subjective ill will rather than objectively constructed intent. See, e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) (“[I]n *Feeney*, the Court asked plaintiffs to prove that legislators adopting a policy that would foreseeably injure women or minorities had acted with the express purpose of injuring women or minorities—in short, a legislative state of mind akin to malice.”). This Article instead focuses on *Arlington Heights* as it was originally handed down and as it was applied in immediately subsequent cases. See, e.g., Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1815–25 (2012) (discussing the case law that immediately followed *Arlington Heights*).

discriminatory intent can be made to do work in the animus cleansing inquiry. But any such insights it generates could teach broader lessons. First, those insights can apply beyond equal protection. Animus doctrine has migrated into the First Amendment's Religion Clauses.²¹ That development, and the more general ubiquity of intent-based approaches in constitutional law,²² thus renders an intent-focused animus-cleansing inquiry increasingly relevant across constitutional law.²³ Second, by applying *Arlington Heights* to the question of animus cleansing (as distinct from animus detection), this Article calls attention to how a sensitive understanding of the intent concept can allow for varied applications of that idea. Any space it thereby opens for more nuanced, context-specific applications of that principle may allow courts the space for using the intent concept in ways that promote, or at the very least do less harm to, equal protection's underlying commitments.²⁴

This Article's thesis is straightforward. It argues that the animus cleansing issue, like the animus detection issue, rests on careful application of several of the *Arlington Heights* discriminatory intent factors. To be sure, the inquiry in a cleansing situation ultimately focuses on the intent of the reenacting legislature, not the legislature that enacted the original law creating the taint.²⁵ There is no point to litigating—or relitigating—the bad intent of a potentially long-ago legislature if that legislature's successor has reenacted the problematic provision. Instead, the relevant inquiry focuses on the intent of the legislature that confronted its predecessor's handiwork.²⁶ This means that application of

21. See Araiza, *supra* note 1, at 993–97 (tracing the migration of animus doctrine from equal protection to the Religion Clauses); Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 53–55 (2019) (noting the connections between animus and Religion Clauses jurisprudence).

22. See Shaw, *supra* note 1.

23. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2420–24 (2018) (explaining how the third iteration of President Trump's "Muslim ban" executive order was cleansed of any bad intent under the Establishment Clause that might have attached to the first two versions of that order); Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2173–76 (2019) (discussing how the Court's decision in *Trump* approached the cleansing issue).

24. See, e.g., Haney-López, *supra* note 20, at 1816 (arguing that in the period immediately before and after *Arlington Heights*, the Court had deployed "a unified, workable response to claims of racial discrimination").

25. See, e.g., *United States v. Hernandez-Lopez*, 583 F. Supp. 3d 815, 820 (S.D. Tex. 2022) (explaining that a challenged law's foundation in a previous racist statute "is relevant to understanding the historical backdrop behind" the challenged law but "is not dispositive for understanding the motivation for the . . . provision" the defendant was charged with violating "because that provision was reenacted" over two decades after the enactment of the original, racism-tainted statute); *United States v. Ponce-Galvan*, No. 21-CR-02227, 2022 WL 484990, at *3 (S.D. Cal. Feb. 16, 2022) ("Arlington Heights directs the Court to look at the motivation behind the official action being challenged. . . . The official action being challenged is 8 U.S.C. § 1326, not the repealed 1929 Act [on which Section 1326 was modeled]." (internal citations omitted)); *United States v. Wence*, No. 3:20-CR-0027, 2021 WL 2463567, at *5 (D.V.I. June 16, 2021) (similar).

26. This focus on a later legislature's reenactment of the offending provision distinguishes the situation this Article studies from situations where a provision simply lingers in the statute books untouched, but still infected with its original animus. In such cases, the relevant judicial inquiry simply examines the original enactment of the law for evidence of such animus or invidiousness. See, e.g., *Hunter v. Underwood*, 471 U.S.

the *Arlington Heights* factors must focus on the reenactment decision. It is the thesis of this Article that the *Arlington Heights* framework can assist in evaluating that latter legislature's work to determine if it adequately cleansed any preexisting animus.

This Article proceeds in three Parts. Part I introduces the cleansing problem. Part II briefly recapitulates my previously made argument connecting animus doctrine with *Arlington Heights*'s understanding of discriminatory intent. With these preliminaries accomplished, Part III considers whether *Arlington Heights* helps resolve the cleansing problem. After Subpart III.A summarizes the *Arlington Heights* framework, Subpart III.B explains how the cleansing issue presents a unique legal question. Subpart III.C then considers whether the factors *Arlington Heights* identified as relevant to the discriminatory intent inquiry can inform the cleansing analysis. This Subpart demonstrates that some of those factors do indeed provide analytical footholds for a cleansing inquiry. Subpart III.D turns to *Arlington Heights*'s burden-shifting structure and examines its role in the cleansing inquiry. This Subpart argues that that burden-shifting provides a useful framework for a court's consideration of the factors Subpart III.C discussed.

At one level, this Article has modest aspirations. By mapping the cleansing inquiry onto the factors and overall framework *Arlington Heights* laid out, it

222 (1985) (invalidating a decades-old, neutrally worded state constitutional provision disenfranchising persons convicted of certain crimes when the evidence showed that the provision was intended to keep Black persons from voting); *id.* at 233 (“Without deciding whether [the provision] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.”).

By contrast, later reenactment of an invidious provision—the issue on which this Article focuses—raises the prospect of that reenactment cleansing any animus infecting its earlier iteration. One might cite as an example of such laws the so-called “mini-Blaine Amendments” state legislatures enacted in the late nineteenth century that limited state support of religion. Some scholars have passingly suggested that any anti-Catholic animus that might have motivated those nineteenth century laws has been cleansed by those provisions’ modern reenactments. *See, e.g.,* Luke A. Lantta, *The Post-Zelman Voucher Battleground: Where to Turn After Federal Challenges to Blaine Amendments Fail*, 67 LAW & CONTEMP. PROBS. 213, 224 (2004) (“That ‘many if not most state constitutions have been re-ratified since the inclusion of the Blaine amendments . . . probably ‘cleanses’ them of any improper motivation that may have initially existed’ . . .”); Anthony Joseph, *Down But Not Out: Trinity Lutheran’s Implications for State No-Aid Provisions*, 21 U. PA. J. CONST. L. ONLINE 1, 26 (2018) (using the same language); Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 149–150 (2000) (“The most important question with respect to the continuing status of each state’s Blaine Amendment appears to be whether the provision in general, or the state constitution as a whole, has been reenacted since the Blaine Amendment was originally adopted. . . . Where such reauthorization has not occurred, *Hunter* indicates that the Blaine Amendments should be subject to strict scrutiny. Where reauthorization has occurred, [other cases] suggest that the taint may have been purged . . .”). However, despite these statements, the Justices in *Espinoza* tangled over this question in the context of a mini-Blaine Amendment that *was* reenacted. *Compare* *Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246, 2273 (2020) (Alito, J., concurring) (“The [Montana Constitution’s no-aid] provision’s ‘uncomfortable past’ must still be ‘examined’ [despite its reenactment in 1972]. And here, it is not so clear that the animus was scrubbed.” (internal citations and brackets omitted)), *with id.* at 2287–88 (Breyer, J., dissenting) (noting Catholic support for the provision when it was reenacted at a state constitutional convention in 1972), *and id.* at 2293–94 n.2 (Sotomayor, J., dissenting) (same).

hopes to demonstrate that the “sensitive inquiry into . . . circumstantial and direct evidence of intent”²⁷ that case promised²⁸ can do good work in related contexts, such as the cleansing inquiry. But in doing so, this Article carries broader import. First, its application of *Arlington Heights* to the cleansing inquiry can help unify this area of equal protection law under a unified doctrinal rubric.²⁹ At the same time, the adjustments necessary to make the *Arlington Heights* framework “work” in the cleansing context may help remind scholars and courts of that framework’s original flexibility and context-sensitivity.³⁰ In a world where scholars have criticized the Court for converting *Arlington Heights* into a rigid, impossible-to-satisfy search for bad subjective intent,³¹ this reminder may trigger moves to return *Arlington Heights* to its roots as a “sensitive”³² tool for ferreting out hidden discrimination in a variety of contexts—indeed, a tool that was originally deployed in the pursuit of progressive, egalitarian goals.³³

I. THE CLEANSING PROBLEM STATED

“[T]he world is not made brand new every morning”³⁴ Justice Souter, speaking for the Court in the 2005 case of *McCreary County v. ACLU*,³⁵ wrote that sentence to explain how the Government–Defendants’ past attempts to display the Ten Commandments in courthouses influenced an Establishment Clause challenge to those Defendants’ subsequent attempts to do versions of the same thing.³⁶ He made that observation in the course of explaining whether a reasonable observer would discern a religion-promoting purpose in the challenged government actions. In turn, uncovering that purpose would prove

27. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

28. *See, e.g.*, Haney-López, *supra* note 20, at 1815 (describing a “Unified, Workable Equal Protection Doctrine” grounded in the contextual approach to intent that *Arlington Heights* exemplified).

29. *See id.*; *see also* Araiza, *supra* note 1, at 1030 (suggesting that the Court’s recent connection of animus doctrine to discriminatory intent more generally in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), may help “recast[] . . . the intent requirement into a single holistic inquiry”).

30. *See, e.g.*, Haney-López, *supra* note 20, at 1816 (describing the intent doctrine the Court partially constructed in *Arlington Heights* as “a unified, workable response to claims of racial discrimination”).

31. *See, e.g.*, Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1082–84 (1998) (discussing this evolution by reference to a case decided two years after *Arlington Heights*); *see also supra* note 20 (describing that evolution and that case).

32. *Arlington Heights*, 429 U.S. at 266.

33. *See generally* Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1 (2016) (excavating and explaining this deployment).

34. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005).

35. *Id.*

36. *See id.* In response to litigation reversals in earlier challenges, the Government–Defendants had modified their displays, most notably by supplementing them with secular documents. *See id.* at 851–58.

a violation of the Establishment Clause under the then-applicable³⁷ test from *Lemon v. Kurtzman*.³⁸

McCreary County turned on the particularities of the *Lemon* test—specifically, its purpose prong.³⁹ But, like *Lemon* itself, it illustrates a broader phenomenon. To the extent purpose inquiries matter in constitutional law,⁴⁰ questions will always arise when the challenged conduct reflects, and is thus tainted by, the same purposes motivating past, condemned actions.⁴¹ A prime example of a situation raising these questions is the Trump Administration’s “Muslim Ban” executive order, upheld in *Trump v. Hawaii*.⁴² *Trump v. Hawaii* involved the third iteration of the Trump Administration’s attempts to limit immigration from majority-Muslim nations. Lower courts had enjoined the previous two iterations. The third iteration, while different in both procedural and substantive details, preserved the core of those earlier orders. Hence the question the *Trump v. Hawaii* Court confronted: was the third iteration of that order tainted by the animus the lower courts had perceived in its predecessors?⁴³ To be sure, that taint did not arise from the Court’s own conclusions about those earlier executive orders; the Court never fully reviewed the lower courts’ conclusions on the merits.⁴⁴ Nevertheless, the lower court decisions identifying constitutional flaws in those earlier versions hovered over the Court’s scrutiny of the third version.

The situation *Trump v. Hawaii* poses exemplifies a particularly blatant variant of the cleansing issue—one where a temporally recent, previous version of a current policy is struck down by a court, leading the government (indeed, the same presidential administration) immediately to try again.⁴⁵ Other variants are less stark but pose their own distinct challenges. One such variant changes the *Trump v. Hawaii* facts by making the two enactment decisions more

37. In 2022, the Court all but overruled that test. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (stating that the Court “long ago abandoned *Lemon*”).

38. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (stating and applying the purpose prong of the test); see also *supra* note 37 (noting the abrogation of *Lemon* in 2022), *abrogated by* *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

39. See *McCreary Cnty.*, 545 U.S. at 859–66.

40. See *Shaw*, *supra* note 1 (noting the ubiquity of purpose inquiries in constitutional law).

41. As noted earlier, that condemnation may either be judicial, or it may result from either general recognition or the government’s concession. See *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1007 (D. Nev. 2021).

42. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

43. Lower courts had struck down earlier iterations of the third executive order with only limited involvement by the Supreme Court. See *id.* at 2403–04 (explaining the litigation prior to the issuance of the third iteration of the order).

44. See *id.*

45. See, e.g., *Murray*, *supra* note 8, at 1248–49 (explaining why a reenactment’s compressed temporal timeframe is relevant to the cleansing inquiry); *Forde-Mazrui*, *supra* note 9, 2391–92 (suggesting that a reenactment of a previously struck-down race-based affirmative action plan, this time supported by a different justification, might encounter judicial skepticism given the short length of time separating the rejection of the first iteration of such a plan and the enactment of the second, differently justified iteration).

temporally distant. For example, in 1981, the Supreme Court in *Michael M. v. Superior Court* upheld a California statute that treated young men and young women differently for purposes of statutory rape liability.⁴⁶ The Court reasoned that even if the sex-stereotype-heavy justification motivating the law's original nineteenth century enactment was unconstitutional, that sexist intent had effectively been cleansed when, nearly a century later, the legislature reconsidered and reenacted the law.⁴⁷ Other temporal distances are shorter than the one in *Michael M.*⁴⁸ But except for situations where the reenactment occurs immediately on the heels of the original enactment, all such distances raise the question of whether the turnover within the legislature serves to cleanse the previous animus.⁴⁹

Another important variable in the cleansing analysis is the degree to which the reenacted law meaningfully differs from its original version. For example, the federal criminal prohibition on unlawful reentry into the country,⁵⁰ originally enacted in 1929 based on motivations the government has conceded in recent litigation to be racist,⁵¹ was reenacted in 1952. In considering equal protection challenges to that reenacted law, some courts have declined to accord significant weight to the racism infecting its 1929 predecessor, in part because of substantive changes the 1952 Congress made to that earlier law.⁵²

These examples illustrate the basic truth that for cleansing issues, intent and history matter. As noted earlier, intent is relevant to a wide variety of constitutional law doctrines.⁵³ Most notably, it matters for equal protection,⁵⁴ the doctrinal core of the animus idea. In turn, cleansing inquiries necessarily raise questions about the history of that intent. Common sense supports the

46. *Michael M. v. Superior Ct.*, 450 U.S. 464, 472–73 (1981).

