

# ANIMUS AND ITS DISTORTION OF THE PAST

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## ANIMUS AND ITS DISTORTION OF THE PAST

Joy Milligan\*

## INTRODUCTION

Do legal concepts alter how we understand the past and present?

The jurisprudence of race suggests that they do.<sup>1</sup> For several decades, federal courts have distorted America's racial history by relying on a misleading legal conception of discrimination. That concept defines illegitimate discrimination as driven solely by subjective ill will. In the Supreme Court's evocative phrasing, such animus consists of "a bare . . . desire to harm a politically unpopular group."<sup>2</sup> By requiring litigants to prove that a decision maker has chosen to act "at least in part 'because of'" the harms they will inflict upon a particular group, the Court has made animus a prerequisite for most constitutional discrimination claims.<sup>3</sup> Animus is inherently subjective and fleeting, localized in the mind of an individual.<sup>4</sup>

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1. See Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 488 (2010) (surveying "an emerging genre of sociological scholarship that explores how law and race construct each other").

2. 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, 628 (2022) ("A broader definition of animus allows for motives other than mere prejudice, including animus arising from moral disapproval or fear."); Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1215, 1240–45 (2017) (arguing that the Supreme Court has not settled on a unified definition of discriminatory intent and discussing animus as one subcategory of that intent).

3. Pers. Adm't v. Feeney, 442 U.S. 256, 279 (1979); see Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1833–37 (2012) (critiquing *Feeney's* introduction of a "malice" requirement for discrimination claims). Other prominent critiques of the Supreme Court's animus doctrine in the race context include Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

4. E.g., *Staub v. Proctor Hosp.*, 562 U.S. 411, 417–18 (2011) (equating "discriminatory animus" with a "malicious mental state" in the Title VII context); see also William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 183–84, 191–92 (2019) [hereinafter Araiza, *Animus*] (suggesting that "objective, institution-focused evidence" should ground findings of animus, while acknowledging that "subjective intents remain relevant"); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 185–186 (2016) (describing the "thick" version of animus as including not just "active hostility" but also "stereotyping and implicit and structural biases"); cf. William Araiza, Regents: *Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983, 987 (2021) [hereinafter Araiza, Regents] (describing "subjective ill will" as the "common understanding of 'animus'"); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 926 (2012) (arguing for an objective, rather than subjective, definition of animus).

The concept of animus has helped courts recharacterize U.S. racial discrimination as having occurred long ago, inflicting distant harms that have long since been cured or simply dissipated. Based on such depictions, courts have increasingly rejected government attempts to use race-based measures to redress past discrimination.

Although the Supreme Court has affirmed that government entities have a compelling interest in remedying their own past discrimination, which justifies using narrowly tailored race-based methods, that doctrinal truism has become increasingly illusory in practice.<sup>5</sup> Courts instead describe discrimination as an ephemeral phenomenon of the past, insufficient to give government any legitimate interest in addressing inequality now.<sup>6</sup>

Recent examples indicate that some courts believe even overt, legally entrenched Jim Crow practices of racial subordination and segregation no longer justify racial remedies.<sup>7</sup> Thus, in summer 2021, four different district courts rejected the federal government's interest in repairing its past practices of race-based economic disenfranchisement against Black and other minority farmers.<sup>8</sup> Acknowledging the federal record as a "sad history" and a "dark history," and one that is "undisputed," those courts nonetheless found that the government lacked any sufficient interest in addressing that past.<sup>9</sup> The last court to rule wrote that all three prior decisions had "rejected systemic racial discrimination as a compelling state interest to support race-based legislation."<sup>10</sup>

If the government's own systemic racial discrimination cannot be the premise for racial remedies, perhaps nothing can. In this Essay, I argue that a long-term movement opposing remedies for racial inequality has culminated in this moment of near-absurdity—when Jim Crow itself is not sufficiently

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5. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (stating that "our prior cases . . . have recognized . . . the compelling interest of remedying the effects of past intentional discrimination"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part); see also Chris Chambers Goodman & Natalie Antounian, *Dismantling the Master's House: Establishing a New Compelling Interest in Remedying Systemic Discrimination*, 73 HASTINGS L.J. 437, 440, 455–59 (2022) (arguing that remedying institutional discrimination should fit within the acknowledged compelling interest of remedying past discrimination).

6. See *infra* Parts I, II.

7. On the history of government-sponsored racial oppression and exclusion in the post-Reconstruction United States (or "Jim Crow" and its permutations), see generally DAVISON M. DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954* (2005); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955); DESMOND KING, *SEPARATE AND UNEQUAL: AFRICAN AMERICANS AND THE US FEDERAL GOVERNMENT* (rev. ed. 2007).

8. See *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1294–95 (M.D. Fla. 2021) (enjoining the loan forgiveness program); *Holman v. Vilsack*, No. 21-1085, 2021 WL 2877915, at \*13–14 (W.D. Tenn. July 8, 2021) (same); *Miller v. Vilsack*, No. 4:21-CV-0595, slip op. at 23 (N.D. Tex. July 1, 2021) (same); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 478 (E.D. Wis. 2021) (imposing a temporary restraining order).

9. *Holman*, 2021 WL 2877915, at \*6; *Wynn*, 545 F. Supp. 3d at 1279; *Faust*, 519 F. Supp. 3d at 475–76; *Miller*, slip op. at 16–17.

10. *Holman*, 2021 WL 2877915, at \*6.

cognizable as “discrimination” to warrant repair.<sup>11</sup> That movement against remedies is deeply intertwined with courts’ embrace of the concept of “animus,” which restricts the forms of harm that the courts will recognize as illegitimate discrimination.

Animus doctrine has helped courts render past discrimination invisible, irrelevant, and unrecognizable. In doing so, the doctrine makes it extremely difficult, if not impossible, to remedy the core wrongs of America’s past. While animus doctrine in recent decades has played a positive role in bringing about victories for the LGBTQ community and people with disabilities, I argue that the concept itself is a risky, unreliable foundation for lasting gains.<sup>12</sup> The hunt for animus may easily distract from and undermine deeper social reform.

Part I begins by probing recent rulings rejecting federal support for Jim Crow in farm programs as a basis for remedial measures. This part shows how those decisions relied on the animus conception of discrimination to dismiss systemic racial exclusion that was explicitly enshrined in federal law and policy.

Part II traces the various ways in which courts have erased past histories of racial discrimination as part of a longer movement against racial remedies. Courts rely upon the passage of time, defendants’ claims of good faith, and even the sheer magnitude of past oppression to deem past wrongs no longer relevant or linked in any way to the present. Those judicial strategies rest on an understanding of discrimination as animus—i.e., as manifesting only in a particular individual’s subjective ill will toward others, a harm that is atomized, transient, and easily repaired.

Part III argues that these jurisprudential moves are not only devastating for racial justice, but also a warning for other movements. Animus doctrine is malleable and contingent, often existing only in the eye of the beholder; it can easily support either side of a conflict, depending on the judge’s sympathies.<sup>13</sup> Moreover, it is readily weaponized to diminish and deny histories of oppression. Those who currently rely upon it should proceed with caution.

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11. On the power of animus doctrine to legitimate even Jim Crow, see Haney-López, *supra* note 3, at 1847–53.

12. See *United States v. Windsor*, 570 U.S. 744, 749–52 (2013); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–50 (1985); see also Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 187–88, 207–21 [hereinafter Carpenter, *Windsor Products*] (tracing animus doctrine’s development and significance for gay rights and disability rights); cf. Dale Carpenter, *The Dead End of Animus Doctrine*, 74 ALA. L. REV. 585, 600–32 (2023) [hereinafter Carpenter, *The Dead End*] (analyzing federal courts’ jurisprudence since 2013 and concluding that animus doctrine’s promise has stalled over the last decade).

13. See Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 285 (“The disposition of *Masterpiece Cakeshop* makes clear the malleability of animus—and the antidiscrimination narrative more generally.”).

## I. JIM CROW DISMISSED

To understand the recent push to repair Jim Crow in federal farm programs, a brief history is needed.

American farm policy remained segregated and unequal long after slavery ended.<sup>14</sup> From the time of the Civil War onward, the U.S. government built an elaborate set of programs and institutions that shaped American farmers' livelihoods, beginning with the creation of the state land-grant universities to provide agricultural education and research.<sup>15</sup> Those universities were later combined with research stations, extension programs, and, from the Great Depression onward, more far-reaching agricultural subsidies and supports.<sup>16</sup>

Black farmers had little access to those crucial supports, which were racially segregated and unequal when they were offered to them at all.<sup>17</sup> Halting change finally began in the 1960s, but the U.S. Department of Agriculture's (USDA) units and their state and local partners resisted nondiscrimination mandates for decades afterward.<sup>18</sup> From 1914 forward, Black farmers' share among all farmers fell dramatically and they lost at least 10 million acres of land.<sup>19</sup>

Finally, Black farmers' activism spurred a dramatic civil rights investigation during the Clinton administration as well as a successful discrimination lawsuit against the USDA, *Pigford v. Glickman*.<sup>20</sup> Black farmers who could present evidence that they had suffered due to past lending discrimination received a series of settlements.<sup>21</sup> The amounts involved, however, were not at a scale that

14. See Joy Milligan, *Protecting Disfavored Minorities: Toward Institutional Realism*, 63 UCLA L. REV. 894, 927–48 (2016) (describing the long history of overt segregation and discrimination in federal farm programs).

15. See Morrill Act, ch. 30, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. §§ 301–302); An Act to Establish a Department of Agriculture, ch. 72, 12 Stat. 387 (1862) (codified as amended at 7 U.S.C. § 2201); Second Morrill Act, ch. 841, 26 Stat. 417 (1890) (codified as amended at 7 U.S.C. §§ 322–323).

