OBJECTIVE ANIMUS?

Steven D. Smith[*]

The idea that a court may invalidate a law by finding it to have been motivated by "animus"—or hatred, or "a bare desire to harm a politically unpopular group"[1]—is "flowering," as Professor William Araiza notes in his article *Animus and Its Discontents*.[2] The idea has also provoked a variety of objections. One objection asserts that judicial decisions grounded in accusations of "animus" constitute a "jurisprudence of denigration," as I have called it,[3] that poisons public discourse and aggravates cultural polarization. We might call this the "denigration objection."

On this point, Professor Araiza seems ambivalent. In his wide-ranging and thoughtful defense of the animus approach, he sometimes suggests, somewhat regretfully, that vilification of groups who lose in constitutional struggles may simply be a necessary part of the development of our collective commitments.[4] He might be right. After all, we *do* think that "police torturers," "censors," "segregationists," "sexists," "and now the homophobes"[5] are, basically, wicked. Don't we? Wouldn't we be morally deficient if we didn't think this?[6]

At other points, however, Professor Araiza finds the denigration objection troublesome—indeed, he suggests that it represents "the ultimate challenge facing the animus doctrine"[7]—and he tries, if not to dissolve or deflect the objection entirely, at least to mitigate its force. His strategy consists primarily of reinterpreting animus not as "subjective ill will" but rather as an "objective" fact or quality.[8]

So, does this reinterpretation succeed in deflecting or at least partly deflating the denigration objection? I don't think so. In this comment, I will try to explain why.

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[*] Warren Distinguished Professor Law & Co-Executive Director, Institute for Law & Religion & Institute for Law & Philosophy, University of San Diego School of Law; Yale University, J.D.; Brigham Young University, B.A. I thank Larry Alexander for helpful comments on an earlier draft.

1. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 762–65 (2013) (finding no legitimate Congressional purpose that overcomes the purpose and effect to disparage and injure those who enter into a same sex marriage).

2. William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 215 (2019).

3. Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 675 (2014).

4. Araiza, *supra* note 2, at 210–11.

5. *Id.* at 211.

6. It should be noted, however, that the denigration objection, at least as I have presented it, worries primarily about accusations of animus or hatred directed against individuals who believe and insist that they *do not* feel any such animus or hatred. *See* Smith, *supra* note 3, at 694.

7. Araiza, *supra* note 2, at 210.

8. *Id.* at 189–92.

I. THE RHETORIC OF DENIGRATION

Denigration is hardly unique to judicial discourse; it is, if anything, even more pervasive and obtrusive in general public discourse. Advocates and politicians routinely advance their causes by accusing their opponents of being "haters"—racists, sexists, homophobes, and the like.

Such rhetoric is related to cultural polarization, both as effect and as aggravating cause. As cultural factions come to inhabit "separate and competing moral galax[ies],"[9] as James David Hunter put it, shared normative premises of "overlapping consensus" in which to ground public advocacy or justification become scarce.[10] And yet there is still some area of agreement. More specifically, the proposition that *it is wrong to act from pure hatred or hostility* still commands virtually universal agreements: Utilitarians and deontologists, religious believers and secularists, can all embrace that proposition. And so, it is natural that advocates will appeal to what everyone agrees on and will thus attempt to convict their opponents of violating that shared norm.

For their part, of course, the accused will typically deny, emphatically, that they are acting from mere hatred. They will find their accusers' ascription of evil motives to be false, ignorant, and insulting. And thus, suspicion and resentment proliferate and the cultural gap grows wider. Sympathetic understanding shrivels, and the accusations of hatred become even more plausible (at least to the accusers) and more rhetorically necessary. The downward spiral proceeds.

The courts' use of animus rhetoric is merely one instance—albeit (given the courts' authoritative status) an especially troublesome one—of this destructive dynamic.[11] Judges are faced with the same challenges of justification that other advocates confront. And the difficulties and deficiencies of standard methods of constitutional analysis—rational basis review, tiers of scrutiny, suspect classifications, doctrinal "tests" with three or four amorphous and bendable "prongs"—are notorious.[12] Why not avoid all of that cumbersome and unconvincing analysis—all of that gobbledygook, a skeptic might say—and just strike down a disfavored law by straightforwardly declaring it to have been a product of mere "animus," or of the "bare . . . desire to harm a politically unpopular group"?[13]

Justices have sometimes found the temptation irresistible; hence Justice Anthony Kennedy's majority opinions in *United States v.*

9. JAMES DAVISON HUNTER, CULTURE WARS 128 (1991).
10. This point is elaborated in Smith, *supra* note 3, at 691–94.
11. The points in this paragraph are elaborated at *id.* at 686–90.
12. *Id.* at 687.
13. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

Windsor,[14] and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[15] (and, in slightly more veiled form, Justice Ruth Bader Ginsburg's *Masterpiece* dissent[16]).

And yet these official accusations of animus, precisely because they come from the Supreme Court, are at least as problematic and polarizing as similar indictments made by mere pundits or politicians or lawyers. Professor Araiza appreciates the concern, and as an enthusiastic proponent of the animus approach, he tries to mitigate it.