47. See generally *id.* at 470. Cf. *id.* at 494 n.9 (Brennan, J., dissenting) (tracing the nineteenth century history of the challenged provision). Of course, the mere passage of time—even a lot of time—should not be thought of as cleansing bad intent. Otherwise, clearly invidiously motivated laws would lose their invidiousness without any affirmative legislative reconsideration. See *Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down a nearly century-old disenfranchisement law triggered by certain criminal convictions when undisputed evidence made clear that its original grounding lay in a desire to disenfranchise Black citizens since the law had not been formally amended since its original, racism-infected enactment).

48. For example, federal immigration law's unlawful reentry statute, discussed in the next paragraph of the text and throughout this Article, features a twenty-three-year gap between enactment of the original, animus-infected law and its reenactment that is alleged to have cleansed that prior taint.

49. See Aviel, *supra* note 8, at 1002–04 (discussing this issue).

50. Immigration and Nationality Act of 1952, 8 U.S.C. § 1326.

51. See *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1009 (D. Nev. 2021).

52. See, e.g., *United States v. Viveros-Chavez*, No. 21-CR-00665, 2022 WL 2116598, at *5 (N.D. Ill. June 13, 2022); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2422 (2018) (noting how the third iteration of the Trump immigration executive order substantively differed from its predecessors in ways that mitigated its disparate impact on Muslims).

53. See Shaw, *supra* note 1, at 1351–58.

54. See *Washington v. Davis*, 426 U.S. 229, 245 (1976) (adopting an intent test for equal protection cases).

idea, expressed in Justice Souter’s aphorism in *McCreary County*,⁵⁵ that neither reasonable observers nor government actors awaken every morning with a completely blank mind. What happened the day or the year or even the decade before remains in their mind—or, in the case of a government institution, its institutional mind.⁵⁶ Thus, reason exists to inquire into that history when determining the current intent of the government actor. That would be true even if the intent inquiry was officially a purely subjective one that sought to determine the actual mindset of the humans leading government institutions.⁵⁷ It is even more true given the ostensibly objective, holistic intent inquiry the Court embraced in its seminal *Arlington Heights* opinion.⁵⁸

For these reasons, both logical and doctrinal, it matters that government action today is often the product of government action yesterday. In turn, if yesterday’s action can be seen as constitutionally problematic—whether or not formally adjudicated as such⁵⁹—then it becomes a matter of great importance whether that earlier bad intent infects the government’s current action or whether that action has been cleansed of such bad intent.

This inquiry matters particularly when that past bad intent can be described as animus.

II. ANIMUS AND DISCRIMINATORY INTENT

Animus, of course, rests squarely on the idea of bad intent.⁶⁰ Indeed, in two cases decided in 2020, the Supreme Court confronted cleansing issues when it examined laws—one that allowed non-unanimous jury verdicts in criminal cases and one that restricted state aid to religion—whose original enactments were tainted with the prejudice that would easily fit within the modern

55. See *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005) (“But the world is not made brand new every morning . . .”).

56. See *Murray*, *supra* note 8, at 1221–24 (considering the institutional dynamics that justify imputing to an institution the responsibility for the actions it took when it was led by an earlier set of human officers).

57. Many observers have argued that the Court’s intent inquiry has devolved into such an inquiry. See *id.* at 1197 n.25 (citing scholars making this argument); see also *supra* note 20 (describing this change).

58. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”); Jessica A. Clarke, *Explicit Bias*, 113 *NW. U. L. REV.* 505, 584 (2018) (describing the *Arlington Heights* inquiry as “call[ing] for a holistic review of evidence of discriminatory intent”). Indeed, that inquiry explicitly sanctions examination of the history of the challenged government action. See *Arlington Heights*, 429 U.S. at 267. See also *infra* Subpart III.C.2 (discussing the historical background factor *Arlington Heights* identifies).

59. See *supra* note 4.

60. See *Araiza*, *supra* note 1, at 999–1000.

conception of animus,⁶¹ if that label were necessary.⁶² Moreover, to repeat, the entire idea of “animus” necessarily implies bad intent.⁶³ Given these observations, animus cleansing cases inevitably raise questions about when government’s bad intent can be said to have been cleansed, as those 2020 cases did.⁶⁴

The animus cleansing problem may benefit from understanding the building blocks of animus doctrine more generally. In other writing, I have argued that the canonical animus cases,⁶⁵ carefully read, incorporate both the factors relevant to standard discriminatory intent doctrine and the burden-shifting framework that doctrine imposes.⁶⁶ Those factors, I have argued, explained why the Court in the animus cases insisted on a tighter fit between the challenged law and a legitimate government interest.⁶⁷ I have further argued that that insistence on a tighter fit reflects a variant of the burden-shifting the Court calls for when a plaintiff in a conventional equal protection case makes a *prima facie* showing that the challenged action was motivated by an intent to discriminate on the alleged ground (e.g., race).⁶⁸ In a 2020 case, the Court at least partially adopted this framing, using the *Arlington Heights* factors to decide an animus claim.⁶⁹

These parallels between conventional discriminatory intent and animus are not coincidental. Both concepts reflect bad intent in some way. Conventional discriminatory intent establishes that the government has in fact discriminated

61. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020) (citing the racist roots of the jury verdict laws under consideration in that case); *Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246, 2259 (2020) (citing the “checked tradition” behind the no-state-aid provision under consideration in that case); *id.* at 2268–74 (Alito, J., concurring) (providing a more detailed discussion of that history).

62. The existence of an equal protection rule strongly disfavoring racial classifications and the non-discrimination component of the Free Exercise Clause have made it unnecessary for those types of discrimination to be analyzed under the animus idea. Both the race and religion antidiscrimination rules long predated the Court’s first articulation of the animus idea in 1973. See *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (race); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (religion); see also *infra* note 65 (citing a 1973 case as the font of equal protection animus doctrine).

63. See *infra* note 72 (quoting the conclusions of two canonical animus cases that unmistakably refer to bad intent).

64. See *supra* note 61.

65. The equal protection animus canon is generally agreed to include four Supreme Court cases: *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996); and *United States v. Windsor*, 570 U.S. 744 (2013). See, e.g., Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 187 (citing these cases as “[t]he animus quadrilogy”). But see Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 900, 906–08 (2012) (arguing that *Palmore v. Sidoti*, 466 U.S. 429 (1984), also belongs within that canon).

66. See ARAIZA, *supra* note 14, at 29–75, 89–104 (describing the analyses in those cases and linking them to the *Arlington Heights* factors).

67. See *id.* at 120–33.

68. See *id.*

69. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915–16 (2020).

on a particular ground.⁷⁰ If that ground is sufficiently constitutionally fraught that such discrimination triggers some form of heightened scrutiny—that is, if the revealed intentional classification is a “suspect” or “quasi-suspect” one—then an intent finding opens the way for that scrutiny even if the challenged law is facially neutral. Animus doctrine bypasses the heightened scrutiny step described immediately above in favor of moving immediately to the ultimate constitutional question of invidiousness.⁷¹ But even though it bypasses that intermediate step, it arrives at the same endpoint: considering whether the challenged government action is invidious.⁷²

As I have argued, the similarities between discriminatory intent doctrine and animus doctrine, both in their mechanics⁷³ and more conceptually,⁷⁴ mean that insights about animus arise from examining discriminatory intent doctrine.⁷⁵ That relationship applies as well when the issue on the table concerns the cleansing, rather than the discovery, of animus. The next part of this Article, Part III, considers the factors the Court has identified as part of the discriminatory intent inquiry, as well as the burden-shifting structure that inquiry has established, to determine how best to approach the cleansing problem.

Part III’s thesis—the core of this Article—is straightforward. First, in order to understand how animus may be cleansed, one must consider how the various discriminatory intent factors that help uncover animus to begin with can also help answer the cleansing question. Second, in order to understand how those factors should influence that cleansing determination, the burden-shifting structure the Court has announced in the discriminatory intent context can play a useful role. To be sure, the analysis is not always simple or straightforward; in particular, mapping the animus cleansing inquiry onto *Arlington Heights*’s burden-shifting structure poses thorny questions. Nevertheless, the discriminatory-intent-based pillars of animus doctrine can also help us understand when animus no longer infects a reenacted law.

70. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268–271 (1977) (concluding, after applying the factors the Court laid out, that the challenged action did not reflect racial discrimination).

71. Indeed, the animus cases arose when the Court either officially rejected heightened scrutiny for a particular type of discrimination or never broached the suspect class/heightened scrutiny question. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–447 (1985) (rejecting heightened scrutiny for discrimination against intellectually disabled persons); *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (all avoiding the suspect class question).

72. See, e.g., *Romer*, 517 U.S. at 634 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”); *Cleburne*, 473 U.S. at 450 (concluding that the challenged government action reflected “irrational *prejudice*” against the burdened group) (emphasis added).

73. See *supra* text accompanying notes 65–69.

74. See *supra* text accompanying notes 70–72.

75. See generally ARAIZA, *supra* note 14.

III. MAPPING THE ANIMUS CLEANSING PROBLEM ONTO ARLINGTON HEIGHTS

A. The Factors and the Burdens

In *Arlington Heights*, the Court, speaking through Justice Powell, laid out several “subjects of proper inquiry in determining whether racially discriminatory intent exist[s].”⁷⁶ While he described those factors as not “purporting to be exhaustive,”⁷⁷ the *Arlington Heights* factors have become generally accepted as the ostensible guide to determining discriminatory intent.⁷⁸ Given their importance generally, and in particular their centrality to this Article’s analysis, the relevant language is provided here:

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it “bears more heavily on one race than another”—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.

76. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). While Justice Powell referred to racial discrimination in setting forth these factors (perhaps unsurprisingly, since *Arlington Heights* involved a race discrimination claim), the Court has since applied those factors to other equal protection claims. *See, e.g.*, *Pers. Adm’r v. Feeney*, 442 U.S. 256, 274 (1979) (applying the *Arlington Heights* framework in a sex discrimination case).

77. *Arlington Heights*, 429 U.S. at 268.

78. The statement in the text requires an important caveat which explains the text’s use of “ostensible.” Two years after *Arlington Heights*, the Court clarified—or, to many, altered—the discriminatory intent inquiry by explaining that discriminatory intent required that the government have classified on the alleged ground “‘because of,’ not merely ‘in spite of,’” the effect of the action on the plaintiff group. *Feeney*, 442 U.S. at 279. To be sure, the Court immediately provided a footnote that sought again to clarify—or perhaps backtrack on—what it had said in the text. *See id.* at 279 n.25 (“This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the law challenged in *Feeney*], a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.”). Despite that footnote, scholars have pointed to *Feeney* as a step away from what one scholar described as a “contextual” approach to intent, *see Haney-López, supra* note 20, at 1808–09, and toward an insistence on subjective ill-will as the ultimate touchstone of discriminatory intent, *see, e.g., Murray, supra* note 8, at 1234 n.250 (citing scholars taking this position). *But see id.* at 1235 (“Because ‘discriminatory purpose’ must be determined on the basis of objective facts . . . it is consistent with reading ‘because of’ in a way that does not demand a specific-intent decision rule.”).

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.⁷⁹

The factors the Court cited can thus be summarized as follows: (1) the challenged decision's disparate impact; (2) the "historical background of the decision"; (3) the "specific sequence of events leading up to the challenged decision"; (4) "[d]epartures from the normal procedural sequence"; (5) "substantive departures"; and (6) the "legislative or administrative history."⁸⁰

Toward the end of his opinion, Justice Powell then provided a footnote to text concluding that the plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor"⁸¹ in the defendant's decision. The footnote reads as follows:

Proof that the decision by the [defendant] Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.⁸²

In sum, *Arlington Heights* laid out a series of factors and a burden-shifting framework relevant to a holistic, contextual inquiry into a government actor's alleged discriminatory intent.⁸³ Given the connection between those factors and that structure and the Court's animus jurisprudence,⁸⁴ a logical starting place for the animus cleansing problem is with those same factors and structure. To be sure, the analysis may not be as easy as simply throwing into reverse the dynamics that cause those factors to appear in the original government action.

79. *Arlington Heights*, 429 U.S. at 266–68 (footnotes and some citations omitted).

80. *Id.*

81. *Id.* at 270.

82. *Id.* at 270 n.21.

83. See N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016) (criticizing the lower court's discriminatory intent analysis because of its "consideration of each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*").

84. See *supra* Part II (explaining this connection).

Nevertheless, revealing the components of a decision's infection with animus may help suggest how that animus may be cleansed.

B. *The Significance of the Cleansing Issue*

Before considering how these factors influence the cleansing analysis, it might be useful to consider how a cleansing inquiry differs from a straightforward discriminatory intent analysis. Ultimately, the cleansing inquiry seeks to determine whether the reenacted version of a tainted law remains infected with the earlier version's discriminatory intent, or whether the law has shed its taint. In that sense, a cleansing inquiry aims at answering the same question as a standard discriminatory intent analysis. Indeed, in some cases involving a particular cleansing question this Article will discuss, courts made this very point.⁸⁵

Nevertheless, the nature of the cleansing inquiry entails a subtly different application of the standard *Arlington Heights* discriminatory intent factors. That difference in application arises from the fact that those factors are applied to a law that exhibits a preexisting taint. While the factors remain the same, with the only difference being the facts to which they are applied, that preexisting taint nevertheless raises different issues regarding their application. The next Subpart examines the distinctive application of these factors to the cleansing question. For now, the important point is to recognize both that the underlying question in cleansing cases is the same as that in standard discriminatory intent cases, and that the distinctive aspects of the cleansing inquiry require a meaningfully different application of the factors relevant to both versions of the intent issue.