16. See Smith-Lever Act, ch. 79, 38 Stat. 372 (1914) (codified as amended at 7 U.S.C. §§ 341–345, 347a, 348, 349); Hatch Act of 1887, ch. 314, 24 Stat. 440 (codified as amended at 7 U.S.C. §§ 361a–361b); see also William P. Browne, *Benign Public Policies, Malignant Consequences, and the Demise of African American Agriculture, in AFRICAN AMERICAN LIFE IN THE RURAL SOUTH, 1900–1950*, at 131, 131–34, (R. Douglas Hurt ed., 2003).

17. See U.S. COMM'N ON C.R., EQUAL OPPORTUNITY IN FARM PROGRAMS 25–38 (1965).

18. See *Decline of Minority Farming in the United States: Hearing before the Gov't Info., Just., and Agric. Subcomm. of the H. Comm. on Gov't Operations*, 101st Cong. 27 (1990); COMM. ON GOV'T OPERATIONS, THE MINORITY FARMER: A DISAPPEARING AMERICAN RESOURCE; HAS THE FARMERS HOME ADMINISTRATION BEEN THE PRIMARY CATALYST, H.R. REP. NO. 101-984, at 37–39 (1990); S. RURAL RSCH. PROJECT, THE EXTINCTION OF THE BLACK FARMER IN ALABAMA (1968); PAMELA BROWNING ET AL., U.S. COMM'N ON C.R., THE DECLINE OF BLACK FARMING IN AMERICA 135–76 (1982).

19. See VERA J. BANKS, U.S. DEP'T OF AGRIC., BLACK FARMERS AND THEIR FARMS 2 tbl.1 (1986); Dania V. Frances et al., *Black Land Loss: 1920–1997*, 112 AEA PAPERS AND PROC. 38, 38–39, 39 fig.1 (2022); Jess Gilbert et al., *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity*, RURAL AM., Winter 2002, at 55, 55.

20. On Black farmers' protests, see Robert Greene, *Agriculture Department Creates Civil Rights Team*, CHARLOTTE OBSERVER, Dec. 13, 1996, at 8A; Bob Hohler, *Black Farmers March in D.C.*, BOS. GLOBE, Dec. 13, 1996, at A32. For the USDA's report on its investigation, see C.R. ACTION TEAM, U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE (1997).

21. As to the litigation, see *Pigford v. Glickman*, 185 F.R.D. 82, 95 (D.D.C. 1999) (approving consent decree). A second settlement for African American farmers (created because the first settlement's notice

could come anywhere close to repairing a century-plus of structural racial exclusion.<sup>22</sup> Further, the lending discrimination in question was specifically limited to post-1980 discrimination in a subset of USDA programs; relief was further limited by evidentiary requirements set up within the claims process.<sup>23</sup> Most of the long historical record of federal farm programs' discrimination went unaddressed by the *Pigford* settlements.

More recently, a new remedial measure was directed at Black farmers. In the American Rescue Plan Act (ARPA), the COVID-relief legislation enacted in March 2021, a less-noticed provision provided loan forgiveness for farmers with outstanding USDA loans.<sup>24</sup> That forgiveness was available only to “socially disadvantaged” farmers, a term the USDA interpreted to include Black, American Indian, Alaskan Native, Hispanic, Asian, and Pacific Islander farmers.<sup>25</sup>

In enacting the ARPA loan forgiveness program, Congress explicitly explained that it wished to help cure a long history of racial discrimination within federal farm agencies, citing multiple sources of evidence buttressing that

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process was inadequate, excluding thousands of claimants) was finalized in 2011. *See* Claims Resolution Act of 2010, Pub. L. 111-291, 124 Stat. 3064 (appropriating funds); *In re* Black Farmers Discrimination Litigation, 856 F. Supp. 2d 1, 26–27 (D.D.C. 2011) (approving settlement).

22. One organization estimated total U.S. farm subsidies at \$477.9 billion between 1995–2021. *See The United States Farm Subsidy Breakdown, 1995–2021*, ENV'T WORKING GRP., <https://farm.ewg.org/region.php?fips=00000&regionname=theUnitedStates> (last visited Feb. 25, 2023). In the *Pigford* settlements, Black farmers received less than \$2.2 billion across both settlements—an amount less than 0.5% of all farm subsidy payments made over just the last twenty-five years. *See* TADLOCK COWAN & JODY FEDER, CONG. RES. SERV., RS20430, THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 7 (2013) (estimating payments under first settlement at \$1.06 billion); Preliminary Final Acct. – Corrected, Aug. 15, 2023 at 1, 2, *In re* Black Farmers Discrimination Litigation, No. 1:08-mc-00511, 2013 WL 4507951 (D.D.C. Aug. 15, 2013), <https://www.blackfarmcase.com/Documents/Preliminary%20Final%20Accounting%20Report.pdf> (estimating payments under second settlement at \$1.10 billion). It is hard to see how payments on that order could compensate for a century-plus of federal discrimination, which ousted and deterred Black farmers from acquiring, maintaining, or expanding their land holdings, and thus from ever becoming eligible for most of the \$20 billion in farm subsidies paid out annually.

23. To permit the litigation to proceed, Congress waived the statute of limitations on the farmers' claims but only to cover farm-lending discrimination occurring from January 1, 1981 onward and within only specified programs. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105–277, 112 Stat. 2681, 2681–30–31 (1998) (codified as amended at 7 U.S.C. § 2279 note (Waiver of Statute of Limitations)). Congress chose that time limitation based on evidence that USDA civil rights enforcement had stopped functioning in that period. *See* C.R. ACTION TEAM, *supra* note 20, at 47; Pamela Stallsmith, *Ignored Since '83, Complaints Will Need New Investigation*, RICHMOND TIMES-DISPATCH, May 25, 1997, at A1.

24. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005, 135 Stat. 4, 12–13 (2021) [hereinafter ARPA].

25. ARPA incorporated an existing statutory definition of a socially disadvantaged group, defined as one “whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.” 7 U.S.C. § 2279(a)(6). The Agency interpreted the statute to include “American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos.” Notice of Funds Availability; American Rescue Plan of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28329, 28330 (May 26, 2021).

history.<sup>26</sup> It is very difficult to gainsay that history, given that farm programs were explicitly racially segregated for nearly a century, including by legislation, regulations, and other formal policies.<sup>27</sup> Those programs were also unequal in very obvious ways, violating even *Plessy*'s mandate of "separate but equal."<sup>28</sup> A 1965 report by the U.S. Commission on Civil Rights amply documented widespread race discrimination, as did another report in 1982.<sup>29</sup>

After ARPA's enactment, half a dozen conservative groups quickly filed a dozen suits challenging the debt relief measures as illegal race-based discrimination.<sup>30</sup> Within a few months of the legislation's enactment, four courts enjoined the program.<sup>31</sup>

Past precedent indicated that under strict scrutiny, these race-based measures had to meet two prongs.<sup>32</sup> First, the government had to show a compelling interest.<sup>33</sup> As noted above, Supreme Court precedent indicates that a government actor has a compelling interest in remedying its own past intentional racial discrimination.<sup>34</sup> Second, the measures had to be narrowly

26. See H.R. REP. NO. 117-7, at 12 (2021); see also Defendant's Brief in Support of Defendant's Motion for Summary Judgment at 1–2, *Miller v. Vilsack*, No. 21-00595 (N.D. Tex. dismissed Aug. 29, 2022) (describing congressional deliberations regarding past discrimination).

27. See Milligan, *supra* note 14, at 927–48.

28. See *id.*; cf. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1952).

29. See U.S. COMM'N ON C.R., *supra* note 17; BROWNING ET AL., *supra* note 18.

30. See Complaint, *Nuest v. Vilsack*, No. 0:21-CV-01572 (D. Minn. dismissed Sept. 19, 2022) (filed by attorneys with the Upper Midwest Law Center); Complaint, *Tiegs v. Vilsack*, No. 3:21-CV-00147 (D.N.D. dismissed Sept. 8, 2022) (filed by attorneys with the Pacific Legal Foundation); Complaint, *Rogers v. Vilsack*, No. 1:21-CV-01779 (D. Colo. June 29, 2021) (filed by attorneys with the Mountain States Legal Foundation); Complaint, *Dunlap v. Vilsack*, No. 2:21-CV-00942 (D. Ore. dismissed Sept. 7, 2022), 2021 WL 2621520 (filed by attorneys with the Pacific Legal Foundation); Complaint, *Joyner v. Vilsack*, No. 1:21-CV-01089 (W.D. Tenn. dismissed Sept. 15, 2022), 2021 WL 2450042 (filed by attorneys with the Liberty Justice Center); Complaint, *McKinney v. Vilsack*, 2:21-CV-00212 (E.D. Tex. dismissed Oct. 18, 2022) (filed by attorneys with the Pacific Legal Foundation); Complaint, *Kent v. Vilsack*, No. 3:21-CV-00540 (S.D. Ill. dismissed Aug. 30, 2022) (filed by attorneys with the Pacific Legal Foundation); Complaint, *Holman v. Vilsack*, No. 1:21-CV-01085 (W.D. Tenn. dismissed Sept. 15, 2022) (filed by attorneys with the Mountain States Legal Foundation and the Southeastern Legal Foundation); Complaint, *Carpenter v. Vilsack*, No. 21-CV-103 (D. Wyo. dismissed Oct. 7, 2022) (filed by attorneys with the Mountain States Legal Foundation and the Southeastern Legal Foundation), *appeal docketed*, No. 22-8079 (10th Cir. Nov. 29, 2022); Complaint, *Wynn v. Vilsack*, No. 3:21-CV-514 (M.D. Fla. dismissed Sept. 13, 2022) (filed by attorneys with the Pacific Legal Foundation); Complaint, *Faust v. Vilsack*, No. 1:21-CV-00548 (E.D. Wis. dismissed Sept. 12, 2022) (filed by attorneys with the Wisconsin Institute for Law & Liberty); Complaint, *Miller v. Vilsack*, No. 4:21-CV-00595 (N.D. Tex. dismissed Aug. 29, 2022) (filed by attorneys with the America First Legal Foundation).