II. SOFTENING THE STING?

Professor Araiza's mitigation strategy basically attempts to distinguish animus from "subjective ill will" and instead to reinterpret it as an "objective" quality. If losing litigants and factions can be told that the animus ascribed to them is not "subjective," they may feel less insulted and resentful. Although convicted of acting from hatred in an "objective" sense, they are not being accused of actually being personally, subjectively hateful. That is the hope.[17]

But isn't this reinterpretation of animus merely a kind of double-talk? Professor Araiza worries about this question,[18] as he should. If "animus" is basically a synonym for something like "hatred," or "animosity," or "hostility," aren't these just inherently "subjective" qualities? Aren't they terms that we use in describing the motives, or attitudes, or states of mind of *persons*, or subjects? So isn't talking about non-subjective animus like referring to "redness, but not in the sense of a color," or about "seventeen, but in a non-numerical sense"? Isn't talk of "objective animus" mere "nonsense," in a technical sense of the term?[19]

And yet lawyers do often refer to, for example, "objective intent" as opposed to "subjective intent" in areas like contract and tort law. It may be said, for example, that people are deemed to intend the natural,

14. 570 U.S. 744 (2013).

15. 138 Sup. Ct. 1719 (2018) (holding that the bakeshop owner was denied a neutral decision maker on his Free Exercise Clause claim when he declined to make a gay couples wedding cake because it was inconsistent with his religious beliefs).

16. *See id.* at 1748 (Ginsburg, J., dissenting); Steven D. Smith, *Disagreement, Discrimination, and Polarization: An Open Letter to Justice Ruth Bader Ginsburg*, PUB. DISCOURSE (Oct. 30, 2018), https://www.thepublicdiscourse.com/2018/10/43954/ [https://perma.cc/QW39-PUW5] (finding Justice Ginsburg's statements to "push people, on both sides, out of the group of people of good will and into the camps of 'scorched earth' extremists").

17. *See, e.g.*, Araiza, *supra* note 2, at 190 ("The result of such an inquiry is thus a conclusion that does not necessarily indict the subjective motivations of any particular person or members of an institution."); *see id*. at 191 ("But these conclusions can be shorn of most of their pejorative connotations by distinguishing them from conclusions about subjective motivations.").

18. *See id.* at 191 (noting the objection that "the entire idea of animus focuses on ill will, such that it drains the term of any meaning to apply it to situations lacking such subjective feelings").

19. *See* STEVEN D. SMITH, LAW'S QUANDARY 8–19 (2004).

foreseeable consequences of their acts, whether or not they subjectively did so intend, or that contractual obligations are determined by the parties' "objective" intentions. This usage seems well accepted. So, if an intention can be objective, why can't a feeling or attitude or motivation—like animus—be objective?

Upon closer examination, though, it seems that "objective intent" in law is still parasitic on "subjective intent"; it starts with subjective intent and then extends it with a *presumption* or else with a *fiction*. It might be that we think people usually do actually, subjectively intend the natural consequences of their acts, so odds are that any given defendant did intend these consequences; but it is too difficult and costly to seek certainty in given cases, so we instead adopt a presumption—one we sometimes describe (or obfuscate) in terms of "objective intent." Or we might mean that for some purposes (which presumably could be elaborated, if the question were pressed), we find it useful to treat some defendants *as if* they had intended particular consequences—whether or not they actually had any such intent. In contractual situations, for example, Jones might have spoken and acted so as to make Harris reasonably believe that he (Jones) was promising to do X, even though subjectively Jones was "mentally crossing his fingers,"[20] so to speak, and thus was not in fact (subjectively) promising. We might in this case want to say that Jones should be treated "as if" he had promised; or we might instead make the same claim by saying that Jones manifested an "objective intention" to promise.[21]

Could we sensibly talk about "objective animus" in either of these senses—namely, as a presumption or as a fiction? Maybe. But if we use the term in the first of these senses (and Professor Araiza sometimes seems to have something like this in mind)[22], it is not clear how the denigration problem is in any way mitigated. To invalidate an enactment of Congress or the council based on ascribed "objective animus" is just to say, "we're striking down this law because we're presuming you acted from mere hatred—although we're not certain: it's just a presumption." What is gained in this locution? Isn't it at least as offensive to be told "we *presume* you acted from hatred" as to be told "we *find* you acted from hatred"?

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20. *See* Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1621 (2009).

21. *See id.* at 1619–27.

22. He argues that animus can be inferred from factors similar to those used in equal protection cases to infer discriminatory intent. Araiza, *supra* note 2, at 184–87. It is at least arguable that these factors, when present, create a sort of presumption of subjective discriminatory intent. Professor Araiza also indicates that the evidence of actual "subjective" animus is relevant to the conclusion of "objective" animus. *Id.* at 192.