C. *The Factors*

1. *Disparate Impact*

Perhaps a happy coincidence (or perhaps reflecting a deeper truth),⁸⁶ the order in which Justice Powell laid out the *Arlington Heights* factors provides a logical sequence for considering these factors' roles in the cleansing inquiry.

85. See, e.g., *United States v. Sanchez-Felix*, No. 21-CR-00310, 2021 WL 6125407, at *5 (D. Colo. Dec. 28, 2021) ("Courts analyzing the constitutionality of [8 U.S.C.] § 1326 have recognized that the historical background of the crime of illegal reentry, including that of the 1929 Act, is relevant to the Court's consideration of § 1326. However, these courts have also noted that *Arlington Heights* 'directs the Court to look at the motivation behind the official action being challenged,' which is not the 1929 Act, but rather § 1326 from the 1952 INA." (citation omitted)); *United States v. Wence*, No. 20-CR-0027, 2021 WL 2463567, at *5 (D.V.I. June 16, 2021) ("*Arlington Heights* directs the Court to look at the motivation behind the official action being challenged. . . . This means that the Court must seek to discern the intent of the Congress that enacted that charged provision, rather than the intent of previous Congresses.").

86. See *infra* text accompanying notes 97–98 (explaining the threshold nature of the disparate impact factor).

The first factor—the extent of the disparate impact—serves as a foundation stone for that inquiry.⁸⁷ Disparate impact is a requirement for any equal protection plaintiff. It has played that role since at least 1971, when the Court rejected a challenge brought by Black plaintiffs to Jackson, Mississippi’s decision to close its public swimming pools, allegedly in response to a desegregation injunction, on the ground that that closure deprived both Black and white persons of access to pools.⁸⁸ An even starker demonstration of that requirement’s force surfaces in two appellate opinions from the 1990s that rejected Black plaintiffs’ challenges to states’ decisions to display the confederate battle flag design on the ground that those decisions offended both Black and white persons.⁸⁹

Disparate impact can also play a role more specific to the intent/animus inquiry. As Justice Stevens observed in his concurrence in *Davis*, “[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.”⁹⁰ A year later in *Arlington Heights*, the Court acknowledged that in extreme cases, “what actually happened”⁹¹ will often be “unexplainable on grounds other than”⁹² those alleged by the plaintiff. While *Davis*’s rejection of a pure impact test required Justice Powell in *Arlington Heights* to downplay the frequency with which such disparate impact by itself proved the alleged intent, the logic of looking initially to impact when determining intent remains solid.

Consider now how a reenacted policy’s disparate impact influences the cleansing analysis. If the current law can otherwise trace its lineage to an older, animus-infected law,⁹³ the fact that the current law produces a similar disparate impact naturally raises suspicions that that current law has not been cleansed.⁹⁴ Indeed, such persistent disparate impact gives reason to suspect—and perhaps presume—that the reenacted law’s impact reveals the same intent that was evidenced in part by the analogous disparate impact the original law generated.

Concededly, this straightforward reasoning elides significant complexities. How similar in type and magnitude must the current disparate impact be to the impact produced by the earlier law for us to say that the current law’s disparate impact likely results from the earlier law’s bad intent? For example, hypothesize

87. *Cf.* Murray, *supra* note 8, at 1236 (explaining that his proposed approach to cleansing “discriminatory taint” begins with inquiring into the degree to which disparate impact persists in the reenacted policy).

88. *See* Palmer v. Thompson, 403 U.S. 217, 218–21 (1971).

89. NAACP v. Hunt, 891 F.2d 1555, 1562–63 (11th Cir. 1990); Coleman v. Miller, 117 F.3d 527, 530 (11th Cir. 1997); *see also* William D. Araiza, *Teach Your Citizens Well: Demeaning Government Speech, Equal Protection Animus, and Government’s Legitimate Power*, 2022 U. ILL. L. REV. 1861, 1867, 1882 (discussing *Hunt* and *Coleman*).

90. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

91. *Id.*

92. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

93. Of course, that tracing presents a fraught question that is dealt with later in this Article. *See infra* Subpart III.C.2; *see also infra* text accompanying notes 95–96.

94. *See* Aviel, *supra* note 8, at 983.

a nineteenth century immigration restriction that originally imposed a disparate impact on Chinese immigrants but that in its current, reenacted form reserves its most serious disparate impact for immigrants from Latin America. Is it enough that the impact remains race- or ethnicity-based, or does the shift in the actual races and ethnicities sufficiently alter the impact so as to mitigate the force of any alleged continuity? Even more fundamentally, what does it mean for the current law “to trace its lineage” to the earlier one?⁹⁵ It may be rhetorically elegant to speak about lineages as if they were objective facts akin to lines on a family tree, but “lineage” and its “traceability” constitute contextual and contingent concepts that raise their own difficulties.⁹⁶ Finally, assuming both a sufficiently close connection between the earlier and later laws and the existence of sufficiently similar disparate impacts, what should be the weight of the resulting presumption, and how should it be understood as capable of being overcome?

These questions require careful analysis. However, *Arlington Heights*’s description of disparate impact as “an important starting point”⁹⁷ reveals the threshold nature of this factor.⁹⁸ A reenacted law that has shed any disparate impact it once might have caused can state a strong claim to having been cleansed of any previous animus.⁹⁹ By contrast, persistent disparate impact provides a fair reason to suspect that the bad intent that caused the previous disparate impact has likewise persisted into the present and has done its dirty work yet again.

2. *The Historical Background*

Just like disparate impact, the second *Arlington Heights* factor—“the historical background of [a] decision”¹⁰⁰—plays a critical role in the cleansing analysis. Indeed, readers might think it obvious that a decision’s historical background does not just play a critical role but in fact encapsulates the entire cleansing inquiry. And indeed, in a broad sense it does: much scholarly analysis on the cleansing issue focuses on the extent to which the current law can reasonably be described as a continuation of the previous infected one.¹⁰¹ Such a connection is obviously a prerequisite for imputing the prior law’s taint or

95. See *id.* at 1001.

96. See *id.* at 1002–06 (examining whether the seating of new legislators or the passage of time cuts the connection between the previous and the current laws).

97. *Arlington Heights*, 429 U.S. at 266.

98. See ARAIZA, *supra* note 14, at 56–58 (explaining how disparate impact played a role in the Court’s animus analysis in *Romer v. Evans*).

99. See Murray, *supra* note 8, at 1238 (“At least when a policy tainted in form is no longer discriminatory in effect, it is appropriate to consider the policy on its own terms.”).

100. *Arlington Heights*, 429 U.S. at 267.

101. See Murray, *supra* note 8; Aviel, *supra* note 8.

animus to the current law. In turn, determining whether that connection exists requires examining the current law's "historical background."¹⁰²

The difficulty lies with the indeterminacy of that concept. Consider one well-known example. In *McCleskey v. Kemp*,¹⁰³ the Supreme Court rejected Eighth and Fourteenth Amendment challenges to Georgia's capital sentencing scheme in the face of sophisticated statistical evidence¹⁰⁴ indicating that race impacted capital sentencing outcomes.¹⁰⁵ The Court's rejection rested largely on what Justice Powell's majority opinion described as the criminal justice system's unusual lack of amenability to standard equal protection analysis in general¹⁰⁶ and statistical disparate impact evidence in particular.¹⁰⁷ However, in a footnote, the Court also rejected McCleskey's reliance on the racist history of Georgia's capital sentencing scheme.¹⁰⁸ While that footnote conceded that *Arlington Heights* had identified "the historical background of the [challenged] decision" as relevant to equal protection analysis, it also insisted that "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value."¹⁰⁹ The footnote concluded as follows: "Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent."¹¹⁰ By contrast, Justice Brennan's dissent provided a detailed summary of the history of racism infecting Georgia's capital punishment law, from the pre-Civil War era to the year McCleskey's direct appeal was rejected by the Georgia Supreme Court.¹¹¹

The Justices' disagreement in *McCleskey* about the relevance to current discriminatory intent of "official actions taken long ago"¹¹² reflects perhaps the most obvious indeterminacy in *Arlington Heights*'s statement. As Professors Aviel and Murray both ask, in essence, how long ago is too long for that history

102. *Arlington Heights*, 429 U.S. at 267.

103. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

104. *See id.* at 291 n.7 (conceding the validity of the evidence); *id.* at 286 (describing the study as "actually two sophisticated statistical studies"). Perhaps unsurprisingly, Justice Brennan's dissenting opinion described the study in much more detailed terms to highlight the care the researcher took. *See id.* at 327–28 (Brennan, J., dissenting).

105. In particular, the evidence showed that the race of the victim mattered significantly in those decisions, with killers of white persons more likely than killers of Black persons to receive a death sentence, and with Black killers of white victims being the combination that was by far most likely to trigger a death sentence. *See id.* at 286–87 (majority opinion).

106. *See, e.g., id.* at 296 (noting the unavailability of both jurors and prosecutors for the sort of motive interrogation that is normally available to the government to rebut a presumption of discriminatory intent).

107. *See id.* at 294–95.

108. *See id.* at 298 n.20.

109. *See id.*

110. *Id.*

111. *See id.* at 328–33 (Brennan, J., dissenting); *see also id.* at 332 (explaining the relevance of that history "in assessing the plausible implications of McCleskey's evidence").

112. *See id.* at 298 n.20 (majority opinion).

to matter?¹¹³ This question is unanswerable in the abstract. Rather, a variety of factors should inform that inquiry. For example, the type of bad intent at issue clearly is surely relevant, with deep-seated, structural bias presumably relevant for a longer period. Whatever one might think of *McCleskey*'s outcome, Justice Brennan is surely correct that Georgia's long and deep legacy of racism—and in particular, its use of the criminal law as a means of racialized social control—likely continues to infect its decision making in all sorts of ways. Other types of historical bias may be (relatively) more fleeting, such that modern reenactments of previously problematic laws pose less of a problem. For example, the anti-Catholic origins of the “little Blaine” amendments of the sort the Court confronted in *Espinosa* have likely largely, if not fully, burned out, such that a modern reenactment of such a law would likely be less vulnerable to a discrimination claim based on those origins.¹¹⁴

Contextual cues may also be relevant in assessing the relevance of decades-old history. For example, in 2016, a court found that North Carolina's “long-ago history [of race discrimination and racially polarized voting] bears more heavily . . . than it might otherwise” to a challenge to a voter identification law that had a racially disparate impact.¹¹⁵ The court accorded that “long-ago history” had additional significance given that “the first meaningful restrictions on voting access” since the 1965 Voting Rights Act “came into being literally within days of North Carolina's release from [that Act's] preclearance requirements” that were aimed precisely at such “long-ago” violations.¹¹⁶

Additional puzzles also lurk in *Arlington Heights*'s historical background factor. To illustrate them, recall 8 U.S.C. Section 1326, the federal unlawful reentry statute.¹¹⁷ While Section 1326 is facially race-neutral, legal challenges to that law have stressed that it descends from a statute enacted in 1929 which, while itself also facially race-neutral, is generally considered to have reflected racial animus.¹¹⁸ Modern equal protection challenges to Section 1326 pose the historical background question in a near-ideal form for study: the legislature

113. See Aviel, *supra* note 8, at 1005–06; Murray, *supra* note 8, at 1217 (drawing what he calls “an important . . . distinction” between “cases . . . where [the original conduct] is quite far away, with complete decisionmaker turnover” and “cases . . . where [the reenacting act] closely follows the [original one], often with substantial or complete decisionmaker identity”).

114. See Lantta, *supra* note 26 (citing sources suggesting passingly that modern reenactment of “little Blaine” Amendments likely cleanses any anti-Catholic animus with which they may have previously been infected). More generally, American history is full of ethnic groups whose previous stigmatization during their initial periods of immigration has softened to the point that they have been largely assimilated into the category “White.” See, e.g., NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995).

115. N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 223 (4th Cir. 2016).

116. *Id.*

117. See Immigration and Nationality Act of 1952, 8 U.S.C. § 1326; see also Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051 (2022) (analyzing the 1929 law in detail).

118. See, e.g., United States v. Machic-Xiap, 552 F. Supp. 3d 1055, 1061–62 (D. Or. 2021); United States v. Calvillo-Diaz, No. 21-CR-445, 2022 WL 1607525, at *2 (N.D. Ill. May 20, 2022).

reenacts a facially neutral law whose precise predecessor¹¹⁹ is generally conceded to have been motivated by racial animus.¹²⁰ To what extent does the animus infecting that earlier law infect the reenacted version?

District courts confronting that question in the Section 1326 context have applied the historical background factor in a variety of ways. Many of them content themselves with the temporal distance point,¹²¹ observing that over two decades elapsed between the original 1929 enactment and the 1952 reenactment, but otherwise leaving the matter at that.¹²² Relatedly, courts inquire into the comparative compositions of the government entity that enacted the original and the reenacted laws. Those courts note that the 82nd Congress that reenacted that provision in 1952 contained only thirty remaining members of the 70th Congress that enacted the predecessor 1929 law.¹²³ While seemingly telling, such simple (and perhaps simplistic) empirics obscure the possibility of deeper continuities between the enacting and reenacting legislatures that go beyond temporal proximity and actual memberships of legislative bodies. For example, Professor Aviel offers a hypothetical fact pattern of a voter identification law originally enacted by a legislature that split perfectly along partisan lines, with all Republican legislators voting in favor and all Democrats in opposition.¹²⁴ To the extent that issue's partisan salience endures, one might be more willing to view more recent Republican and Democratic legislators simply as stand-ins for their predecessors.

Such inquiries pose both empirical and conceptual challenges for courts, requiring them to resolve complex issues such as the persistence of a particular type of bias and the long-term partisan valence of particular issues. On that second point, recall, for example, the remarkable switch from Dixiecrat-dominated southern Democratic parties that predominated as late as the mid-1960s to the more racially liberal multi-ethnic coalitions that characterize

119. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 320–45 (1987) (Brennan, J., dissenting) (generally discussing the impact the historical racism of Georgia's criminal law regime had on the disparate racial impact of its current capital sentencing scheme).