31. See *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1294–95 (M.D. Fla. 2021) (enjoining the loan forgiveness program); *Holman v. Vilsack*, No. 21-1085, 2021 WL 2877915, at \*13–14 (W.D. Tenn. July 8, 2021) (same); *Miller v. Vilsack*, No. 4:21-CV-0595, slip op. at 23 (N.D. Tex. July 1, 2021) (same); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 478 (E.D. Wis. 2021) (issuing a temporary restraining order to halt the loan forgiveness program).

32. See *Adarand Constructors v. Peña*, 515 U.S. 200, 235 (1995).

33. *Id.*

34. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and in judgment).

tailored to meet that goal.<sup>35</sup> Of the two prongs, the “narrow tailoring” requirement has been the most challenging hurdle for race-based programs.<sup>36</sup> For the ARPA provisions, that seemed likely to be the key test. Tracing exactly how a century of overt racial exclusion can be understood to have shaped the present and specifying what calibrated remedies should look like are challenging tasks.<sup>37</sup>

What made the district court decisions so striking was that they did not focus solely on the narrow-tailoring issues. Rather, the courts questioned or rejected the possibility that the United States might have a compelling interest in remedying its own past race discrimination in farm programs at all.<sup>38</sup> That conclusion is, quite simply, mind-boggling given the history.

None of the courts claimed that discrimination had not occurred. The decisions contained statements like this:

It is undisputed that the USDA has a sad history of discriminating against certain groups of farmers based on their race. The evidence in the record reveals systemic racial discrimination by the USDA . . . throughout the twentieth century which has compounded over time, resulting in bankruptcies, land loss, a reduced number of minority farmers, and diminished income for the remaining minority farmers.<sup>39</sup>

Another court stated: “It is undeniable—and notably uncontested by the parties—that USDA had a dark history of past discrimination against minority farmers.”<sup>40</sup> Yet, those courts found a compelling interest in remedying that history lacking.<sup>41</sup>

The most troubling move that these courts made rested on a key phrase from a different decision—a May 2021 decision by the United States Court of Appeals for the Sixth Circuit, just shortly before these decisions. That case, *Vitolo v. Guzman*, involved conservative legal groups’ challenge to another race-conscious provision in ARPA that prioritized minority and women restaurant owners for grants to relieve payroll and other expenses.<sup>42</sup>

*Vitolo’s* context dramatically differed from farming. It involved a private industry, restaurants, in which the federal government did not have the same well-documented, overt role in subsidizing the entire sector nor in segregating

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35. *Adarand*, 515 U.S. at 237.

36. *E.g.*, *Parents Involved*, 551 U.S. at 733–34 (invalidating race-based school integration measures as insufficiently tailored); *Gratz v. Bollinger*, 539 U.S. 244, 270–75 (2003) (invalidating undergraduate admissions program’s use of race as insufficiently tailored).

37. *See Paradise*, 480 U.S. at 171 (describing factors affecting narrow tailoring determination).

38. *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1279–81 (M.D. Fla. 2021); *Holman v. Vilsack*, No. 21-1085, 2021 WL 2877915, at \*6 (W.D. Tenn. July 8, 2021); *Miller v. Vilsack*, No. 4:21-CV-0595, slip op. at 16–17 (N.D. Tex. July 1, 2021); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 475–76 (E.D. Wis. 2021).

39. *Holman*, 2021 WL 2877915, at \*6.

40. *Wynn*, 545 F. Supp. 3d at 1279.

41. *Id.*; *Holman*, 2021 WL 2877915, at \*6.

42. *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021).



and excluding minority participants as it did in farming.<sup>43</sup> Justifying the federal government's compelling interest in the restaurant-focused measures was thus more difficult because the glaring history of discrimination was lacking.

For the ARPA farm decisions, *Vitolo's* import lay in an unfortunate doctrinal gloss. The Sixth Circuit, in considering the Government's argument that it had a compelling interest in avoiding being a "passive participant" in private actors' discrimination, used an infelicitous way to describe past doctrine. According to the *Vitolo* majority, a remedial measure must "target a specific episode of past discrimination."<sup>44</sup> The panel explained that remedies "cannot rest on a 'generalized assertion that there has been past discrimination in an entire industry.'"<sup>45</sup> Insofar as the Sixth Circuit meant to state the well-established rule that the government has no compelling interest in remedying general societal discrimination, it did not go astray.<sup>46</sup> The panel's language also was accurate insofar as it indicated that even when the government attempts to avoid passive participation in others' discrimination, it must have relatively specific evidence of that discrimination.<sup>47</sup>

But the court's usage of the phrase "specific episode" was potentially misleading. The phrase suggested—consistent with many versions of the animus model—that reviewing courts must be on the hunt for a very particular moment in time when a decision maker consumed with racial prejudice acted to hurt minority groups.<sup>48</sup> Further, the phrase suggested that current policymakers are constrained only to cure such "specific episodes," or such moments of ill will.<sup>49</sup>

The Sixth Circuit's misleading turn of phrase took on an even more unfortunate meaning in the decisions considering federal farm loan forgiveness. Several of the district courts cited *Vitolo* for the theory that even a remarkably overt and well-documented history of discrimination by the government actor at issue—by the USDA and its agencies themselves—somehow fell short unless it could be described as a "specific episode."<sup>50</sup>

What would that specific episode look like? The passage of the 1890 Morrill Act, in which Congress knowingly blessed the creation of a racially segregated land-grant university system, which came to serve as the backbone for many

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43. *Id.* at 356–57.

44. *Id.* at 361.

45. *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (plurality opinion)).

46. See *Croson*, 488 U.S. at 505–06; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978).

47. See *Croson*, 488 U.S. at 504; *id.* at 491–93, 510–11; *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008).

48. *Vitolo*, 999 F.3d at 361.

49. *Id.*

50. *Holman v. Vilsack*, No. 21-1085, 2021 WL 2877915, at \*6 (W.D. Tenn. July 8, 2021); *Miller v. Vilsack*, No. 4:21-CV-0595, slip op. at 16–17 (N.D. Tex. July 1, 2021); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 475–76 (E.D. Wis. 2021).

farm programs?<sup>51</sup> The repeated authorization of agricultural extension programs that were explicitly segregated and often assigned no Black extension agents to Black farmers at all?<sup>52</sup> Permitting all-white committees of local farmers to decide their neighbors' entitlement to federal benefits during the days of Jim Crow and beyond?<sup>53</sup>

For district courts to mislabel that history as “a generalized assertion that there has been past discrimination in an entire industry” (rather than in a pervasive set of government programs) that cannot sustain subsequent remedies was quite shocking.<sup>54</sup> The effect is to suggest that structural, overt racial exclusion cannot be cured if it cannot be understood as a discrete event or a single identifiable moment of prejudice-driven targeting of particular farmers.

The decisions thus suggest more than simple misreadings of past precedent or misunderstandings of the federal government's role in U.S. agriculture. An extreme reading of the animus model might in fact demand the approach taken by those lower courts by understanding discrimination solely as the temporally discrete moment of a procedural violation: a government decision making process that has been tainted with racial ill will. That kind of extreme model suggests that once animus fades, or if it cannot be located in a particular moment or episode, any structural consequences need not or even cannot be addressed.

The *Vitolo* panel did not simply invent the language requiring a “specific episode” of discrimination. That language echoes a more commonly used phrasing, in which multiple courts and commentators (including current Chief Justice Roberts at his nomination hearings) have stated that race-based remedies may be justified by the need to cure past governmental discrimination so long as “specific instances of past discrimination” are identified and shown.<sup>55</sup> The

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51. Second Morrill Act, ch. 841, § 1, 26 Stat. 417 (1890) (codified as amended at 7 U.S.C. § 323) (“[N]o money shall be paid out under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of this act if the funds received in such State or Territory be equitably divided . . .”).

52. See Smith-Lever Act, ch. 79, 38 Stat. 372 (1924) (codified as amended at 7 U.S.C. §§ 341–345, 347a, 348, 349); Earl W. Crosby, *The Struggle for Existence: The Institutionalization of the Black County Agent System*, 60 AGRIC. HIST. 123 (1986); Carmen V. Harris, “*The Extension Service Is Not an Integration Agency*”: *The Idea of Race in the Cooperative Extension Service*, 82 AGRIC. HIST. 193 (2008); R. Grant Seals, *The Formation of Agricultural and Rural Development Policy with Emphasis on African-Americans: II. The Hatch-George and Smith-Lever Acts*, 65 AGRIC. HIST. 12 (1991); Morton Sosna, *The South in the Saddle: Racial Politics During the Wilson Years*, WIS. MAG. HIST., Autumn 1970, at 30, 35; Doxey A. Wilkerson, *The Participation of Negroes in the Federally-Aided Program of Agricultural and Home Economics Extension*, 7 J. NEGRO EDUC. 331 (1938).

53. See C.R. ACTION TEAM, *supra* note 20, at 18–20; HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE* 41 (3d ed. 2009); Pete Daniel, *African American Farmers and Civil Rights*, 73 J.S. HIST. 3, at 10–11 (2007); Lewis W. Jones, *The Negro Farmer*, 22 J. NEGRO EDUC. 322, 331 (1953).

54. *Faust*, 519 F. Supp. 3d at 475–76.