Or we could say "we're going to treat this case *as if* Congress or the council had acted from hatred, whether or not they actually did that." But *why* should we treat the case as if the facts were other than they were? Presumably some justification would need to be given, as in the case of contractual obligations based on apparent promises that might not have been subjectively intended but were reasonably relied on.[23] If there is no adequate justification, the fiction (of "objective animus") would seem to be unwarranted. Conversely, if there *is* an adequate justification (i.e., for treating some people *as if* they had acted from hatred even if they didn't), why not just articulate that justification, whatever it is, instead of hiding it behind a misleading and demeaning fiction?

These ways of redeeming the *prima facie* nonsensical notion of "objective animus" seem unpromising. (Unless, that is, the whole point is to gain an illicit rhetorical advantage while avoiding candid analysis.) Professor Araiza thus primarily seems to have something different in mind. He suggests that animus might be said to be "objective" if it is ascribed not to *individual human beings*—legislators, citizens—but rather to an *institution*, such as Congress or the city council.[24] A court might then placate the members of the Congress that enacted the Defense of Marriage Act (DOMA), say, with something like this explanation: "Although we're declaring the law you enacted invalid on the ground that it was the product of animus, or of 'a bare desire to harm a politically unpopular group,' please don't take offense. We're not saying that *you* personally (or, for that matter, your congressional colleagues) acted from hatred. We're only saying that *Congress* acted from hatred."

Individual legislators would thus not need to feel insulted because no ill will has been ascribed to them personally.[25] And Congress . . . ? Well, Congress *as an institution* has no feelings that could be hurt. Does it?

This seems to be the strategy. And yet, if Congress is not the kind of entity that has feelings that could be insulted, how can it be that Congress is the kind of entity that can act from hatred, or "animus"? The question deserves closer attention.

III. INSTITUTIONS AND ANIMUS

What would it mean for an "institution" as such—an institution abstracted away from the human beings who compose it—to act from animus?

We do routinely talk about institutions as "intending" things. For example, we construe statutes in accordance with what "Congress intended." How do these ascriptions of institutional intent work? What

23. *See* Kraus, *supra* note 20.
24. *See* Araiza, *supra* note 2, at 191–92.
25. *See supra* text accompanying note 17.

do they mean? If we could figure out the answer to those questions, we might be able to assess the plausibility of Professor Araiza's suggestion of institutional animus.

Consider two quite different possibilities. Perhaps the most common and commonsensical response would suggest that statements about what an institution intended are shorthand summaries of some aggregation of the intentions of the persons who compose that institution. Persons have intentions; institutions abstracted from the persons who compose them do not.[26] So to say that "*Congress* intended X" is to say that "the *members of Congress* (or at least some relevant subset of them) intended X."[27]

Institutional animus might be understood in this sense. And yet it seems that Professor Araiza cannot embrace this conception because it would defeat the whole point of his resort to institutional animus. The point, once again, was precisely to *avoid* the insult and polarization that results from attributing animus to the human persons who compose Congress, or the council, or the community.[28] But that is exactly what this commonsense conception of institutional animus does.

So let us consider a second response. Perhaps some sophisticated theory might be developed to explain how an institution *in itself* can have things like intentions not reducible to the "subjective" intentions of its human members. Philosophers sometimes attempt such accounts[29]; and theorists sometimes offer such accounts for, for example, corporations.[30] Could the possibility of institutional and hence "objective" animus be supported in this way?

Maybe. But Professor Araiza does not pretend to offer, or even gesture toward, any such theory in this article. If such a theory were proposed, we could then evaluate its plausibility; and we could ask whether as a matter of justice or policy it makes sense to invalidate laws when *institutions* somehow acted from animus even though the *human beings* who compose those institutions did not. At present, though, this possibility amounts to nothing more than a large, speculative, wholly unsecured promissory note.

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26. *See, e.g.*, Anthony Quinton, *I—The Presidential Address: Social Objects*, 76 Proc. Aristotelian Soc'y 1, 17 (1975) ("To ascribe mental predicates to a group is always an indirect way of ascribing such predicates to its members.").

27. This kind of conception promptly gets into familiar problems of aggregation: How do we combine the personal intentions of members to form an "institutional" intent? Do *all* of the members need to have had the requisite intent? That standard seems overly rigorous. So, does it need to be a majority? Maybe only particularly important or well-placed members? These are hard questions, but we need not worry about them here. That is because, as we will see, the aggregation approach is not helpful for Professor Araiza's project anyway.

28. *See supra* text accompanying note 17.

29. For a review of some of the leading theories see John Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47, 75–87 (2015).

30. *See id.* at 75.

But if we would gain nothing by treating institutional animus as an aggregation or summation of "subjective" hatred attributed to the humans who compose those institutions, and if we have not even the glimmer of a theory of institutional animus that is independent of the more "subjective" and personal animus of its human members, then what is left of the idea of "objective" institutional animus? So far as I can see, the answer is . . . nothing.

IV. CONCLUSION

Professor Araiza is to be commended for his careful, fair-minded treatment of the pros and cons of "animus doctrine." As a proponent, he understandably wants to deflect the charge that this approach amounts to a politically polarizing, socially destructive "jurisprudence of denigration."[31] But it may be that if he wants to continue to defend the animus doctrine, he will simply have to own the approach for what it is.

31. *See* Smith, *supra* note 3.