120. Indeed, the 1929 law's similar facial neutrality makes the case study even more revealing, as it removes any obvious cleansing effect one might have discerned had Congress in 1952 enacted a facially neutral law to replace a facially race-based law.

121. *See supra* text accompanying notes 42–49 (contrasting short and long time gaps between a law's original enactment and reenactment).

122. *See, e.g., Machic-Xiap*, 552 F. Supp. 3d at 1061; *United States v. Muñoz-De La O*, 586 F. Supp. 3d 1032, 1037–39 (E.D. Wash. 2022); *United States v. Rodriguez-Arevalo*, No. 19-CR-00281, 2022 WL 1542151, at *6 (M.D. Pa. May 16, 2022).

123. *See, e.g., United States v. Santos-Reynoso*, No. 21-CR-268, 2022 WL 2274470, at *4 (S.D.N.Y. June 23, 2022); *United States v. Viveros-Chavez*, No. 21-CR-655, 2022 WL 2116598, at *8 (N.D. Ill. June 13, 2022).

124. As Professor Aviel notes, such a split is plausible in states where partisan affiliation and support for restrictive voter identification laws closely correlate. *See Aviel, supra* note 8, at 1003.

southern Democratic parties today.¹²⁵ Confronted with the challenge of reaching principled conclusions about the persistence of a particular policy's political valence, as illustrated by Professor Aviel's hypothetical,¹²⁶ one can understand even more why this *Arlington Heights* factor remains resistant to principled application.

For these same reasons, one might also understand why courts wrestling with this factor might welcome a more objective criterion. One such guidepost—indeed, one hiding in plain sight—inquires into the actual substance of the two laws in question to determine how identical they really are. Straightforwardly enough, one might think that perfectly or nearly identical laws at least raise an inference that identical intent motivates both of them, thus necessarily suggesting that any animus infecting the original law remains unpurged.

But problems lurk here as well. Again, district courts' examinations of Section 1326 provide revealing insights. Several decisions rejecting equal protection attacks on Section 1326 note that the 1952 iteration of that provision substantively differed from the 1929 version—indeed, in ways that made the law less draconian.¹²⁷ To be sure, at least one district court disagreed with that conclusion, finding the 1952 iteration of the provision to be substantively indistinguishable from the 1929 version, except for a provision making it easier for federal authorities to prosecute offenders and thus *more* draconian.¹²⁸ While that factual disagreement raises questions about how to determine whether an intricately worded, multi-component law¹²⁹ is in fact identical to a previously enacted provision,¹³⁰ perhaps the more interesting question is whether, or to what degree, a subsequent law must be functionally identical to the previous one for the previous provision's taint to infect the subsequent provision. Professor Murray suggests that in order to impute the former law's taint to the subsequent law, the two laws must perform the same function.¹³¹ Using *Ramos* as an example, he offers the hypothetical of Louisiana abandoning its non-

125. See Ron Elving, *Dixie's Long Journey from Democratic Stronghold to Republican Redoubt*, NPR (June 15, 2023, 7:03 PM), <https://www.npr.org/sections/itsallpolitics/2015/06/25/417154906/dixies-long-journey-from-democratic-stronghold-to-republican-redoubt>.

126. See Aviel, *supra* note 8, at 1003.

127. See, e.g., *Santos-Reynoso*, 2022 WL 2274470, at *4; *Viveros-Chavez*, 2022 WL 2116598, at *8.

128. See *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1027 (D. Nev. 2021).

129. By this term, I simply mean a law that features several different relevant components. For example, Section 1326 specifies the type of preexisting status that makes the alien subject to the law (e.g., whether the alien had previously been excluded or deported), the conduct that is made criminal (“enter[ing], attempt[ing] to enter, or . . . at any time [being] found in, the United States”), and the exceptions to the criminalization of that conduct. Immigration and Nationality Act of 1952, 8 U.S.C. § 1326.

130. This problem is compounded by the reality that a subsequently enacted law may in fact read differently from a previous provision but be functionally the same. For example, the later enacted law may omit a previous regulation or restriction that has become obsolescent, or otherwise update the previous provision's mechanics, while not fundamentally changing its substance.

131. See Murray, *supra* note 8, at 1220.

unanimous verdict law but enacting a statute giving prosecutors additional peremptory juror strikes. As he observes, both laws would yield the same functional result: either Black persons would end up on juries but with weakened power to prevent a conviction through a “not guilty” vote, or they would never end up on juries in the first place.¹³²

Whether such a hypothetical initiative by Louisiana should trigger a court’s suspicion of carried-forward bad intent¹³³ probably cannot be answered objectively, at least not without considering the other *Arlington Heights* factors.¹³⁴ But recall that the Voting Rights Act’s preclearance provisions were adopted exactly because southern lawmakers had shown themselves to be quite adept at achieving functionally identical results—suppressing Black persons’ voting rights—by a variety of distinct and seemingly unrelated mechanisms, abandoning one and adopting another as the former was exposed and denounced by courts.¹³⁵ Nevertheless, aggressive judicial policing of such evasions, via the presumptive tainting of any law that triggers the same functional result as a previous one concededly infected with animus, may exceed the judicial ken.¹³⁶

Further complicating the question of how much similarity must exist between a current law and its animus-infected ancestor to carry forward the earlier law’s taint, one might legitimately claim that any changes between the two constitute a positive sign of sincere dialogue between courts and legislatures.¹³⁷ Ultimately, whether one casts those subsequent laws as nefarious evasions of judicial decisions or praiseworthy attempts at intergovernmental discourse probably turns on one’s willingness to credit the legislature’s goodwill. The appropriate degree of such willingness perhaps should flow from a consideration of all the relevant *Arlington Heights* factors taken as a whole.¹³⁸

If this concededly inconclusive discussion of the historical background factor advances the analysis, it does so in two ways. First, it operationalizes the instinct that the historical background of a reenacted law should indeed matter

132. See Murray, *supra* note 8, at 1220–21.

133. Professor Murray believes that it should not. See *id.* at 1221.

134. See *infra* note 138.

135. See *South Carolina v. Katzenbach*, 383 U.S. 301, 333–35 (1966) (making this point).

136. By contrast, such aggressive policing via prophylactic rules may be well within Congress’s capabilities as well as within its powers under the Reconstruction Amendments’ Enforcement Clauses. See, e.g., *id.* at 337 (upholding the preclearance provisions of the Voting Rights Act as appropriate enforcement of those amendments based on this prophylactic reasoning). *But see* *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (striking down the coverage formula governing those provisions’ applicability). See also William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 951–55 (2013) (considering this issue from the perspective of the deference due Congress’s factfinding when it legislates to enforce individual rights).

137. See Aviel, *supra* note 8, at 1006–12 (considering this possibility).

138. See, e.g., Clarke, *supra* note 58 (describing the *Arlington Heights* inquiry as a “holistic” one); *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1021 (D. Nev. 2021) (deciding a cleansing question by considering the “totality of the circumstances” revealed by several *Arlington Heights* factors).

to its constitutionality when that background reveals a plausible connection to an earlier enactment infected with animus. Second, however, it makes clear that, except perhaps in easy cases,¹³⁹ this factor alone will not decisively answer the cleansing question.¹⁴⁰ Instead, context matters when assessing both the cleansing issue generally and the historical background factor in particular. One particular aspect of that context is the regularity with which the reenacting legislature conducted its work. This Article now turns to that issue.

3. Procedural and Substantive Irregularities

Beyond a challenged law's persistent disparate impact and its relationship to the historical animus with which that law is alleged to remain infected, the *Arlington Heights* factors also inquire into decisional regularity. The *Arlington Heights* Court explained that “[d]epartures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role.”¹⁴¹ It then immediately added that “[s]ubstantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.”¹⁴²

Before considering these factors individually, it bears quickly reflecting on the assumptions underlying the focus on both procedural and substantive regularity. As Michael Selmi has observed, there is no reason to assume that, in the abstract, a lack of regularity necessarily constitutes evidence of bad motive.¹⁴³ To be sure, either type of irregularity suggests that something beyond business as usual has influenced the decisional process or the decision itself. But that “something” could be many things: carelessness,¹⁴⁴ garden-variety corruption,¹⁴⁵ a particularly powerful interest group that has its own private but

139. See Lantta, *supra* note 26; Joseph, *supra* note 26; Heytens, *supra* note 26—all of which imply that the modern reenactment of “Little Blaine” Amendments may have cleansed their anti-Catholic animus. *But see* Espinoza v. Mont. Dep’t of Revenue, 140 S. Ct. 2246, 2273 (2020) (Alito, J., concurring) (insisting that even reenacted versions of such provisions may be problematic).

140. See, e.g., United States v. Wence, No. 20-CR-0027, 2021 WL 2463567, at *7 (D.V.I. June 16, 2021) (“Ultimately, the question for the Court is whether a law related to one that was stained by white supremacy can ever be cleansed without a formal condemnation of the earlier law. The answer is that it requires a more nuanced look at the surrounding circumstances, including the passage of time, the pronouncements made with respect to the new law, and the nature and purpose of the law.”); see also United States v. Rios-Montano, No. 19-CR-2123, 2020 WL 7226441, at *5 (S.D. Cal. Dec. 8, 2020) (using very similar language in the context of an analogous challenge to another immigration law).

141. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

142. *Id.*

143. See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 305 (1997) (“Other than our history of racial discrimination, there is no reason that deviations from legislative procedures would be relevant to proving intentional racial discrimination.”).

144. See, e.g., Almonte v. Pierce, 666 F. Supp. 517, 527 n.5 (S.D.N.Y. 1987) (concluding that “carelessness” explained an alleged procedural deviation).

145. See, e.g., *In re Flint Water Cases*, No. 5:17-cv-10342, No. 17-10164, No. 17-10342, 2019 WL 3530874, at *23 (E.D. Mich. Aug. 2, 2019) (explaining that the allegation that a municipal agency was corrupt “does not indicate racial animus”), *aff’d*, 969 F.3d 298 (6th Cir. 2020).

constitutionally innocent motives for exerting influence,¹⁴⁶ or, simply enough, the existence of a unique situation that justifiably requires a unique procedure or decision on the merits.¹⁴⁷ Professor Selmi argues that procedural or substantive deviations become probative of the alleged type of discrimination only when that type of discrimination has already been hovering over the issue due to the law's historical background. That history provides the reason for believing that such deviations are best explained not by any of the constitutionally innocent reasons noted above (or any other innocent reason) but instead by the type of discrimination that historically influenced decisions of that type made by that decision maker.¹⁴⁸

Professor Selmi's insight reinforces the conceptual coherence of Justice Powell's explanation that the intent determination requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."¹⁴⁹ Among other ways, that sensitivity manifests by judges remaining alert to connections between the historical background factor and the irregularity factors currently under discussion. As Professor Selmi suggests, decisional irregularity is not strongly probative—and indeed may well be entirely meaningless—without an acknowledgement that the alleged discriminatory ground (such as race) was lurking in the background as a possible explanation for those irregularities. In turn, that lurking can be inferred from both the historical fact that that alleged discrimination existed and from the disparate burden the challenged law inflicts.¹⁵⁰

146. See, e.g., Paul J. Stancil, *Assessing Interest Groups: A Playing Field Approach*, 29 CARDOZO L. REV. 1273, 1290 (2008) (identifying licensing laws as a species of rent-seeking legislation).

147. See, e.g., *Laramore v. Ill. Sports Facilities Auth.*, No. 89-C-1067, 1996 WL 153672, at *13 (N.D. Ill. Apr. 1, 1996) (rejecting, in the context of a racial discrimination challenge to a government decision to locate a baseball stadium in a particular location, the argument that the decision was procedurally irregular because "[t]his is not a situation like *Arlington Heights* where the zoning board had routine procedures it followed in ruling on requests for zoning changes. Instead, the site selection in this case was the result of a complex political process conducted under intense time pressure. Under those circumstances, there is no 'normal' procedure against which to judge the defendants' conduct").

148. See Selmi, *supra* note 143, at 304–05 ("[T]he *Arlington Heights* factors are relevant because they provide indicia of discrimination; these factors are relevant because our experience suggests they are likely indicative of discriminatory acts. For example, when legislatures deviate from customary practices where race may be a factor, and no reasonable explanation for the departure is forthcoming, the legislature's action is understood against the historical fact that legislatures have often made distinctions based on race in order to disadvantage minority groups. Other than our history of racial discrimination, there is no reason that deviations from legislative procedures would be relevant to proving intentional racial discrimination. As was also true with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), absent a history of discrimination, such departures might have been indicative of a propensity to vote against zoning requirements for any number of [innocent] reasons But race, we know, is different, and so, at least in *Arlington Heights*, the Court suggested that certain inferences could be drawn based on our knowledge and expectations of the operations of legislatures—inferences that would not be plausible absent that historical background. In law, as elsewhere, actions and evidence acquire their meaning from experience and context." (footnote omitted)).

149. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); see also, e.g., Clarke, *supra* note 58 ("*Arlington Heights* calls for a holistic review of evidence of discriminatory intent, considering history, context, effects on minority groups, and statements by decisionmakers.").

150. See *supra* Subpart III.C.1 (explaining how the continuation of disparate impact is both an *Arlington Heights* factor and relevant to the cleansing analysis).