55. See, e.g., 20 ROY M. MERSKY & TOBE LIEBERT, *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT*

“specific instances” language appears as early as 1976 in a state judicial opinion, but it is most often used to describe the Court’s rulings in key cases limiting race-conscious remedies like *Wygant v. Jackson Board of Education* and *City of Richmond v. J.A. Croson Co.*<sup>56</sup>

Why did “instance” transmute to “episode” in *Vitolo* and the cases citing it, and does it matter? Arguably, the shift is consequential. An “instance” may mean an example; the word does not necessarily evoke a limited time period in the same way that an “episode” does.<sup>57</sup> What is an anti-miscegenation law like the one struck down in *Loving v. Virginia*, or a school segregation statute like the ones at issue in *Brown*?<sup>58</sup> Each is more easily termed an “instance,” or example of discrimination, than an “episode.”

The bizarre quality of seeking “episodes” of discrimination as a precondition for measures aimed at racial repair is that the term itself suggests that race discrimination in the United States is episodic in nature. The wide set of laws, regulations, and official policies (and the built environment itself) that mandated racial exclusion were not simply “episodes” but rather relatively fixed features over sweeping periods of U.S. history. Racially oppressive laws and policies have been lasting, not short-lived, features in the nation’s history.

Several of the courts that enjoined the APRA loan forgiveness also suggested that even if past discrimination was well-established, the federal government could not possibly show that it continued to impact the present. For example, the *Miller* court wrote that “the Government puts forward no evidence of intentional discrimination by the USDA in at least the past decade.”<sup>59</sup> The court then refused to take “a leap back in time,” stating that “any past discrimination is too attenuated from any present-day lingering effects

JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916–2005: JOHN G. ROBERTS, JR. 622 (2006) (stating that *Adarand* and *Croson* “held that affirmative action programs are permissible if they are meant to remedy specific instances of past discrimination”); 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.10(b)(iii)(2) (5th ed. 2012) (describing Justice Stevens’ dissent in *Fullilove v. Klutznick*, 448 U.S. 448 (1980)); Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1141–42 (2002) (describing the United States Court of Appeals for the Fourth Circuit’s invalidation of a public school transfer policy relying on racial classifications); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 930 n.7 (2001) (describing the United States Court of Appeals for the Fifth Circuit’s ruling invalidating an affirmative action program at the University of Texas School of Law).

56. See, e.g., *Law v. Dept. of Just.*, 521 U.S. 567, 583–84 (Scalia, J., dissenting); *Johnson v. Mortham*, 926 F. Supp. 1460, 1481 (N.D. Fla. 1996); *Johnson v. Miller*, 864 F. Supp. 1354, 1380 (S.D. Ga. 1994); *Williams v. City of New Orleans*, 543 F. Supp. 662, 680 (E.D. La. 1982), *rev’d en banc*, 694 F.2d 987 (5th Cir. 1982); *Lige v. Town of Montclair*, 72 N.J. 5, 28 (1976) (Pashman, J., dissenting).

57. Compare *Instance*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/instance>, (“[A]n individual illustrative of a category or brought forward in support or disproof of a generalization.”), with *Episode*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/episode>, (“[A] usually brief unit of action in a dramatic or literary work.”).

58. See *Loving v. Virginia*, 388 U.S. 1, 4–5 nn.3–4 (1967) (describing Virginia laws punishing interracial marriage); *Brown v. Board of Educ.*, 347 U.S. 483, 486 n.1 (1954) (describing South Carolina, Virginia, and Delaware laws requiring racial segregation in schools, and a Kansas statute permitting such segregation).

59. *Miller v. Vilsack*, No. 4:21-CV-0595, slip op. at 17 (N.D. Tex. July 1, 2021).

to justify race-based remedial action.”<sup>60</sup> Another court suggested that because the United States had already taken significant steps to repair past discrimination via the *Pigford* settlements, presumably any prior discrimination was cured. “[T]he historical evidence does little to address the need for continued remediation,” the *Wynn* court concluded.<sup>61</sup> The government was therefore required to present evidence that “the prior remedial measures failed to adequately remedy the harm.”<sup>62</sup> On this point, the court dismissed the government’s showing as “limited and largely conclusory.”<sup>63</sup>

## II. DISAPPEARING DISCRIMINATION

The ARPA decisions, like all judicial decisions considering whether race-based remedies are necessary to cure past racial harms, implicitly address large-scale questions about the past: When does discrimination end? When does it stop impacting the present? Courts frequently decide these questions as if they could be ruled upon as matters of law, disregarding the difficulty of answering such questions as matters of social science and history. In recent decades, the steady trend has been for an increasingly conservative judiciary to pinpoint any actionable discrimination as having ended long ago and to presume that as a result it no longer has any impact.

Such rulings reflect the culmination of a long-term movement opposing attempts at repairing racial injustice.<sup>64</sup> That movement has operated in somewhat covert jurisprudential ways. Beginning in the 1970s and working against the backdrop of recent cases that embraced—even required—race-conscious measures to address Jim Crow segregation, a conservative set of judges and legal advocates articulated standards that did not overturn that authority but instead subtly eroded it.

As this Part shows, those courts and activists acknowledged the constitutional mandate to cure discrimination but depicted that discrimination as increasingly distant. They emphasized the passage of time since such racial exclusion occurred, as well as the importance and impact of governments’ subsequent good-faith compliance with judicial mandates. They also atomized

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60. *Id.*

61. *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021); *see also Holman v. Vilsack*, No. 21-1085, 2021 WL 2877915, at \*6–7 (W.D. Tenn. July 8, 2021) (relying upon *Wynn*’s reasoning).

62. *Wynn*, 545 F. Supp. 3d at 1279.

63. *Id.*; *see also Holman*, 2021 WL 2877915, at \*6–7 (citing *Wynn* and arriving at the same conclusion).

64. *See, e.g.,* Clint Bolick, *Unfinished Business: A Civil Rights Strategy for America’s Third Century*, 14 HARV. J.L. & PUB. POL’Y 137, 137 (1991) (denouncing race-conscious strategies as “social engineering disguised as civil rights”); Edwin Meese III, *Civil Rights, Economic Progress, and Common Sense*, 14 HARV. J.L. & PUB. POL’Y 150, 151–52 (1991) (expressing opposition in similar terms); *see also* DENNIS DESLIPPE, PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION 3 (2012) (tracing early opposition to affirmative action to three factions: labor unions, colorblind liberalism, and colorblind conservatism).

the actors involved.<sup>65</sup> If the precise governmental entity at issue could not be shown to have caused particular racial harms, then the actual cause became an amorphous phenomenon they termed “societal discrimination.”<sup>66</sup> Thus, even as conservatives could not deny that discrimination had occurred, they suggested that it had occurred long ago, had been aggressively addressed, and could hardly be thought to affect the present. Moreover, anyone asserting that the past remained relevant had the burden of showing exactly how the particular governmental entity in question had caused specific present harms.

The concept of discrimination-as-animus aided these distancing, disappearing tactics. Jim Crow itself, of course, existed in a set of concrete laws, institutions, and policies that endured.<sup>67</sup> Jim Crow’s proponents argued that the system itself rested on benign motives, not ill will toward Black Americans.<sup>68</sup> But animus did not cohere with that recent, well-known past. In fact, the concept seemed tailor-made to obscure it, rendering it irretrievable and irremediable.

If animus involves a passing, subjective state of mind, then more enduring and impersonal practices may not be “discrimination” in any recognizable sense. If much time has passed since a singular moment of animus, then the consequences of a particular moment must surely have dissipated.<sup>69</sup> Because “animus” is localized to a particular individual or decision maker, evidence that a different decision maker took the action in question must exonerate this entity. And if animus is the problem, good faith must be the cure.

#### A. *Legal Context*

A decade after the Court struck down de jure segregation in *Brown v. Board of Education*,<sup>70</sup> the federal courts embarked on what one scholar termed “the jurisprudence of remedy.”<sup>71</sup> The courts began to mandate more aggressive approaches to ending Jim Crow, including what came to be called “institutional reform.”<sup>72</sup>

School desegregation cases required school authorities to “take whatever steps might be necessary to convert to a unitary system in which racial

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65. See Goodman & Antounian, *supra* note 5, at 447–48.

66. See *id.*

67. SITKOFF, *supra* note 53, at 8.

68. See Haney-López, *supra* note 3, at 1849.

69. Cf. Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1479, 1519–24 (2018) (arguing that the government “cannot quickly repair” the legitimacy harms resulting from malicious intent.)

70. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

71. See Freeman, *supra* note 3, at 1079.

72. See Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

discrimination would be eliminated root and branch,”<sup>73</sup> while cases challenging whites-only hiring by police, fire departments, and other public agencies mandated corrective remedies including affirmative action.<sup>74</sup> Court-ordered remedies were often race-based, sometimes necessarily so given Supreme Court doctrine requiring that such measures “promise[] realistically to work, and . . . to work *now*.”<sup>75</sup> Those cases thus outlined the remedies that a court may, or must, order in response to intentional, systemic racial discrimination by a government.<sup>76</sup> Over time, the federal courts did not squarely overturn that case law but scaled back the need for court-ordered remediation by suggesting that any discrimination had disappeared or become irrelevant.<sup>77</sup>

A second line of cases considered what remedies a government actor may “voluntarily” use to address past systemic discrimination in which it participated, actively or passively.<sup>78</sup> By the late 1960s, some government authorities began to take it upon themselves to comply with civil rights mandates, voluntarily adopting institutional reforms even without being sued.<sup>79</sup> Early statements in the Court’s desegregation cases suggested that government actors had ample discretion to adopt race-based measures for this and related purposes.<sup>80</sup> However, the Court ultimately equated such measures with all affirmative action programs and imposed strict scrutiny on them.<sup>81</sup> In doing so, the majority accepted a government’s compelling interest in remedying its past discrimination while requiring that the government present a “strong basis in

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73. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22–31 (1971) (approving race-based measures to bring about school desegregation).

74. *See, e.g., United States v. Paradise*, 480 U.S. 149, 153–168 (1987) (plurality opinion) (describing Alabama state troopers’ decades of refusing to hire non-white candidates and affirmative action remedies mandated by courts in response).