Having established that the procedural and substantive irregularity factors derive their significance from the presence of other *Arlington Heights* factors, we can now consider how each irregularity factor feeds into the cleansing analysis.

a. Procedural Irregularities

Before examining how procedural decisional irregularities influence the cleansing analysis, consider courts' use of the procedural irregularity factor in conventional discrimination claims. As one might intuitively expect, conventional illustrations of this *Arlington Heights* factor often feature attempts to rush a decision through, either by shortcutting normal deliberative processes or, analogously, excluding persons who would ordinarily play important roles in the decisional process.¹⁵¹

One example of such irregularities—an example factually similar to *Arlington Heights* itself—involved a challenge to a local zoning decision that made it harder to build multifamily housing in a town that had traditionally emphasized single-family homes. In *MHANY Management, Inc. v. County of Nassau*,¹⁵² the United States Court of Appeals for the Second Circuit upheld the district court's decision that the town had intentionally discriminated based on race when it made that zoning decision.¹⁵³ Among other observations, the appellate court noted that after initially giving favorable consideration to a rezoning request that would have facilitated construction of multifamily housing, town officials switched course.¹⁵⁴ Importantly for our purposes, the officials did so by bypassing the persons and entities that had participated in the decision up to that point and further deviating from normal procedures when calendaring the issue for a public hearing. In light of such conduct, the Second Circuit upheld the district court's finding “rejecting [the town's] argument . . . that the adoption of [the challenged zoning decision] was

151. See *infra* note 156. To be sure, other instances of this factor simply involve the government decision maker following an unusual procedure without any necessary inference of hiding or rushing (or delaying) a decision. See, e.g., *Park v. Trs. of Purdue Univ.*, No. 09-CV-87, 2011 WL 1361409, at *7 (N.D. Ind. Apr. 11, 2011) (refusing to dismiss an equal protection claim brought by a dismissed student against a state university when the student alleged that one of his professors subjected his work to plagiarism-checking software, which the student alleged was a deviation from normal procedures). One scholar has expanded the catalog of actions relevant to this factor to include more general steps government can take to ensure “that a given policy has been thoroughly vetted.” Landau, *supra* note 23, at 2176; see also *id.* (including among those more general steps “the quality of deliberation” and “documentation of studies”).

152. *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581 (2d Cir. 2016).

153. *Id.* at 624.

154. *Id.* at 607.

business as usual.”¹⁵⁵ Other cases speak in similar terms about government officials avoiding particular decision makers or particular processes.¹⁵⁶

Consider now how the procedural irregularity factor applies to a cleansing inquiry. Assuming a historical background of unconstitutional bias, one can reasonably suspect that such bias might have infected a legislature’s reenactment of the tainted policy if its decisional process reveals attempts to evade normal deliberation and discussion by the proper officials. Intuitively, one might suspect that such evasions reflect attempts to avoid confronting difficult or uncomfortable questions the given issue raises. Surely, the fact that a contemplated decision would reinscribe an invidious policy constitutes that sort of question; thus, avoiding deliberation on that issue should raise judicial eyebrows.

To be sure, that taint may not “flip[] the evidentiary burden”¹⁵⁷ away from the plaintiff and onto the government defendant.¹⁵⁸ Thus, a court should not require the government to prove that the legislature affirmatively deliberated on the fact that the policy it was considering reenacting was tainted. But if the plaintiff can demonstrate the lack of such deliberation, that fact should count in favor of her *prima facie* case, in a manner akin to demonstrating that the legislature rushed or short-circuited its decisional process.¹⁵⁹ Conversely, if the government can demonstrate that the legislature acknowledged and deliberated on the fact of the prior policy’s taint before reenacting it, it would have a strong claim to have cleansed that animus.

One might intuit that the sort of deliberation described immediately above is important to the legitimacy of a decision to reenact a tainted law. Nevertheless, it merits considering more carefully how the lack of such deliberation raises doubts that any preexisting animus has truly been cleansed. One way to connect the lack of such deliberation to the cleansing inquiry is simply to observe that proper lawmaking procedures require the decision maker to consider the most critical issues relevant to a legislative decision. Surely, a proposed law’s constitutional invidiousness constitutes such an issue. Scholars

155. *Id.*; see also *id.* at 607–08 (upholding the district court’s finding that “the ‘not nearly as deliberative’ adoption of [the challenged zoning decision] was suspect”).

156. See, e.g., *Texas v. United States*, 887 F. Supp. 2d 133, 165 (D.D.C. 2012) (citing, as relevant to this factor, evidence in a redistricting case about the lack of field hearings and exclusion of particular legislators from the redistricting process, in contrast to past redistricting processes), *vacated on other grounds*, 570 U.S. 928 (2013); *Veasey v. Perry*, 71 F. Supp. 3d 627, 645–53 (S.D. Tex. 2014) (setting forth numerous procedural irregularities accompanying the Texas legislature’s consideration and enactment of a voter identification law, including rushed treatment, suspension of normal voting rules, and the bypassing of normal committee assignments, as relevant to the *Arlington Heights* procedural irregularity factor), *aff’d in part, vacated in part, and remanded sub nom.* *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *vacated*, *Veasey v. Abbott*, 815 F.3d 958 (5th Cir. 2016); *Coal. for T] v. Fairfax Cnty. Sch. Bd.*, No. 21-cv-296, 2022 WL 579809, at *7 (E.D. Va. Feb. 25, 2022) (finding relevant to this *Arlington Heights* factor the fact that “for such a significant set of actions, the [government’s] procedure was remarkably rushed and shoddy”).

157. *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018).

158. See *id.*; see also *infra* note 177 (discussing *Abbott* in more detail).

159. See text accompanying *supra* notes 151–156.

have argued that even presidential decisions, often considered the epitome of law-free discretion and thus shorn of any legal requirements of deliberation, are in fact subject to a requirement that the President deliberate on the legality of her intended conduct.¹⁶⁰ Given such arguments about legal constraints on presidential decision making, it is not a large leap to insist that legislatures similarly deliberate.¹⁶¹ Indeed, such a requirement might well inhere in the republican character of the federal government and the Constitution's guarantee to the states of a similarly "[r]epublican [f]orm of [g]overnment."¹⁶² As for administrative action, such a deliberation requirement analogously inheres in the expectation of reasoned deliberation on the factors relevant to the decision.¹⁶³

Such deliberation may be particularly critical—and thus its absence particularly suspicious—when it concerns the constitutionality of the act in question. Notwithstanding the fetishization of judicial review as the only method by which legislation can be tested for constitutionality, scholars have persuasively argued that legislatures have a legal responsibility to deliberate on the constitutionality of bills they are considering enacting.¹⁶⁴ If they do have such a responsibility, a failure to engage in such deliberation, especially when the law arguably reinscribes a prior unconstitutional rule, would seem to constitute every bit as much a flaw in the decision making process as a failure to present a zoning question for decision by the normal decision makers via a normal process.¹⁶⁵

As an example of this deliberation requirement, consider yet again Section 1326, the federal unlawful reentry statute.¹⁶⁶ Plaintiffs challenging

160. See generally Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1271 (2021) (arguing that the exercise of both the President's constitutional powers and his powers under statutory delegations of authority often imply such an obligation).

161. See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 586–87 (1975) (calling for legislatures to deliberate on the constitutionality of proposed legislation).

162. U.S. CONST. art. IV, § 4; see, e.g., H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1707–11 (1988) (discussing one leading scholar's understanding of the connection between civic republicanism and deliberative democracy).

163. See, e.g., *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983) (requiring that federal agency action be “rational” and “based on consideration of the relevant factors”).

164. At least one school of thought holds that every government actor has that responsibility, even if those determinations are sometimes effectively immune from judicial review. See, e.g., Brest, *supra* note 161, at 586 (“None of [the] considerations [militating toward judicial restraint in reviewing the constitutionality of legislative actions] suggests that the legislature should exercise restraint in assessing the constitutionality of its own product.”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1264 (1978) (suggesting that Congress may have the responsibility to make constitutional determinations to enforce judicially underenforced constitutional norms). More recently, scholarship about “popular constitutionalism” has argued that the People, acting either via their legislative electoral choices or more directly, play a legitimate—indeed, a critical—role in determining the Constitution's meaning. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004).

165. See generally *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 607–08 (2d Cir. 2016).

166. Immigration and Nationality Act of 1952, 8 U.S.C. § 1326.

Section 1326 have argued that the Congress that reenacted that provision in 1952 failed to acknowledge, let alone deliberate on, the fact that it was reenacting a law that originally rested on racial animus. In other words, they have argued that the 1952 reenacting Congress failed to cleanse the law's original discriminatory stain when it failed even to acknowledge that stain, let alone deliberate on whether the public good nevertheless required readopting the earlier tainted policy.¹⁶⁷

This argument raises the question of how courts can implement the deliberation demand sketched out above. How can a court determine that a previous animus stain has been cleansed because the reenacting Congress acknowledged that stain but determined, after due deliberation, that more legitimate public purposes justified reenacting the law? For example, the one opinion that to date has ruled against Section 1326's constitutionality concluded that in the reenacting Congress "there ha[d] been no attempt at any point to grapple with the racist history of Section 1326 or remove its influence on the legislation."¹⁶⁸ The categorical nature of that court's conclusion made it easier for it to fault Congress's deliberative care in reenacting the 1929 law.¹⁶⁹ One can readily imagine harder cases where a court concedes that the legislature gave at least some thought to the law's problematic history before reenacting it.¹⁷⁰ Such claims would put courts in the difficult position of judging whether such deliberation was sufficient to cleanse the taint—a task that might well exceed both courts' capacity and authority.¹⁷¹

Other courts construing Section 1326 have rejected plaintiffs' claims that the 1952 Congress inadequately grappled with the 1929 law's racism.¹⁷² But those decisions do not provide robust guidance on how courts should calibrate their scrutiny of the legislature's action.¹⁷³ Instead, they have cast the plaintiffs' (unsuccessful) arguments as maintaining that Congress's alleged deliberative

167. See, e.g., *United States v. Muñoz-De La O*, 586 F. Supp. 3d 1032, 1050 (E.D. Wash. 2022); *United States v. Viveros-Chavez*, No. 21-CR-665, 2022 WL 2116598, at *4 (N.D. Ill. June 13, 2022).

168. *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1026 (D. Nev. 2021); cf. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1224 (11th Cir. 2005) (rejecting an argument that a 1968 reenactment of an 1868 felon disenfranchisement law was tainted with the racial prejudice that infected the earlier law, emphasizing the deliberative process that led to the reenactment).

169. See *Carrillo-Lopez*, 555 F. Supp. 3d at 1027; see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) ("Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint.").

170. See, e.g., *Murray*, *supra* note 8, at 1242–44 (considering formulas for judging such attempts).

171. In referring to the closely related concept of "due process of lawmaking," one scholar has concluded that "it is widely believed that judicial enforcement of robust principles of 'due process of lawmaking' would be unworkable." Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 244 n.225 (2015). But see Landau, *supra* note 23, at 2167–71 (discussing sex discrimination, affirmative action, and Takings Clause cases where the Supreme Court based its decision in part on the care with which the government deliberated).

172. See *infra* note 174.

173. Cf. Stephen Gardbaum, *Due Process of Lawmaking Revisited*, 21 U. PA. J. CONST. L. 1, 28–30 (2018) (citing examples from foreign courts of successful judicial review of legislative processes).

failure shifted to the government the burden of justifying the legitimate need for Section 1326¹⁷⁴—an argument that, as noted earlier,¹⁷⁵ the Supreme Court has flat-out rejected.

Unless those plaintiffs simply made the wrong legal argument,¹⁷⁶ it may be that these courts just as simply found a convenient way to avoid having to decide the difficult question of the adequacy of Congress’s deliberations in 1952. But regardless of the reason, the severely problematic history behind Section 1326 makes it unsurprising that those courts have shied away from dismissing as entirely irrelevant Congress’s alleged failure to confront the predecessor law’s conceded animus. Indeed, recent Supreme Court precedent suggests that any such dismissal would itself violate well-established law.¹⁷⁷

In sum, courts deciding challenges to Section 1326 have implicitly—and in at least one case, explicitly¹⁷⁸—conceded that a deliberative process failure of the sort this Subpart has described is indeed relevant to the cleansing analysis. Again, this concession should not be surprising. Intuitively, something is indeed wrong when a previous law acknowledged to be invidious provides the

174. See, e.g., *United States v. Ramirez-Aleman*, No. 21-cr-3403, 2022 WL 1271139, at *6 (S.D. Cal. Apr. 27, 2022) (“Defendant in this case asks this Court to commit the same error [as the district court in *Abbott v. Perez*, 138 S. Ct. 2305 (2018)] by demanding Congress prove it has faced the (alleged) discriminatory roots of the 1929 Act and changed its heart in more recent enactments and amendments, thereby purging the taint.”); *United States v. Wence*, No. 20-cr-0027, 2021 WL 2463567, at *7 (D.V.I. June 16, 2021) (“Wence . . . employs an argument from the negative, asserting that by failing to clearly repudiate the 1929 Act’s racist origins, the subsequent reenactments of 8 U.S.C. § 1326 are necessarily tainted by the 1929 Act’s discriminatory purpose. This argument, however, improperly seeks to shift the burden to the Government . . .” (internal citation omitted)); see also *United States v. Machic-Xiap*, 552 F. Supp. 3d 1055, 1074 (D. Or. 2021) (“[H]istorical background revealing past discrimination cannot alone ‘flip[] the evidentiary burden on its head.’” (alteration in original) (quoting *Abbott*, 138 S. Ct. at 2325)). *Abbott* is discussed below. See *infra* note 177.

175. See *supra* text accompanying notes 157–158.

176. It is possible that either those advocates or the courts themselves confused the concepts of the burden of proof (or persuasion) and the burden of production. See *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 272–76 (1994) (explaining the difference between these concepts).

177. Courts citing plaintiffs’ alleged attempts to illegitimately flip the burden of proof have support for their position in the Supreme Court’s 2018 decision in *Abbott v. Perez*, 138 S. Ct. 2305 (2018). See, e.g., *United States v. Ramirez-Aleman*, No.: 21-cr-3403, 2022 WL 1271139, at *6 (S.D. Cal. Apr. 27, 2022) (citing *Abbott*, 138 S. Ct. at 2324–25). *Abbott* considered an equal protection challenge to the Texas Legislature’s 2011 redistricting plan. The relevant district lines had been preliminarily enjoined, and the lower court ended up drawing its own lines for use in the 2012 elections, basing them on what it considered the legitimate elements of the state’s 2011 plan. The year after, in 2013, the legislature redrew the lines, in turn basing them in part on the court’s 2012 lines. *Abbott*, 138 S. Ct. at 2315–17. In upholding those legislatively drawn lines, the *Abbott* Court faulted the lower court for “flip[ping] the evidentiary burden on its head” by putting the state to the burden of explaining how it had in fact engaged in good-faith deliberation about the constitutionally problematic aspects of the 2011 district lines when it redrew the lines in 2013. *Id.* at 2325. However, immediately before so doing, the Court acknowledged both that “[t]he ‘ultimate question remains whether a discriminatory intent has been proved in a given case’” and that “[t]he ‘historical background’ of a legislative enactment is ‘one evidentiary source’ relevant to the question of intent.” *Id.* at 2324–25 (first quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980), *superseded by statute*, Voting Rights Act of 1965, 42 U.S.C. § 1973(a) (recodified as amended at 52 U.S.C. § 10301 (2014)); and then quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)). The burden-shifting *Arlington Heights* calls for is discussed in the next Subpart. See *infra* Subpart III.D.

178. See *supra* note 168.

foundation for a reenacted version of that law without the reenacting legislature acknowledging that fact and at least “grappl[ing]”¹⁷⁹ with that legacy. Far from violating recent Supreme Court precedent, that precedent, carefully read, supports that intuition.¹⁸⁰

Finally, and to re-ground this analysis in *Arlington Heights*, this deliberative failure is fairly characterized as a procedural flaw since normal legislative procedures would include deliberation on the constitutionality of a proposed law, especially when that proposal’s predecessor has been acknowledged to be constitutionally flawed.¹⁸¹ To those who still doubt this characterization, consider the following example. A legislature deliberates on whether to enact a particular proposal. All arguments for and against that proposal are allowed to be raised except one: whether the law is constitutional. One would hardly call that a normal decisional process.

b. Substantive Irregularities

After identifying the procedural deviation factor discussed in the prior Subpart, Justice Powell wrote the following: “Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a [result] contrary to the one reached.”¹⁸² As compared to its procedural mate, this substantive irregularity factor plays a more complex role in the cleansing analysis.

As with the discussion of procedural irregularity, I begin here with a very quick defense of substantive regularity’s relevance to the conventional discriminatory intent inquiry. That relevance makes intuitive sense. A decision that radically deviates from the legislature’s usual preferences or outputs *should* trigger suspicion, especially when that decision creates disparate impact on the alleged discriminatory ground and its history reveals past discrimination on that very same ground. One must assume that some impulse motivates a substantive deviation from a government entity’s normal preferences. When the alleged discrimination has hovered in the historical background of the government’s action and when the challenged action imposes disparate burdens on that same ground, it seems reasonable to presume that those historical motivations

179. See *supra* note 168.

180. See *supra* note 177.

181. In fairness, the actual words *Arlington Heights* uses to describe the procedural irregularity factor speak to “[d]epartures from the normal procedural sequence.” *Arlington Heights*, 429 U.S. at 267 (emphasis added). One might object that the type of procedural regularity this Subpart has described speaks to procedural regularity more generally, rather than the more specific sequential procedure Justice Powell spoke of. But as noted in Subpart III.A’s introductory discussion of the *Arlington Heights* factors, translating those factors into the distinct context of cleansing requires some adjustment of those factors.

182. *Id.*

likewise motivated the otherwise unusual government action.¹⁸³ That presumption becomes even more plausible when “the factors usually considered important by the decisionmaker *strongly* favor a [result] contrary to the one reached.”¹⁸⁴ In light of the action’s invidious legacy and disparate impact, the severity of the deviation from what might otherwise be expected provides even more reason to suspect that the challenged decision is motivated by something similarly invidious.

A cleansing inquiry employs a mirror image of this reasoning. Unlike the conventional application of the substantive deviation factor, a cleansing inquiry looks *favorably* on a substantive change as evidence that the reenacted law does not simply continue the old animus-infected policy.¹⁸⁵ By contrast, the government’s insistence on acting consistently with the prior policy provides reason to believe that that consistency was motivated, at least in part, by a desire to inflict the same harms the earlier policy did. The key move here is to realize that in a cleansing situation, a first-blush understanding of the baseline—the status quo against which the challenged law operates—holds that baseline to be infected.¹⁸⁶ Thus, government consistency—in this case, the reenactment of the same animus-infected policy—constitutes the suspicion-inducing conduct.¹⁸⁷

Concededly, flipping the substantive regularity factor in this way raises questions about the logic of applying this factor to the cleansing inquiry. If the point of this factor is to highlight the deviation implicit in any substantive shift

183. See *Selmi*, *supra* note 143, at 304–05 (“[W]hen legislatures deviate from customary practices where race may be a factor, and no reasonable explanation for the departure is forthcoming, the legislature’s action is understood against the historical fact that legislatures have often made distinctions based on race in order to disadvantage minority groups.”); see also Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217, 1231 (1977) (observing, in the author’s discussion of pre-*Arlington Heights* housing discrimination cases, that “in some cases a municipality has adopted last-minute strategies such as changing existing zoning, declaring a moratorium on building permits, or refusing to issue necessary sewer connection permits, to block the construction of a lower income subsidized housing project fully authorized and allowable under existing zoning restrictions. These sudden municipal changes of heart have supported judicial findings of racially discriminatory intent.”); *id.* at 1231 n.55 (citing cases supporting that statement).

184. *Arlington Heights*, 429 U.S. at 267 (emphasis added).

185. See *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1021–22 (D. Nev. 2021).

186. But see *infra* text accompanying notes 189–190 (explaining how this seeming consistency could in fact be flipped and thus understood as inconsistency with a broader decisional norm).

187. To be sure, cases such as *Abbott v. Perez*, discussed in the previous Subpart, see *supra* note 177, warn that this suspicion does not justify “flip[ping] the evidentiary burden” from the plaintiff to the government defendant. *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018). Nevertheless, a comparison of the challenged law (including a law that reenacts an earlier one) with what came before remains a valid *Arlington Heights* factor. See *Arlington Heights*, 429 U.S. at 267. *Abbott* recognized the continued probative value of such factors, even if, taken in isolation, no single one of them justified “flip[ping] the evidentiary burden.” *Abbott*, 138 S. Ct. at 2324–25; see also *supra* note 177 (explaining this point further); *Carrillo-Lopez*, 555 F. Supp. 3d at 1021–22 (finding it justifiable to shift the burden to the government under the *Arlington Heights* structure after reviewing, “under the totality of the circumstances,” the plaintiff’s evidence on the *Arlington Heights* prima facie factors).

of the sort Justice Powell described in *Arlington Heights*,¹⁸⁸ then one might fairly ask if characterizing the problem in the cleansing context as one of legislative *consistency* addresses a similar dynamic. In particular, one might acknowledge, as the prior paragraph does, that a cleansing situation features a baseline consisting of invidious government action but may still question whether it makes conceptual sense to evaluate the government's consistent embrace of that invidious policy through the lens of a factor that concerns itself with substantive irregularity. This objection makes clear that applying *Arlington Heights* to the cleansing inquiry is not a simple mechanical operation. Rather, that task calls for nuance and context-sensitivity.

Nevertheless, three closely related rejoinders reduce the force of that objection. First, this invidious baseline furnishes a reason to suspect that a legislature's persistent embrace of the infected policy itself reflects a deviation from the norm of legislative good faith.¹⁸⁹ If this norm takes the form of a presumption that a legislature will act in pursuit of the public interest,¹⁹⁰ then a decision to reenact a provision that has already been condemned as or conceded to rest on animus could reasonably be understood to indicate a deviation from that broader norm. At the very least, that prior law's stain erases any exculpatory force that the substantive irregularity factor might otherwise imply flows from the legislature's consistency.

Second, and relatedly, at this stage of the analysis, the only question on the table asks whether sufficient evidence of bad intent exists to justify flipping the burden to the government. Thus, even if persistent pursuit of a concededly invidiously motivated policy does not by itself suffice to justify that flip, it adds weight to that side of the scale by suggesting a persistent deviation from the legislative good faith norm discussed above.¹⁹¹ Third, it bears recalling that that scale does not demand too much of the plaintiff—only that the alleged invidious intent constitute “a motivating factor”¹⁹² in the decision, *not* the “dominant” or even “primary” factor, let alone the sole one.¹⁹³ Surely, consistent pursuit of an invidiously motivated policy goes some distance toward making that modest showing, especially when that pursuit can be understood as deviating from a broader substantive norm.

But before considering further how the substantive regularity factor should apply in cleansing situations, it behooves considering the complexity of that

188. See *infra* text accompanying note 194 (explaining the example of this factor Justice Powell used in his opinion).

189. See generally *Abbott*, 138 S. Ct. at 2324 (discussing “the presumption of legislative good faith”).

190. See generally *id.*

191. See *supra* text accompanying notes 189–190.

192. *Arlington Heights*, 429 U.S. at 270.

193. *Id.* at 265; see also *id.* at 270 & n.21 (setting forth the respective burdens of the plaintiff and the defendant in discriminatory intent claims); *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1011 (D. Nev. 2021) (concluding that the “totality of the evidence” reveals that the alleged bad intent was a motivating factor behind the 1952 unlawful reentry law).

factor more generally. Some substantive deviations are straightforward. In *Arlington Heights* itself, Justice Powell cited as an example a case in which a plot of land formerly zoned for government buildings was suggested as a site for low-income multifamily housing. The area surrounding the plot was already zoned for high-density housing, yet the government refused to rezone the plot in question despite the former city planning director's testimony that "from a zoning standpoint" "there was no reason . . . the land should not be" zoned for high-density housing.¹⁹⁴

Cases such as this example present relatively easy applications of the substantive regularity factor: the issue for the government's decision is a binary one (rezone to multifamily housing or not), the deviation from past conduct (the existing zoning around the site) is stark, and the facts (the former planning director's testimony) suggest little if any reason to credit the challenged decision as pursuing a legitimate public goal. But other fact patterns require more nuanced inquiries. In addition, as explained above, the cleansing context adds its own layer of complexity.

As an example of these nuances, return yet again to Section 1326, the federal unlawful reentry statute. Courts considering equal protection challenges to the 1952 iteration of that provision noted that that latter iteration differed substantively from its 1929 predecessor.¹⁹⁵ But the changes cut in different directions, rendering the law both more and less draconian.¹⁹⁶ One court concluded that the combination of those changes meant that the 1952 iteration was "not simply a reenactment of"¹⁹⁷ the 1929 law. For that reason, that court downplayed the relevance of the 1929 law's racism¹⁹⁸ and concluded that the case was controlled by *Abbott's* insistence that the 1952 Congress, like all legislatures, was "entitled to a presumption of good faith."¹⁹⁹

This example reveals the complexity of many situations where a plaintiff argues that the reenacting legislature did not meaningfully alter the previous animus-infected law. Unlike the example Justice Powell provided in *Arlington*

194. *Arlington Heights*, 429 U.S. at 267 n.17 (quoting *Dailey v. City of Lawton*, 425 F.2d 1037, 1040 (10th Cir. 1970)); see Mandelker, *supra* note 183, at 1238–39 (explaining how the *Arlington Heights* Court distinguished cases such as *Dailey*).

195. See, e.g., *United States v. Viveros-Chavez*, No. 21-CR-665, 2022 WL 2116598, at *4 (N.D. Ill. June 13, 2022); see also *United States v. Ramirez-Aleman*, No.: 21-cr-3403, 2022 WL 1271139, at *5 (S.D. Cal. Apr. 27, 2022).

196. One change expanded the range of conduct that made aliens subject to the law's criminal penalties while another added a provision that allowed aliens to seek an exemption from the law's prohibitions. See *Viveros-Chavez*, 2022 WL 2116598, at *5.

197. *Id.* at *6.

198. See *id.* ("[T]he 71st [1929] Congress's intent is relevant only to the extent that it can provide the basis for an inference regarding Congress's intent in 1952."). Despite the court's reference to the 71st Congress, the 1929 law was enacted by the 70th, not the 71st, Congress. See Fish, *supra* note 117, at 1054 n.14 (2022) (citing the statute as enacted by the 70th Congress).

199. *Viveros-Chavez*, 2022 WL 2116598, at *6.

Heights,²⁰⁰ the question before Congress in 1952 was not a binary one—that is, it was not a simple choice between two diametrically opposite options. Rather, the 1952 Congress faced an infinite number of options for altering the 1929 law.²⁰¹ That reality in turn raises the question of how meaningful any difference really is²⁰² and, by extension, how much any particular change matters to this factor.

These questions demand much more supple judgments than those required by Justice Powell’s straightforward example of a city that refused to rezone a parcel for multifamily housing when all the surrounding land was so zoned and the city’s former zoning expert found no relevant public purpose justifying the refusal.²⁰³ Further complicating courts’ task is the fact that legislatures may often wish to readopt a previous invidious policy by enacting a differently worded law and, when challenged, arguing that the two are substantively distinct. As Professor Aviel explained, legislators often exhibit a “commitment to stay the chosen course, responding to unfavorable [judicial] rulings by finding new vehicles for the ‘same ideas’ that animated their previous unsuccessful efforts.”²⁰⁴ To confirm this point, one simply needs to recall the reasoning behind the Voting Rights Act’s preclearance provisions—namely, that southern and other covered jurisdictions had become adept at responding to judicial strike downs of particular voter suppression measures by enacting different measures that aimed at the same invidious goal.²⁰⁵

The issue is complex for yet an additional reason. Beyond the fact (discussed above²⁰⁶) that legislatures face myriad options when considering whether to reenact a previous policy lies the even more foundational complication that old policies tarred with animus may nevertheless serve legitimate government purposes. That reality (among others) has led courts and scholars to question the usefulness of the entire concept of purpose in constitutional law, given the asserted ease with which a legislature can reenact a previously invidiously motivated law while newly asserting a plausible claim of furthering a legitimate government interest.²⁰⁷ When a legislature does just

200. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 n.17 (1977).

201. See, e.g., *Viveros-Chavez*, 2022 WL 2116598, at *5 (explaining that the 1952 Congress both expanded the class of conduct that would trigger criminalization of unauthorized reentry but also added an exemption to that criminal prohibition).