75. *Green*, 391 U.S. at 439.

76. *See id.* at 438 n.4 (“[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.” (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965))).

77. *See, e.g., Miller v. Vilsack*, No. 4:21-CV-0595, slip op. at 17 (N.D. Tex. July 1, 2021); *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021).

78. The “voluntary” label is often a misnomer because *Brown II* and subsequent cases indicated that governments that previously engaged in intentional segregation have an ongoing, affirmative duty to eliminate its effects. *See McDaniel v. Barresi*, 402 U.S. 39, 40–41 (1971) (citing the school district’s “affirmative duty to disestablish the dual school system [of prior segregation]” in upholding a race-conscious voluntary desegregation plan).

79. *See id.*; *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 805 (2007) (Breyer, J., dissenting) (noting that after the Court mandated desegregation, “different [school] districts—some acting under court decree, some acting in order to avoid threatened lawsuits, some seeking to comply with federal administrative orders, some acting purely voluntarily, some acting after federal courts had dissolved earlier orders—adopted, modified, and experimented with hosts of different kinds of plans, including race-conscious plans, all with a similar objective: greater racial integration of public schools”).

80. *E.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (stating that school boards had the authority to adopt racial integration plans requiring each school to match the district’s overall racial makeup “in order to prepare students to live in a pluralistic society . . . as an educational policy . . . within the broad discretionary powers of school authorities”).

81. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277–80 (1986) (plurality opinion).

evidence” supporting the remedial need.<sup>82</sup> Governments defending their remedial programs did not have to definitively prove their own past wrongdoing but did have to offer evidence approaching a “prima facie case.”<sup>83</sup>

In implementing those principles, conservative courts and advocates have continually made it more difficult for governments to rely upon their own past discrimination as a foundation for remedial action. Just as in the court-ordered remedies context, in the “voluntary”-remedies context, opponents suggest that the time of discrimination is long ago and that good-faith interventions have cured any cognizable harms.<sup>84</sup> Therefore any remaining inequalities are presumed to be due to “societal” discrimination, which governments lack any compelling interest in dismantling.

### B. *Rendering Discrimination Invisible*

In this section, I examine the courts’ varied methods of “disappearing” discrimination across cases involving both court-ordered and voluntary remedies. While the courts do not explicitly center the concept of animus, their willingness to treat discrimination as ephemeral and easily dissipated points to their understanding of discrimination as a state of mind, rather than as an institutionalized and enduring status quo.

#### 1. *Time Alone*

The Supreme Court has frequently suggested that remedies for past discrimination may be left in place only for a limited period. In some instances, the passage of time in and of itself cures “old” discrimination.

In the context of terminating existing consent decrees that include race-based relief, modern courts acknowledge that discrimination occurred.<sup>85</sup> However, they limit that discrimination to the period prior to the original judicial ruling or approval of the consent decree.<sup>86</sup> Viewed as existing only up to the entry of the decree, that discrimination appears to have existed only in the distant, foggy past.

Those decisions invariably emphasize the many years since discrimination was first found and how long affirmative action remedies have persisted since

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82. *Id.* at 277.

83. *See* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (pointing out that the city presented “nothing approaching a prima facie case of a constitutional or statutory violation” to justify its remedial program); *Wygant*, 476 U.S. at 277 (requiring that the defendant have “a strong basis in evidence for its conclusion that remedial action was necessary”); *id.* at 292 (O’Connor, J., concurring in part) (stating that evidence supporting “a prima facie Title VII pattern or practice claim” would suffice).

84. *See* *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion).

85. *See* *Dean v. City of Shreveport*, 438 F.3d 448, 452 (5th Cir. 2006); *Cleveland Firefighters for Fair Hiring Pracs. v. City of Cleveland*, 917 F. Supp. 2d 668, 680 (N.D. Ohio 2013).

86. *See* *Cleveland Firefighters*, 917 F. Supp. 2d at 680.

then. For example, the Fifth Circuit in 2006 described a consent decree that had operated for twenty years as “breathhtakingly long”—even as it earlier in the opinion noted “the City now admits that for over 100 years it systematically excluded all minorities from its fire department.”<sup>87</sup> Similarly, an Ohio district court in 2013 marveled that a requested extension to a consent decree governing the Cleveland Fire Department would “affect[] only applicants who had not even yet been born at the time the discrimination was found to have occurred.”<sup>88</sup> The court ruled that the discrimination identified in 1975 had long since been cured, seemingly ignoring subsequent charges of discrimination post-dating the initial consent decree.<sup>89</sup> The Sixth Circuit, in an earlier opinion in the case, had approvingly cited a 1994 decision by the United States Court of Appeals for the Eleventh Circuit, suggesting that “thirteen years of racial preferences” should presumptively exhaust any governmental interest in remedying past discrimination.<sup>90</sup>

Time alone also limits voluntary racial remedies. The Court has frequently indicated that voluntary programs of affirmative action must have an end date. In its doctrine governing constitutional challenges to affirmative action, the Court, in cases like *United States v. Paradise* and *Grutter v. Bollinger*, cited the “duration of the relief” as a key factor in judging whether the remedies were narrowly tailored.<sup>91</sup>

## 2. *Good-Faith Interventions*

Another tactic is to assert that past remedial steps have fully cured any past discrimination. No vestiges remain. However, the court or litigant that asserts this usually does not prove it as a matter of empirical fact. Instead, it is established by fiat—as a matter of law. As Alan Freeman presciently wrote in 1978, the result is “to make the problem of racial discrimination go away by announcing that it has been solved.”<sup>92</sup>

Relatively early on, school desegregation cases exhibited this tendency. For example, in *Pasadena City Board of Education v. Spangler*, the Court indicated that a one-time institutional shift sufficed to erase the consequences of past de jure segregation<sup>93</sup>: “For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part

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87. *Dean*, 438 F.3d at 452–61.

88. *Cleveland Firefighters*, 917 F. Supp. 2d at 675.

89. *Id.* at 672, 680–82.

90. *Cleveland Firefighters for Fair Hiring Pracs. v. City of Cleveland*, 669 F.3d 737, 742 (6th Cir. 2012) (quoting *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1575–76 (11th Cir. 1994)).

91. *See* *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *see also* *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (describing a “durational requirement” for affirmative action in university admissions).

92. Freeman, *supra* note 3, at 1102.

93. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436–37 (1976).



of the defendants, the District Court had fully performed its function of providing the appropriate remedy . . . .”<sup>94</sup> To the extent neighborhood segregation evolved in ways that undermined the effects of the prior remedial attendance plan, the court was powerless to intervene.<sup>95</sup> The one-time act of creating racially integrated zones for a single year was sufficient to purge the constitutional violation.<sup>96</sup>

Fifteen years later, in *Board of Education v. Dowell*, the Court indicated that all desegregation orders should have a limited time span, ordering lower courts to terminate them if school officials “had complied in good faith with the desegregation decree since it was entered, and . . . the vestiges of past discrimination had been eliminated to the extent practicable.”<sup>97</sup> Good faith and “practicability” thus governed—no finding that the vestiges had actually been eliminated was required.<sup>98</sup>

Another decade and a half after *Dowell*, the Supreme Court ruled that the Jefferson County, Kentucky public school system no longer had an interest in remedying the effects of the system’s prior de jure segregation.<sup>99</sup> A federal judge had declared the system “unitary” (i.e., sufficiently desegregated) after twenty-five years in 2000.<sup>100</sup> This finding sufficed even though the Supreme Court’s own decisions (like *Dowell* itself) meant that a “unitary” ruling was neither an onerous threshold nor a definitive finding that the vestiges were eradicated.<sup>101</sup>

Similarly, the litigants suggested in the briefing on the APRA farm loan forgiveness that federal discrimination against Black farmers had been fully resolved by the series of settlements originating in the *Pigford* litigation.<sup>102</sup> Reviewing courts seemed receptive, as noted above.<sup>103</sup> Courts indicated that the implementation of remedies created an additional burden on the government

94. *Id.*

95. *See id.* at 431–36 (noting that “literal compliance with the terms of the court’s order had been obtained in only the initial year of the [desegregation] plan’s operation” while attributing increasing resegregation to a “quite normal pattern of human migration” falling outside of the school district’s responsibility to address).

96. *Id.* at 434 (“[A]doption of the Pasadena Plan in 1970 established a racially neutral system of student assignment in the PUSD.”).

97. *Board of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991).

98. *Id.*; *see also* Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 820 (2010) (“The *Dowell* decision freed school districts from the obligation . . . to convert intentionally segregated schools to integrated schools.”).

99. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 715–16, 721 (2007) (“Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments.”).

100. *Hampton v. Jefferson Cnty. Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000); *id.* (“To the greatest extent practicable, the Decree has eliminated the vestiges associated with the former policy of segregation and its pernicious effects.”).

101. *See supra* notes 94–98 and accompanying text.

102. Plaintiff’s Reply Brief in Support of Motion for Preliminary Injunction at 13 n.6, *Wynn v. Vilsack*, No. 3:21-CV-514 (M.D. Fla. dismissed Sept. 13, 2022).