202. Compare *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1022 (D. Nev. 2021) (concluding that there was only one change between the two laws and that the change was not substantive), with *United States v. Maldonado-Guzman*, 21-CR-448, 2022 WL 2704036, at *3 (S.D.N.Y. July 12, 2022) (finding “key substantive differences” between the two laws (quoting *Viveros-Chavez*, 2022 WL 2116598, at *5)).

203. See *Arlington Heights*, 429 U.S. at 267 n.17.

204. Aviel, *supra* note 8, at 963.

205. See *supra* note 135 and accompanying text.

206. See *supra* text accompanying notes 200–201.

207. See, e.g., Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 125–27 (considering the argument that motive review is problematic because of the futility reflected in this dynamic).

that, a court is placed in the difficult position of either accepting the newly stated justification by crediting what the Supreme Court in 2018 called “the presumption of legislative good faith,”²⁰⁸ or divining and applying criteria justifying a rejection of that presumption.

Perhaps surprisingly, courts applying the substantive deviation factor have at least occasionally given careful scrutiny to legislatures’ asserted interests justifying the substantive deviation,²⁰⁹ including in situations involving the reenactment of policies already condemned as invidious.²¹⁰ But that sort of intrusive judicial review may be unnecessary if the substantive deviation factor under consideration here plays its appropriate role in the *Arlington Heights* structure—as one data point in a holistic inquiry into whether the alleged discrimination constituted “a motivating factor in the [legislature’s] decision.”²¹¹ A positive answer to that inquiry shifts the burden to the government to show that it would have made the same decision even absent the alleged discriminatory intent.²¹² It is at that latter point, when a variety of factors combine to justify questioning “the presumption of legislative good faith,”²¹³ that it may be more appropriate for a court to scrutinize the government’s justifications more carefully.²¹⁴

With the relevant *Arlington Heights* factors explicated,²¹⁵ this Article now considers what the shifted burden cited immediately above means in the animus cleansing context.

208. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

209. *See, e.g.*, *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, No. 06-7185, 2011 WL 4915524, at *5 (E.D. La. Oct. 17, 2011) (rejecting a city’s argument that the city had an oversupply of multifamily housing, thus rendering innocuous a zoning ordinance that essentially forbade the further construction of such housing within the city); *Burstyn v. City of Mia. Beach*, 663 F. Supp. 528, 536–37 (S.D. Fla. 1987) (finding a substantive departure indicative of discriminatory intent when a city deviated from normal zoning criteria in restricting the locations for adult congregate living facilities).

210. *See, e.g.*, *Greater New Orleans*, 2011 WL 4915524, at *5.

211. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *id.* at 270; *see also* *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1021 (D. Nev. 2021) (considering the impact of the *Arlington Heights* factors under a “totality of the circumstances” approach).

212. *See Arlington Heights*, 429 U.S. at 270 n.21 (setting forth this burden-shifting structure).

213. *Abbott*, 138 S. Ct. at 2324.

214. *See Arlington Heights*, 429 U.S. at 265–66 (“[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But . . . [w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.”).

215. *Arlington Heights* cites two additional factors relevant to the intent inquiry: “The specific sequence of events leading up to the challenged decision,” *Arlington Heights*, 429 U.S. at 267, and “[t]he legislative or administrative history,” *id.* at 268, relevant to the challenged decision. This Article does not examine these factors in any detail because they focus exclusively on the events surrounding the reenactment without any connection to what came before. To be sure, the factors this Article does discuss also focus on the substance and the process of the reenactment of the previous law. But the factors discussed in this Article nevertheless have a connection to the previously enacted law. The historical background factor obviously does. The

*D. Burden-Shifting and the Limits (and Promise) of the Arlington Heights
Analogy*

1. *The Mechanics of Arlington Heights Burden-Shifting*

The final component of the *Arlington Heights* framework is its burden-shifting structure. At the start of his discussion of the intent requirement, Justice Powell explained that the reality of legislative action—in particular, the fact that legislators and bureaucrats often operate under “broad mandate[s]”²¹⁶ authorizing them to consider many different factors when making a given decision—justifies excusing plaintiffs from having to prove that the alleged discrimination constituted the legislature’s sole motivation.²¹⁷ He continued that that same need to balance multiple, often-competing policy goals means that courts should usually defer to legislatures’ resolution of those conflicts.²¹⁸ However, he cautioned that “racial discrimination is not just [a] competing consideration.”²¹⁹ Thus, he concluded that introductory discussion by stating: “When there is a proof [*size*] that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference [to the legislature’s need to balance competing policy considerations] is no longer justified.”²²⁰

This discussion established the framework for the intent inquiry. Under that framework, the plaintiff bears the initial burden to show that the alleged intent was *a*—not *the*—factor motivating the legislature. Second, if the plaintiff makes that showing, the burden then shifts to the government to show that it would have made the same decision even had it lacked the discriminatory intent the plaintiff had just demonstrated.²²¹ Applying this framework to the animus cleansing context would allow reenactment of the animus-tainted law if the government could show that the legislature would have reenacted the law even absent the preexisting animus that persisted into the current iteration of the challenged law.

disparate impact factor inquires into the continuation of the previous law’s impact. Finally, this Article applies the procedural and substantive irregularity factors in ways that relate back to that previous law.

None of this is to say that the reenacting legislature’s own deliberations have no connection to the animus cleansing issue. Indeed, the discussion of the procedural irregularity factor explicitly considers whether the reenacting legislature “grapple[d] with” the law’s previous bad intent. *Carrillo-Lopez*, 555 F. Supp. 3d at 1026. But whether the reenacting legislature did in fact acknowledge or “grapple with,” *id.*, that intent is most coherently understood as part of the procedural irregularity factor. At any rate, even if the legislature history factor was discussed on its own, its relevance, for cleansing purposes, would be limited to the same discussion this Article provides as part of its procedural irregularity discussion.

216. *Arlington Heights*, 429 U.S. at 265.

217. *See id.*; *see also* *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (“It is difficult or impossible for any court to determine the ‘sole’ or ‘dominant’ motivation behind the choices of a group of legislators.”).

218. *Arlington Heights*, 429 U.S. at 265.

219. *Id.*

220. *Id.* at 265–66.

221. *See id.* at 270 n.21 (setting forth this structure).

2. Dissatisfaction with the Result?

The question is whether that final burden placed on the government is adequate. Some readers, including those who endorse or merely find acceptable the conventional *Arlington Heights* structure and the intent requirement it implements, may nevertheless find the just-suggested burden placed on the government to be unsatisfyingly light. That reaction may flow from the details of the government's action, for example, the alacrity with which a legislature reenacted a law a court had only recently condemned as grounded in animus.²²² It may also flow from the brute moral force of the previous law's grounding in animus, which may strike some readers as weighty enough to justify requiring more of the government when the legislature reenacts the same policy.²²³ As Kim Forde-Mazrui observes in his investigation of the cleansing issue, not all constitutional taints look alike.²²⁴ Some may reflect basically benign ideas that have become "outdated in light of changed cultural norms"²²⁵—for example, archaic notions of appropriate gender roles. Other times, however, those original ideas could be described as "cruel or immoral"²²⁶ or what we might describe as resting on animus.²²⁷ If that prior taint is indeed that problematic, one might reasonably prefer a rule demanding more of the government if the plaintiff establishes, via the *Arlington Heights* factors, that such seriously bad intent has persisted. On this theory, a finding that a law's predecessor was infected, not just with outdated ideas but animus, should impose a more onerous justificatory burden on a reenacting legislature.

But what could that more onerous burden look like? One might be tempted to require, as Professor Murray proposes, some type of government acknowledgement of and engagement with that preexisting animus.²²⁸ Such requirements are surely useful. But this Article's analysis already accounts for them as part of the plaintiff's *Arlington Heights*-grounded prima facie case. Thus, it already makes room for the government–defendant to argue at that initial phase of the litigation that it did indeed acknowledge and engage with that

222. See *supra* text accompanying notes 45-49 (noting this variable). Thanks to Rebecca Aviel for suggesting this point.

223. Cf. Forde-Mazrui, *supra* note 9, at 2394 (suggesting that courts may be more skeptical about a legislative reenactment of a previously unconstitutional law, despite the legislature's proffering of more legitimate reasons for the reenacted provision, when "the Court views a law's original purpose, even if legally tolerated at the time, as nonetheless cruel or immoral").

224. See *id.* at 2391–93.

225. *Id.* at 2393.

226. *Id.* at 2394.

227. See, e.g., *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1007 (D. Nev. 2021) (noting that Section 1326's predecessor was conceded by the Government to be racist).

228. See Murray, *supra* note 8, at 1241 ("[P]urgative reason-giving must reflect robust engagement with the tainted relationship."); see also Fish, *supra* note 117, at 1104–05 (discussing the appropriate impact of a reenacting legislature's acknowledgement or failure to acknowledge an earlier law's invidiousness on the reenacted law's constitutionality).

problematic legacy.²²⁹ When the plaintiff has already successfully made those arguments in making out her prima facie case, and thus presumably overcome any contrary government evidence,²³⁰ how (if at all) can the government attempt to make the same argument when the burden shifts to it at this second stage of the litigation?²³¹

Heightened scrutiny provides another tempting answer when searching for an appropriate burden to place on the government.²³² But problems lurk here as well. At least as conventionally understood, such scrutiny requires that the government's proffered reason constitute the actual reason the government acted as it did.²³³ If, by this point in the litigation, the plaintiff has shown that the government has failed to engage with the prior law's taint and sincerely adopt more legitimate justifications for the law,²³⁴ then it is hard to see how heightened scrutiny would lead to anything but a quick strike down of the reenacted law for failing the purpose prong of that scrutiny.²³⁵ Otherwise, we would be left with ostensibly heightened scrutiny that allowed the possibility of upholding the reenacted law because it furthered an important government interest that, by hypothesis, the government did not consciously embrace during its reenactment deliberations. At the very least, that sort of judicial review would reflect a new and odd variant of heightened scrutiny.²³⁶

229. See *supra* Subpart III.C.3.a; see also, e.g., *Cook v. Babbitt*, 819 F. Supp. 1, 20–22 (D.D.C. 1993) (considering evidence supporting both the plaintiff and the defendant when determining whether the plaintiff had shown the existence of unexplained procedural irregularities “which, if unexplained, would constitute a ‘departure from the normal procedural sequence’ within the meaning of *Arlington Heights*” (brackets omitted) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977))); 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF EVIDENCE* § 5122 (2d ed. 2005) (“[S]ince satisfying the burden of production means the case will go to the jury, as a practical matter the opponent may feel a need to introduce evidence to ensure that the jury does not find the evidence sufficient to justify a verdict.”).

230. See *supra* Subpart III.C.3.a; see also *Cook*, 819 F. Supp. at 20–22.

231. To be clear, this point is not a critique of Professor Murray's proposal, which does not employ the *Arlington Heights* structure and thus does not attempt to locate this requirement at any particular place in that structure. Instead, this point here is simply that, if one accepts the *Arlington Heights* framework as appropriate for the cleansing inquiry, this “acknowledgement and engagement” requirement cannot provide the content for what the government has to prove when the burden shifts to it.

232. See *Murray, supra* note 8, at 1197–98 (discussing heightened scrutiny in cleansing cases).

233. See, e.g., *United States v. Virginia*, 518 U.S. 515, 535–36 (1996) (explaining that sex discrimination can only be upheld based on a government's actual reasons for classifying based on sex); see also *Murray, supra* note 8, at 1240 (dismissing rational basis review as the proper response to reenactments of tainted laws given that such review allows courts to hypothesize any legitimate justification for the challenged law).

234. See *supra* Subpart III.C.3.a. (discussing that showing as one possible component of the plaintiff's prima facie showing).

235. See generally *Aviel, supra* note 8, at 969 (noting the importance to heightened scrutiny that the government's asserted justification be the one actually motivating the legislature).

236. To be sure, because legislative engagement with a law's preexisting animus is only one of the *Arlington Heights* factors in a cleansing case, it is technically possible that a legislature could fail to display that engagement yet still succeed in defeating the plaintiff's prima facie claim that a bad, uncleansed motive was a motivating factor for the law. But it would be an odd situation in which the legislature fails to grapple with such bad motives when reenacting a law but still succeeds in defeating what is, at least ostensibly, a relatively low hurdle for the plaintiff at the initial stage of the litigation.

3. *A Satisfactory Burden?*

The prior Subpart ended by suggesting that it might be difficult to develop a conceptually coherent but still meaningful burden to impose on the government when the plaintiff has succeeded in making her prima facie case that animus continued to infect a reenacted law. Alternatives to the *Arlington Heights* approach of insisting simply that the government establish that it would have made the same decision despite the persistent bad intent the plaintiff has shown seem to fail.²³⁷ But the *Arlington Heights* approach itself might strike some as insufficiently demanding when the intent in question is so problematic as to be fairly described as reflecting animus.

However, on reflection, *Arlington Heights*'s final but-for inquiry may indeed provide a meaningful final check on a legislature's reenactment of an animus-infected law whose taint remains uncleansed. The key here is to recognize that that final inquiry speaks less to the presence of the alleged bad intent than to its impact on the plaintiff. As Justice Powell noted in *Arlington Heights*, if the defendant carried that final burden, the plaintiff "no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose."²³⁸ Thus, by the time the litigation progresses to that final stage, the question is simply whether the bad intent or animus (or, in our case, the uncleansed animus) in fact caused the injury to the plaintiff, or whether that injury would have occurred even without it.²³⁹

Is this causation concept a meaningful limit on legislative reenactments of constitutionally problematic policies? Consider an example. In *United States v. Carrillo-Lopez*,²⁴⁰ the district court reached this final stage of the *Arlington Heights* process when deciding a challenge to the federal unlawful reentry statute.²⁴¹ At that stage, the Government argued that preservation of American citizens' economic competitiveness against foreign labor, national security, and foreign policy considerations all provided the required but-for justification for the 1952 Congress's reenactment of the animus-infected 1929 policy. The court, however, rejected those arguments, finding that they were all bound up in the underlying racism that infected the original 1929 policy and that the plaintiff's prima facie proof had shown remained uncleansed.²⁴²

237. See *supra* Subpart III.D.1–2.

238. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977).

239. See Young, *supra* note 1, at 205 (arguing that under *Arlington Heights*, "[t]he concern is whether the motive caused the action that caused a sort of harm that otherwise satisfies both standing law and the substantive requirements of a constitutional cause of action" (emphasis omitted)); Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 24 n.68 (1988) (noting *Arlington Heights*'s "contention that invidious motives have no constitutional significance if they are not causative factors in the enactment of legislation").

240. *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021).

241. *Id.* at 1022. The court had previously concluded, based in part on a cleansing inquiry, that the plaintiff had made out the prima facie case required by the first stage of *Arlington Heights*. See *id.* at 1003–22.

242. See *id.* at 1022–25.

The justifications the Government cited in *Carrillo-Lopez*—protecting Americans’ economic well-being, guarding national security, and promoting the nation’s goals abroad—are all, of course, legitimate. Indeed, in the context of an immigration statute, they are also quite intuitive. The court nevertheless found them to be too connected to the preexisting “racial animus” to serve as justifications truly separate from the uncleansed invidiousness the plaintiff demonstrated through his *prima facie* showing.²⁴³ Other cases finding the government to have failed to carry its burden at the final stage of the *Arlington Heights* inquiry have held that the government’s proffered alternative justifications were pretextual.²⁴⁴ Thus, in these situations, courts concluded that the government’s proffered alternative justifications either remained connected to the bad intent (or uncleansed animus) that the plaintiff demonstrated as part of his *prima facie* showing²⁴⁵ or were not real (i.e., were pretextual).²⁴⁶

Thus, the final *Arlington Heights* stage, if applied rigorously, may indeed be capable of imposing meaningful limits on the government’s ability to prevail notwithstanding the plaintiff’s *prima facie* showing of uncleansed animus. Indeed, if the plaintiff succeeds in making that *prima facie* showing, which includes elements such as persistent disparate impact and a failure to grapple with the law’s unsavory legacy, then a truly rigorous application of *Arlington Heights*’s burden-shifting might impose a formidable challenge on the government.

4. *Burden-Shifting, Animus, and a Unified Approach to Equal Protection*

This proposed approach to burden-shifting may carry one final, broader benefit. Fully applying the *Arlington Heights* framework to the animus cleansing inquiry creates an even tighter doctrinal connection between animus and the discriminatory intent to which *Arlington Heights* speaks. That connection would help cement an appropriate place for animus within equal protection doctrine. More speculatively—and perhaps surprisingly—cementing that place may create space for more diverse approaches to equal protection.

243. *Id.* at 1023 (economic competitiveness); *id.* at 1023–24 (national security); *id.* at 1024–25 (foreign relations).

244. *See, e.g., Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 553–54 (S.D.N.Y. 2006).

245. *Cf. Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) (“Where a law otherwise is untethered to racial bias . . . the new law may well be free of discriminatory taint.”).

246. Indeed, conclusions about the pretextual nature of those alternative justifications suggest the same kind of tethering of the government’s action to the bad intent the plaintiff successfully showed in his *prima facie* case. *See, e.g., Doe*, 462 F. Supp. 2d at 554 (“The evidence, viewed as a whole, makes it clear that the Village’s claim that defendant[’s] [–police force’s] actions were driven by legitimate law enforcement concerns is a pretext dreamed up to try to legitimate its activity in opposition to the presence of [Latino] day laborers [alleging race-based police harassment]. Ultimately, this conclusion [about pretext] rests on the clear contradiction between defendants’ conclusory testimony that their [law enforcement] campaign was not race-based and the hard facts, which indicate that it was.”).

To begin, recall that the entire point of the *Arlington Heights* inquiry is not to directly decide the constitutionality of a given government action. Instead, that inquiry seeks to determine whether the government action, though facially neutral, should nevertheless be understood as an instance of the type of discrimination the plaintiff alleges—in most cases, race²⁴⁷ or sex²⁴⁸ discrimination. An affirmative determination—that is, a decision that the law in question does in fact reflect, say, sex discrimination—does not automatically condemn that decision to invalidation. Instead, it merely triggers the level of judicial scrutiny appropriate for the type of discrimination the *Arlington Heights* inquiry has uncovered.²⁴⁹ While that scrutiny would likely be fatal,²⁵⁰ a final strike down of the action should await the application of that level of scrutiny.

An animus finding may be different. Scholars have wondered whether an animus determination should constitute, as Susannah Pollvogt calls it, “a doctrinal silver bullet”²⁵¹ that necessarily requires invalidation of the challenged law. The prevailing view seems to be that animus is in fact a flat-out constitutional wrong that requires invalidation of the infected law, rather than a factor, even a strong one, militating against the law but nevertheless one that could conceivably be outweighed by a sufficiently strong government justification.²⁵² Nevertheless, both scholars²⁵³ and Supreme Court justices have shown ambivalence on this point.²⁵⁴

247. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–71 (1977) (considering whether a locality’s zoning decision in fact constituted race discrimination).

248. See, e.g., *Pers. Adm’r v. Feeney*, 442 U.S. 256, 274–81 (1979) (considering whether a state’s civil service preference for veterans in fact constituted sex discrimination).

249. See *Arlington Heights*, 429 U.S. at 270 n.21.

250. Not only are race and sex classifications subject to heightened scrutiny but, perhaps ironically, the added implications of the law’s facial neutrality may make it even more likely that that facially neutral conduct exposed as sex or race discrimination would be struck down. This is because in order for such discrimination to survive, the government must offer real justifications for the law, not merely hypothesized ones as is acceptable for rational basis review. Instead, what is required are real justifications that reflect the government’s awareness that it is using a suspect classification tool and its sincere conclusion that use of that tool was truly necessary to achieve an unusually important goal. See *supra* note 233 (citing a case that stands for this proposition). Given these requirements, one can easily imagine how difficult it would be for the government to claim at the first stage of the *Arlington Heights* inquiry that a facially neutral law in fact did not classify on the alleged ground but then, upon losing that argument, to claim that the legislature forthrightly confronted the fact it *was* using the alleged classification tool and sincerely concluded that an overriding public interest required that it do so. See Araiza, *supra* note 14, at 192 n.3 (stating this point). Still, because at least theoretically the *Arlington Heights* inquiry leaves one final opportunity for the government to prevail even if it loses on the intent question—that is, when the court applies heightened scrutiny—the text uses the qualifier “likely.”

251. Pollvogt, *supra* note 65, at 889.

252. See *id.*; Carpenter, *supra* note 65, at 221. *But see id.* at 231–32 (arguing that an animus finding should not cause the strike down of a law unless it “materially influenced” the legislative outcome). As will become clear from the text, this view is one that I have largely adopted. See *infra* text accompanying note 260.

253. See, e.g., Pollvogt, *supra* note 65.

254. In her concurring opinion in *Lawrence v. Texas*, Justice O’Connor, who relied on an animus theory to strike down Texas’s sodomy law in that case, wrote the following about the canonical animus cases that had been decided up to that point: “When a law exhibits [the requisite] desire to harm a politically unpopular

This ambivalence raises questions about the coherence of providing the government with *Arlington Heights's* final chance to rebut the plaintiff's prima facie showing when that showing reveals uncleansed animus. Should the government be allowed that final chance to show it would have made that same decision absent the intent the plaintiff has proven when that intent takes the form of animus? To restate that question, if animus really is “a doctrinal silver bullet,”²⁵⁵ should the plaintiff's showing that that “silver bullet” at least partially motivated the government suffice to end the case in the plaintiff's favor without giving the government a final chance to prove that it would have made the same decision even had it lacked that animus?

The answer may be a (relatively) simple one. In other writing, I have argued that a conventional animus inquiry (i.e., an inquiry that does not feature preexisting stains to be cleansed) should end with the equivalent of a shift in the evidentiary burden to the government.²⁵⁶ In such an inquiry, that final burden-shift gives the government a chance to show that the government was truly pursuing a legitimate public purpose rather than a purely private-regarding interest, such as “a bare . . . desire to harm a politically [powerless] group.”²⁵⁷ I have further argued that in the canonical animus cases, that burden imposed on the government manifests via the stricter-than-normal rational basis review that characterizes those cases.²⁵⁸

That same dynamic justifies an analogous final burden-shift in animus cleansing cases. Recall that the ultimate intent question in a cleansing case is the same as in a conventional intent case where preexisting animus is not an issue. In both cases, the question is whether the legislature that, respectively, reenacted or initially enacted the challenged law acted on the problematic intent.²⁵⁹ Thus, if the government in a conventional case has the final opportunity to establish that promotion of a legitimate goal would have prompted the challenged action, it should have a similar opportunity in a cleansing case. It therefore follows that in a cleansing case, the plaintiff's prima

group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.” *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment). Justice O'Connor's careful word choice leaves unanswered whether she meant to say that such “searching” review necessarily leads to a strike down, or whether it has just so happened that in the cases where the Court has applied such review it has struck down the challenged law, thus leaving open the possibility of a different result in a future case.

255. See Pollvogt, *supra* note 65, at 889.

256. See ARAIZA, *supra* note 14, at 139–43.

257. U.S. Dep't of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973); see also Andrew T. Hayashi, *The Law and Economics of Animus*, 89 U. CHI. L. REV. 581, 584 (2022) (“[E]conomic analysis traditionally and generally proceeds from the assumptions that individuals pursue their (narrowly construed) self-interest and are indifferent to the effects of their actions on the welfare of other people.”). After explaining such assumed indifference, Professor Hayashi then recognized that animus goes beyond that that indifference. See *id.* (“In a time of pervasive animus, would that it were so. The dismal science is not, apparently, dismal enough.”).

258. See *supra* notes 66–67 and accompanying text.

259. See *supra* text accompanying note 25 (explaining that in a cleansing case, the relevant inquiry is that of the reenacting legislature, not the legislature that originally enacted the problematic law).

facie showing does not conclusively prove that the preexisting animus prompted the challenged reenactment. Instead, that conclusion must await the evaluation of any government argument that regardless of any animus that might have lingered uncleansed, a public-regarding reason provided an independently sufficient reason for the legislature to have reenacted the tainted provision.²⁶⁰

Under this approach, then, animus retains its status as a *per se* constitutional wrong—“a doctrinal silver bullet,” to use Professor Pollvogt’s term.²⁶¹ However, the final shift in the proof burden remains necessary to determine whether animus in fact caused the discriminatory harm—or, to phrase it conversely, whether the plaintiff was in fact the victim of animus.²⁶² As this Article stated early on,²⁶³ in a cleansing case, that determination turns in large part on a subsidiary conclusion of whether the legislature failed to cleanse any preexisting animus. But regardless of whether the case involves a cleansing inquiry or a conventional animus issue, the final stage of the court’s analysis should ask whether the challenged action in fact flowed from the bad intent the plaintiff showed in its *prima facie* case. In this way, the structure of an animus cleansing case is made to parallel the structure of a conventional animus case, which, I have argued,²⁶⁴ is in turn analogous to a non-animus-grounded discriminatory intent case. This harmonization helps to unify the structure of equal protection law, locating animus within that structure while also recognizing that different types of discrimination may call for different judicial decision rules. Indeed, the variety of such rules may well include some that do not focus on intent at all.²⁶⁵

260. See, e.g., *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1022–27 (D. Nev. 2021) (considering government claims of this sort); see also *supra* Subpart III.D.3. (demonstrating that this inquiry can be a meaningful one).

261. See Pollvogt, *supra* note 65, at 889.

262. Cf. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (explaining that if the government–defendant can demonstrate at the final stage of the inquiry “that the same decision would have resulted even had the impermissible purpose not been considered . . . the complaining party . . . no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose”).

263. See *supra* text accompanying note 25.

264. See *supra* Part II.

265. See Kenneth L. Karst, Foreword, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 51 (1977) (“If we were talking about some new form of discrimination—say, discrimination against persons with red hair, or discrimination against whites—then the ‘purpose’ doctrine would make eminent sense, as would its corollary view that stigmatic harm can result only when there is a purpose to cause it. But in America today, where the problem of racism is the problem of eliminating a long-established stigma of inferiority—that is, a day-to-day assumption by many among us that some of our citizens are not quite persons—it is as plain as a cattle prod that we are talking about something quite different.”); see also William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 WM. & MARY L. REV. 435, 467–68 (2013) (making this point in the context of a discussion of the equal protection “class-of-one” doctrine).

CONCLUSION

As promised at the outset, this Article's thesis is straightforward. Because animus, like other species of bad intent, is properly uncovered via *Arlington Heights*'s analysis, the animus cleansing inquiry can benefit from that same analysis. Still, as the Article has demonstrated, the application of both that case's factors and its burden-shifting structure raise complex questions. Nevertheless, this Article has attempted to show how those doctrinal components, as reflections of a holistic and context-sensitive inquiry, can respond to common-sense intuitions about discriminatory intent. It has also attempted to show how applying those components to the specific issue of animus cleansing can help unify equal protection intent doctrine.

That last point raises a deeper normative question—namely, whether intent doctrine *should* be buttressed in this way.²⁶⁶ While that question lies far beyond this Article's intended scope, it merits noting that this Article's analysis raises the prospect of a more nuanced and contextual approach to the intent issue. Indeed, the very task of applying *Arlington Heights* to the animus cleansing inquiry requires such nuance and context sensitivity. By recognizing that case's adaptability to different contexts, analyses such as this Article's may help in the project of reclaiming *Arlington Heights* as a usable tool to combat a variety of different ills.²⁶⁷ While that reclamation may not satisfy those who find the very idea of intent unsuitable for the task of making good on the Equal Protection Clause's promise, it nevertheless offers a way to fix much of what scholars of many different stripes have identified is wrong with current equal protection law.

266. See *supra* text accompanying notes 18-24 (acknowledging this issue).

267. See *supra* text accompanying notes 31-33.