103. *See supra* notes 58–61 and accompanying text.

to show that their past interventions had not in fact fully cured the prior harms, and that those harms shaped current outcomes in empirically identifiable ways.<sup>104</sup> They did so even though the *Pigford* settlements explicitly addressed only two decades of discrimination, out of many such decades, by a single farm agency among several and thus could not plausibly have fully remediated all the past impacts of Jim Crow in federal farm supports.<sup>105</sup>

### 3. “Societal” Discrimination

Another way to render past discrimination irrelevant, and hence inadequate as a basis for current race-based remedies, has been to locate it outside of the government entity before the court. Under current doctrine, if discrimination is too widespread, so that it cannot be adequately localized in one particular decision maker or entity, it necessarily becomes “societal discrimination.”<sup>106</sup> Similarly, if one government actor’s discrimination has commingled with other governmental discrimination, especially over time, then the whole must be attributed to those other causes—most often to the lumpy, amorphous whole of “society.”<sup>107</sup>

Thus, if discrimination is felt by a prior generation and those impacts affect the victims’ children or even grandchildren, any such later follow-on effects are erased. For example, if socioeconomic status explains students’ achievement gaps in a formerly de jure segregated school district, then courts have ruled that the achievement gaps are non-attributable to the schools’ own discrimination. Federal courts have proved willing to declare this without any inquiry into whether the segregated and unequal education offered in the past to current children’s parents diminished the current socioeconomic status of those families and their children’s academic achievement.

As the en banc Fourth Circuit wrote in 2001, “Most courts of appeals . . . have declined to consider the achievement gap as a vestige of discrimination or as evidence of current discrimination.”<sup>108</sup> The court noted that desegregation in the Charlotte-Mecklenburg schools had only begun thirty years earlier, and “only 15 [percent] of black parents are college graduates, compared to 58 percent for white parents.”<sup>109</sup>

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104. *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021); *Holman v. Vilsack*, No. 21-1085, 2021 WL 2877915, at \*6–7 (W.D. Tenn. July 8, 2021).

105. *See supra* notes 21–23 and accompanying text.

106. *Cf. Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307–09 (1978) (critiquing “societal discrimination” as “an amorphous concept of injury that may be ageless in its reach into the past”).

107. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276–78 (1986) (plurality opinion).

108. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 330 (4th Cir. 2001) (en banc).

109. *Id.* at 313–15, 331 (alteration in original) (quoting the expert witness).

Nonetheless, the court refused to consider whether that gap in Black college attainment might be partially rooted in the prior Jim Crow era.<sup>110</sup> Terming that and other indicators of the socioeconomic gap “startling,” the en banc majority cited a former superintendent’s statement that “in Charlotte, a majority of poor students happen to be African-American.”<sup>111</sup> Accepting happenstance as the explanation for structural racial inequality, the court ruled that “socioeconomic disparities between black and white pupils are troubling, [but] they are not the result of [Charlotte-Mecklenburg Schools]’s actions or inactions.”<sup>112</sup> In such a world, structural racial inequality is everyone’s and no one’s fault. But surely the local school system is one of the most logical places to look in considering why a Black–white gap in parental education levels exists—especially in a district that was intentionally segregated just a generation and a half earlier.

Similarly, the Fourth Circuit announced in a case challenging a race-based remedial program at the University of Maryland that “any intergenerational effects of segregated education are the product of societal discrimination, which cannot support a program such as this one.”<sup>113</sup> This is an astonishing conclusion for the court to endorse, considering that the State of Maryland not only intentionally segregated its university system but also its entire system of elementary and secondary education.<sup>114</sup> Even if the units involved were administratively separate arms of the state, that does not explain how the overall state policies mandating segregation in all parts of the Maryland public school system could be dismissed as “societal discrimination.”<sup>115</sup>

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110. *Id.* at 330–32 (identifying no clear error in the district court’s finding that the achievement gap was not a vestige of prior de jure segregation).

111. *Id.* at 331 (quoting former Superintendent Dr. John Murphy).

112. *Id.*

113. *Podberesky v. Kirwan*, 38 F.3d 147, 157 n.8 (4th Cir. 1994).

114. See John K. Pierre, *History of De Jure Segregation in Public Higher Education in America and the State of Maryland Prior to 1954 and the Equalization Strategy*, 8 FLA. A&M U. L. REV. 81 (2012).

115. All three judges on the *Podberesky* panel themselves graduated from segregated institutions of higher education, an indicator of segregation’s enduring impacts. *Podberesky*, 38 F.3d at 151 (listing judges on panel); see *Hiram Emory Widener*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/widener-hiram-emory-jr> (last visited Feb. 25, 2023) (earned B.S. from Naval Academy in 1944 and L.L.B. from Washington and Lee University School of Law in 1953); *William Walter Wilkins*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/wilkins-william-walter> (last visited Feb. 25, 2023) (earned B.A. from Davidson College in 1964 and J.D. from University of South Carolina in 1967); *Clyde H. Hamilton*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hamilton-clyde-h> (last visited Feb. 25, 2023) (earned B.S. from Wofford College in 1956). As to those institutions’ desegregation timelines, see *A History of Wofford College, 1854-present*, WOFFORD COLL., <https://www.wofford.edu/about/fast-facts/wofford-history/chapter-3> (last visited Feb. 25, 2023); Carl W. Tobias, *Brown and the Desegregation of Virginia Law Schools*, 39 U. RICH. L. REV. 39, 49 (2004); Susan D. Hansen, *The Racial History of the U.S. Military Academies*, 26 J. BLACKS HIGHER EDUC. 111, 115 (1999); *Historical Timeline: From the College’s Inception to the Commission on Race and Slavery*, DAVIDSON COLL., <https://www.davidson.edu/news/2021/01/15/historical-timeline-of-davidson-college> (last visited Feb. 25, 2023); *50th Anniversary of Desegregation*, UNIV. OF S.C., <https://www.sc.edu/desegregation/> (last visited Feb. 25, 2023).

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Over a wide variety of settings, courts have characterized racial discrimination as long-past, already well-addressed, or untraceable to any particular government actor. Those characterizations mesh neatly with understandings of discrimination as animus alone. Animus, or racial ill will, must be located in subjective mindsets or emotional states that necessarily manifest in particular actors at particular times and, as such localized, temporary wrongs, must be relatively easily cured. For opponents of racial repair, refusing to acknowledge discrimination that does not manifest in that form has been a highly useful strategy.

### III. ANIMUS'S INSTABILITY

Animus has been long critiqued in equal protection's race doctrine.<sup>116</sup> But scholars and advocates have more readily embraced it in other areas of equal protection law. Insofar as animus doctrine has aided the LGBTQ rights movement by enabling the invalidation of laws barring gay people from marriage or intimacy, animus doctrine appears highly salutary.<sup>117</sup> Understood as simply one among various bases for invalidating a law, the doctrine is normatively appealing and historically well-grounded. Courts *should* invalidate laws motivated by “a bare congressional desire to harm a politically unpopular group” because they conflict with a democratic government's mandate of “equal regard” for all members.<sup>118</sup> Doing so also coheres with equal protection's basic historical goal of preventing “class legislation.”<sup>119</sup>

Unfortunately, the problems that “intent” doctrine has created for equal protection law are likely to arise for the concept of animus as it operates in the domain of LGBTQ and disability rights. As Ian Haney-López and others have shown, animus doctrine has allowed courts to refuse to recognize discrimination when it suits them.<sup>120</sup> At the same time, animus doctrine increasingly performs the opposite function—allowing courts to identify and penalize discrimination that others find imperceptible.<sup>121</sup>

Animus doctrine's instability derives from the fact that “animus” truly is in the eye of the beholder. It functions as a label for unjustified social or moral

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116. See *supra* note 3 and sources cited therein.

117. See *United States v. Windsor*, 570 U.S. 744, 770 (2013); *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003); *Romer v. Evans*, 517 U.S. 620, 632 (1996).

118. See *Carpenter*, *Windsor Products*, *supra* note 12, at 216, 223–30 (quoting U.S. Dep't of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973)).

119. See *Araiza*, *Animus*, *supra* note 4, at 199–209.

120. *Haney-López*, *supra* note 3, at 1783, 1787–88, 1853–60; *Freeman*, *supra* note 3, at 1054–55; *Robinson*, *supra* note 4, at 173–74, 180–83.

121. See *Murray*, *supra* note 13, at 275 (arguing that the Court's decision in *Masterpiece Cakeshop* “distorts and inverts the entire concept of animus”).

judgments, distinguishing those views from others that remain acceptable and valid.<sup>122</sup> Disapproval of gay couples' relationships and sex lives becomes "animus" when the Court labels it so, even as disapproval of other behaviors remains a valid basis for punitive laws and civil burdens so long as the Court accepts those judgments. "White supremacy" became a form of unacceptable "animus" only when the Court chose to deem it so; prior to that, it was simply one among many social-political judgments that the judiciary found perfectly acceptable.<sup>123</sup>

The malleability of animus doctrine thus renders it an unreliable foundation for rights battles. At the same time, "animus" doctrine is a very potent tool for limiting remedies for past subordination. The concept of animus denotes a passing state of affairs, existing in the subjective state of mind of decision makers. As a constitutional violation defined by negative emotion or ill will, discrimination becomes both difficult to "see" or recognize and also difficult to locate in time. In the limiting case, animus may last only for a brief moment, with equally ephemeral impacts.

As outlined in Parts I and II, the difficulty of pinning down discrimination as animus has become a major obstacle for race-based remedies. Courts have evolved many tactics to dismiss past discrimination as irrelevant, invisible, dissipated, cured, or unknowable. As the farmers' loan-forgiveness cases illustrate, once discrimination is understood exclusively as animus, courts may even more easily erase or refuse to acknowledge the subordination of the past.<sup>124</sup> Structural and long-term subordination is not reducible to—or even visible in—moments of animus.

How is that "disappearing" of past discrimination relevant to other rights movements, ones less associated with a quest for affirmative action or other long-term forms of repair for past material subordination?

First, it is important to recognize that there is no reason to assume that long-term material remedies are not needed for LGBTQ communities or for people with disabilities simply because such steps have not made it onto the political agenda yet. Members of those groups have strong claims for material remedies in much the same way that minorities and women do.<sup>125</sup>

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122. Cf. Araiza, *Animus*, *supra* note 4, at 211–13 (noting difficulty of finding doctrinal alternatives to animus doctrine that would not similarly express "implied moral judgment[s]").

123. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating the prohibition on interracial marriage as "measures designed to maintain White Supremacy" and thus lacking any "legitimate overriding purpose independent of invidious racial discrimination"); cf. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (ruling that moral judgments condemning homosexuality provided a sufficient rational basis to justify a sodomy prohibition), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 566 (2003).

124. See *supra* notes 8–10, 31–63, and accompanying text.

125. For examples of the many material harms visited on LGBTQ people by the federal government, see MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2009).

Second, while it is true that the present standard of rational basis review indicates that remedies aimed at LGBTQ people and people with disabilities would be reviewed leniently, it is quite possible that standards of review could shift in ways that begin to require that remedial programs be justified by reference to past discrimination—or “animus.”<sup>126</sup> If that occurs, then the requirement to justify remedies by unearthing past animus would be as onerous, if not more so, for those groups as it has for people of color.

Equal protection doctrine that spells the end of remedies for past overt subordination thus signals trouble for all groups impacted by animus doctrine.

#### A. *Animus Versus “Discriminatory Intent”*

One may well ask whether race doctrine’s conception of discriminatory intent is really the same thing as “animus” as it manifests in other areas of equal protection law. Some commentators distinguish animus doctrine from the broader concept of “discriminatory intent” in equal protection jurisprudence.<sup>127</sup> To the extent they wish to defend animus doctrine, they may distinguish it from “discriminatory intent” in order to shield the concept from scholars’ repeated attacks upon the equal protection “intent” requirement. They may also believe that the two do differ in formal legal ways that matter.

However, that stance is misplaced. Animus doctrine outside the race context is susceptible to the same pitfalls that mark “intent” doctrine, and the two concepts function in equivalent ways as a practical matter. The concept of animus as used in rational basis review, and the concept of discriminatory intent as used more broadly in equal protection doctrine, boil down to the same thing.

It is true that courts state that proving discriminatory intent only triggers more searching review, not automatic invalidation, while proving animus immediately renders the law invalid.<sup>128</sup> That is the formal boilerplate of the law. But when a plaintiff is put in the position of proving discriminatory intent (rather than simply pointing to facial classifications, as in affirmative action programs), it means that government has hidden that true purpose.<sup>129</sup> In such situations where the government has hidden its discrimination, once the decision maker’s true intent is shown, the governmental defendant normally

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126. Multiple lower courts have imposed at least intermediate scrutiny on sexual orientation or gender identity discrimination in the wake of *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), which classified both types of discrimination as forms of sex discrimination under Title VII of the Civil Rights Act of 1964. *E.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 1, 972 F.3d 586, 608–09, 611–13 (4th Cir. 2020); *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). Imposing such scrutiny implies that any remedial measures aimed at LGBTQ communities would have to be justified by important government interests. Such interests could include remedying past discrimination against LGBTQ people.

127. *E.g.*, Araiza, *Animus*, *supra* note 4, at 187–88, 198–99.

128. *See id.*; *see also* Araiza, *Regents*, *supra* note 4, at 1000 (discussing the application of strict or intermediate scrutiny).

129. *See* *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

does not then attempt to defend its discrimination against the group based on purportedly benign, yet hitherto undisclosed, motives. Had its true motives been benign, why would they have been hidden? Nor do governments generally defend in the alternative, i.e., “we did not intend to discriminate, but even if we *did* intend to do so, we had compelling reasons.”

Thus, if plaintiffs successfully show hidden discriminatory intent, then it is practically certain that the government’s actual, undisclosed intent is to harm the group in question and that there is no hidden yet benign and compelling justification for it. As such, the government purpose will equate to animus—and will usually lead to automatic invalidation.<sup>130</sup> In addition, as Ian Haney-López has pointed out, even as a doctrinal matter, the Court effectively has come to require animus or “malicious intent” be shown in order to make out a constitutional discrimination claim.<sup>131</sup> The two concepts thus effectively collapse into each other, both in practical and doctrinal terms.

### B. *The Brief Useful Life of Animus*

During the last few decades, courts have increasingly been willing to rely upon a “bare . . . desire to harm” as a basis for invalidating certain forms of discrimination against LGBTQ people and people with disabilities.<sup>132</sup> When courts are willing to make that inferential leap, challenges to discriminatory laws become much easier.<sup>133</sup>

Other areas of doctrine, however, demonstrate the risk that this normatively compelling concept may transform. Where once a showing of “animus” might be one among multiple routes to invalidating government action—e.g., with the alternative being showing a lack of a rational basis, or a lack of fit—that may shift.

In the race and gender context, because the classifications have gone underground, now the only means to invalidate discrimination is to prove animus.<sup>134</sup> This is simply a threshold requirement. Similarly, to the extent classifications go underground (as they are increasingly found socially unacceptable, and hence rooted in an illegitimate “desire to harm”) or are cloaked in increasingly strong assertions of “benign” goals, then LGBTQ

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130. See *Carpenter, Windsor Products*, *supra* note 12, at 245 (comparing courts’ invalidations of laws driven by “impermissible racial purposes” with invalidation of laws driven by the “invidious and unconstitutional purpose” of animus). The exception is if “mixed motives” are at work and the government successfully proves that its alternative, legitimate reasons would have led it to take the action in question even without any hidden discriminatory intent. *Arlington Heights*, 429 U.S. at 270 n.21; see also *Carpenter, Windsor Products*, *supra* note 12, at 244 (describing this defense).

131. Haney-López, *supra* note 3, at 1783–85, 1839.

132. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985) (quoting *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *United States v. Windsor*, 570 U.S. 744, 770 (2013); *Romer v. Evans*, 517 U.S. 620, 634 (1996).

133. See *Pollvogt*, *supra* note 4, at 889 (describing animus as “a doctrinal silver bullet”).

134. *Robinson*, *supra* note 4, at 172–73, 180–81.

people and people with disabilities will be put to the challenge of proving “animus.”<sup>135</sup>

As a general matter, then, once a particular group identity is no longer used as the explicit basis for discrimination, because overt bias has been deterred by changes in the law or in social norms, then the litigant will necessarily have to prove discriminatory intent, which in the Court’s modern doctrine, equates to animus.

### C. *The (In)visibility of Animus*

We know from other contexts that “animus” may be an extremely slippery concept—one seemingly designed to allow courts to avoid finding discrimination rather than ferreting it out. Yet the concept of animus evolves to suit federal judges’ present needs. Its utility may lie in its malleability and ambiguity. Ready at hand when needed, it assumes multiple forms, coming in and out of sight as suits the beholder.

For example, animus has been remarkably easy to prove in certain recent contexts. In particular, the Court has proved highly sympathetic to some religious adherents’ claims that government bodies have discriminated against them in penalizing their refusal to treat same-sex couples equally. The Court majority has apparently determined that religious animus is an ever-lurking danger in modern America, a risk which justifies exempting religiously motivated individuals from civil rights laws.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court found religious animus in extremely scant evidence.<sup>136</sup> The case centered on the Colorado Civil Rights Commission’s finding that a baker had engaged in unlawful sexual orientation discrimination in refusing to bake a cake for a same-sex couple.<sup>137</sup> The Supreme Court majority claimed that the Commission had demonstrated “elements of a clear and impermissible hostility toward the sincere religious beliefs” of the baker based on the commissioners’ comments suggesting that religion should not be used as a justification for discriminating against others, as well as the Commission’s failure to find discrimination in other bakers’ refusal to place derogatory, religiously tinged messages on the cakes they sold.<sup>138</sup> The majority’s factual findings flew in the face of the

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135. On the obstacles this would create, see Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 229 n.75 (quoting *Moreno*, 413 U.S. at 534–35); *id.* at 227–28 (discussing “the likely problems with instituting animus as the new gatekeeper to meaningful Equal Protection scrutiny”); Araiza, *Regents*, *supra* note 4, at 1024–25 (considering risk that animus doctrine raises the bar for equality advocates challenging governmental action).

136. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1729–31 (2017).

137. *Id.* at 1726.

138. *Id.* at 1729–30.



evidence and were particularly remarkable given the Court's reluctance to find racial animus in more damning situations.<sup>139</sup>

In contrast, in other decisions, the Court has been forced to acknowledge express animus yet nonetheless has deemed it legally irrelevant. Most notably, in *Trump v. Hawaii*, overt statements by the President expressing animus toward Muslims became non-issues.<sup>140</sup> As even the majority acknowledged, President Donald Trump had expressly called for a "Muslim Ban" during his candidacy, and advisors confirmed his intent to pursue that goal after the election.<sup>141</sup> Yet the Court, citing the need to defer to the Executive Branch regarding national security and immigration matters, asked only whether "the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes."<sup>142</sup> The institution of the Presidency swallowed up any need to see the individual decision maker and his actual motivations.

In other situations, even ones involving long-term structural exclusion, animus is impossible for the courts to detect. That has occurred when the relevant people targeted by the legislation were not included in the political process at all and hence did not need to be addressed, whether with malevolence or benign intent. It has also occurred when political decision makers spoke about their actions vis-à-vis the politically excluded in terms of benign intent.

Thus, in *Dobbs v. Jackson Women's Health Organization*, Justice Alito dismissed the possibility that nineteenth-century state laws criminalizing abortion might have rested on views that treated women as inferior: "Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to . . . women?"<sup>143</sup> Justice Alito's tone of incredulity ignored the wholesale exclusion of women from voting and political office, as

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139. See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 135 (2018) ("In *Masterpiece* . . . the Court misread the facts to find intentional hostility . . . where none existed."); Murray, *supra* note 13, at 273–80 (critiquing the majority's "puzzling" findings); cf. Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 334–35 (1997) (describing "the Court's unwillingness to infer [racial] discrimination from circumstantial evidence"). In another recent decision, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Court unanimously overturned a city agency's refusal to contract with a Catholic organization that discriminated against same-sex couples seeking to be foster parents. While the majority did not explicitly find "animus," it indicated that a government's refusal to use its discretion to exempt religious providers from anti-discrimination laws would itself equate to religious discrimination in many instances. *Id.* at 1877–81. The majority seized on the theoretical possibility of discretionary exemptions as a basis for invalidating the City's refusal to contract. *Id.* at 1878–79. As Justice Gorsuch wrote in his concurrence, the majority engaged in very stretched reasoning to reach this conclusion. See *id.* at 1928–29 (Gorsuch, J., concurring in judgment) (arguing that the majority "change[d] the terms of the parties' contract, adopting an uncharitably broad reading" in ruling that the contract's non-discrimination clause was not "generally applicable" and allowed exemptions).

140. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420–21 (2018).

141. *Id.* at 2417.

142. *Id.* at 2419–20.

143. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256 (2022). In the same passage, Justice Alito also dismissed the possibility of religious animus. *Id.*

well as their legal subordination, throughout the entire period.<sup>144</sup> Earlier in the opinion, the majority had dismissed the possibility of illicit gender motives in even more sweeping tones: “[T]he ‘goal of preventing abortion’ does not constitute ‘invidiously discriminatory animus’ against women.”<sup>145</sup> In the case that *Dobbs* relied upon, Justice Scalia had indignantly indicated that the goal of barring abortion was a benign one, which “does not remotely qualify for such harsh description, and for such derogatory association with racism.”<sup>146</sup> Thus, in a case like *Dobbs*, when the majority dismisses any equal protection claims that might be raised around women’s reproductive rights, animus is important precisely because it is nowhere to be found.

In earlier gender discrimination cases like *Personnel Administrator of Massachusetts v. Feeney*,<sup>147</sup> the Court similarly dismissed long-term structural exclusion of women in order to foreground the ostensibly benign motives of lawmakers. In *Feeney*, the plaintiff challenged Massachusetts’ absolute priority for veterans in public employment.<sup>148</sup> As the Court described it, she argued that “the State, by favoring veterans, intentionally incorporated into its public employment policies the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans.”<sup>149</sup> Even while acknowledging the reality of those sex-based policies, the Court focused on Massachusetts legislators’ “legitimate and worthy purposes” of rewarding veterans for their military service.<sup>150</sup> No gender animus was visible to the Court in such a scheme, no matter how closely veteran status proxied for gender. To the extent any cognizable discrimination had taken place in giving rise to the veteran qualification, it was irrelevant: “[T]he history of discrimination against women in the military is not on trial in this case.”<sup>151</sup> The Court did not even bother to note the wholesale exclusion of women from the state’s own political process during the years the veterans’ preferences were initially enacted.<sup>152</sup>

In cases like *Dobbs* and *Feeney*, the type of historical government animus a plaintiff would be required to show morphs into a fantastic beast nowhere to

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144. See SUSAN CARY NICHOLAS ET AL., RIGHTS AND WRONGS: WOMEN’S STRUGGLE FOR LEGAL EQUALITY 3–19 (1986); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968–93 (2002).

145. *Dobbs*, 142 S. Ct. at 2246 (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 273–274 (1993)).

146. See *Bray*, 506 U.S. at 274.

147. *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979).

148. *Id.* at 259.

149. *Id.* at 276.

150. *Id.* at 274; see also *id.* at 275, 277.

151. *Id.* at 278.

152. See *id.* at 267–70 (discussing the 1896 statute and its updating in 1919); Edmund B. Thomas, Jr., *School Suffrage and the Campaign for Women’s Suffrage in Massachusetts, 1879-1920*, HIST. J. MASS., Winter 1997, at 1, 1 (noting that Massachusetts women lacked the right to vote, except to vote for school committee candidates, until 1920).

be found in actual history. Even Jim Crow becomes lawful under such an approach. A century of segregated and unequal facilities would not be a manifestation of “animus,” so long as some ostensibly neutral classification could be used as a direct proxy for race—just as the ability to bear children or serve in a military from which women were historically excluded served as a direct proxy for gender in *Dobbs* and *Feeney*. Who could say why lawmakers or other officials sanctioned regimes of structural exclusion? How could one be sure that they did so out of antipathy toward the group in question?

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Animus is a shapeshifter. Sometimes easily detected on slight cues, sometimes obvious but irrelevant, and sometimes invisible despite manifest clues, animus cannot be nailed down satisfactorily. That seems to be the case because at present, animus functions as a way for the judiciary to demarcate legally valid and invalid forms of treatment without further rationalization. In other words, the Court uses the concept as a malleable label in ways that might otherwise seem mysterious if they were not explicable as a mode for the Court to regulate legal categories, statuses, and conditions.

At times, that malleability may work in the favor of marginalized groups, but animus doctrine is a decidedly double-edged sword. Once overt discrimination becomes unacceptable and goes underground, or once backlash becomes strong enough, the judiciary may become quite reluctant to find that systemic subordination of the marginalized is rooted in animus. Further, as such overtly discriminatory regimes recede into the past, the courts become increasingly adept at erasing that unpalatable past as one long ago dissipated, cured, or swamped by other forces.

## CONCLUSION

The possibilities for repairing America’s centuries of racial injustice seem increasingly limited by the courts’ baseline vision of history, discrimination, and causation: one in which short-lived episodes of racial animus can be readily, quickly cured.

ARPA’s debt forgiveness provisions for minority farmers were never implemented. After the United States District Court for the Northern District of Texas certified a nationwide class action in the suit styled *Miller v. Vilsack*, most of the dozen lawsuits challenging the APRA loan relief went into stasis.<sup>153</sup>

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153. *Miller v. Vilsack*, No. 4:21-CV-0595, slip op. at 23 (N.D. Tex. July 1, 2021) (order granting motion for class certification); *Kent v. Vilsack*, No. 3:21-CV-540, 2021 WL 6139523, at \*3 (S.D. Ill. Nov. 10, 2021) (listing seven district courts that had stayed the litigation pending an outcome in *Miller*, while noting that four had declined to grant a stay or had yet to rule).

Miller, though, moved toward summary judgment.<sup>154</sup> Perhaps fearing the litigation's potential to create bad law, federal lawmakers mooted the dispute. In August 2022, Congress enacted new provisions repealing ARPA's Section 1005 and authorizing race-blind debt relief for distressed farmers, along with additional loan relief designated for farmers of any race that had experienced discrimination in federal farm loan programs.<sup>155</sup>

Black farmers reacted with dismay to the legislative change, fearing further economic suffering if the promised USDA support did not materialize.<sup>156</sup> For their part, conservative legal groups crowed: "President Biden and his allies in Congress recognized that their unlawful, unconstitutional, racially discriminatory program has effectively been crushed in court," said an America First Legal lawyer.<sup>157</sup>

The latest experiment in attempting to repair—at least in an incremental way—the legacy of Jim Crow in federal farm programs thus ended before it really began. Conservative constitutional doctrine froze the program, forcing Congress to adopt an approach requiring individual findings of discrimination.

That bodes poorly for future attempts at racial repair. By portraying Jim Crow as long ago, irrelevant, and likely already cured, conservative courts and activists have rendered a century-plus of overt racial subordination extremely difficult to acknowledge, much less remedy.

Instead, even the democratic branches of government were forced to adopt an "animus" model for dealing with the structural legacies of America's racial caste system. It remains to be seen how the USDA will interpret and implement the new program authorizing debt relief for farmers harmed by past federal lending discrimination. But the most likely model may be a version of "animus lite"—which, like *Pigford's* past settlement claims process, might require minority farmers to attempt to prove that a specific, white comparator farmer was treated more favorably than they were.<sup>158</sup>

Placing that burden on farmers is completely at odds with what we actually know of the past and the reasonable inferences to be drawn therefrom. Black farmers became a tiny proportion of America's farm owners because of

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154. Motion for Summary Judgment, *Miller v. Vilsack*, No. 4:21-CV-0595 (N.D. Tex. dismissed Aug. 29, 2022).

155. See Inflation Reduction Act, Pub. L. 117-169, §§ 22006–22008, 136 Stat. 1818, 2021–23 (2022); Alan Rappeport, *Congress Rewrites Aid Program Black Farmers Pinned Hopes On*, N.Y. TIMES, Aug. 13, 2022, at B3.

156. See Rappeport, *supra* note 155; see also Ellyn Ferguson, *Civil Rights Lawyer Crump Sues US Over Repealed Aid to Black Farmers*, ROLL CALL (Oct. 12, 2022, 5:20 PM), <https://rollcall.com/2022/10/12/civil-rights-lawyer-crump-sues-us-over-repealed-aid-to-black-farmers/>; Alan Rappeport, *Debt Relief Blocked, Black Farmers Fear Ruin*, N.Y. TIMES, Feb. 22, 2022, at A1.

157. Rappeport, *supra* note 155.

158. See Stephen Carpenter, *The USDA Discrimination Cases: Pigford*, In re Black Farmers, Keepseagle, Garcia, and Love, 17 DRAKE J. AGRIC. L. 1, 17–18 (2012) (describing the initial *Pigford* settlement claims process's requirements, including a showing that each Black farmer received "treatment . . . less favorable than that accorded specifically identified, similarly situated white farmers" regarding USDA loans).

structural racial discrimination built into the USDA and its programs, which were racially segregated and highly unequal from the start.<sup>159</sup> To try to press those historical facts into contemporary models of animus and differential individual treatment is to deny reality.

That is precisely what current remedial doctrine leads toward: the denial that systemic racial structures and exclusions constituted cognizable discrimination at all, or that anything can be done about them in the present. Animus doctrine, insofar as it pushes out all other notions of discrimination, thus constitutes a legal fiction of the most perverse sort: One that undermines our ability to accurately name and address reality.

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159. *See supra* notes 12–16, 25 and sources cited therein.