AFTER *GRANTS PASS*: HOUSING ANIMUS

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ABSTRACT

The Court's recent decision in City of Grants Pass v. Johnson *exposes hundreds of thousands of Americans to potential criminalization for engaging in basic life-sustaining activities. By ruling that the enforcement of ordinances prohibiting camping and sleeping in public does not violate the Eighth Amendment, the Court has overturned decades of Supreme Court precedent which held the opposite view.*

As the number of unhoused individuals has increased, so too has the number of municipalities and states that criminalize the survival activities of houseless people. Many of these jurisdictions have established a complex network of severe anti-homeless ordinances that amount to an attack on houseless existence and should concern any advocate of fair and equitable governance.

With the Supreme Court's recent departure from the Eighth Amendment protections established in Robinson v. California *more than sixty years ago, this Article proposes that courts engage in heightened rational basis review of these ordinances, using "animus doctrine." Unlike previous Supreme Court cases that struck down legislation merely for depriving a group of certain benefits, many of these anti-homeless ordinances aim to undermine the very existence of unhoused individuals. Legal theories of animus doctrine may provide some relief to the number of unhoused people who have faced displacement from their communities as a result of the Supreme Court's decision in* Grants Pass v. Johnson.

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INTRODUCTION

The court's decision in *Grants Pass v. Johnson* leaves the estimated 650,000 unhoused individuals in the United States vulnerable to criminalization for simply existing.[1] Leaving the unhoused with no constitutional protections means that there is nothing to stop them from being put through a constant cycle of unpayable fines and jail, digging them deeper and deeper into a perpetual cycle of homelessness.[2] As Justice Sotomayor remarked during the *Grants Pass v. Johnson* oral argument: "Where do we put them if every city, every village, every town lacks compassion . . . . Where are they supposed to sleep? Are they supposed to kill themselves. . . .?"[3] While housing advocates lost the *Grants Pas*s battle, this Article will argue they may be able to secure greater victories in the future by bringing Equal Protection claims against local municipalities—like Grants Pass, Oregon—who have engaged in legislative actions aimed at undermining houseless individuals' very existence.

The number of unhoused individuals in this country has only grown in recent years—rising 12% from 2022 to 2023.[4] In turn, many cities criminalize basic human functions such as sleeping and sitting outside.[5] Furthermore, the racially marginalized are also disproportionately represented among the unhoused—while

1. City of Grants Pass v. Johnson, 603 U.S. 520 (2024). For the majority of this article, the author has elected to the use the term "unhoused" over the commonly used "homeless," except for when describing "anti-homelessness" given that those who espouse these sentiments generally use the term "homeless." Saying "anti-homeless" emphasizes the gravity of the stance and is also less confusing than anti-houselessness, as the term "houseless" often refers to the lack of affordable housing, and those who harbor anti-homeless sentiment often have animus for those without housing themselves. Many have made the switch away from referring to those experiencing homelessness as "homeless" and instead calling them "unhoused," "persons experiencing homelessness," or "houseless" to emphasize the very real dearth of affordable housing in this country and to lessen the stigma associated with the term "homeless." For more information, *see* Amanda Abrams, *Is It OK to Use the Word 'Homeless'–or Should You Say 'Unhoused'?*, GUARDIAN (July 20, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/jul/20/homeless-unhoused-houseless-term-history [https://perma.cc/B2CW-HQ7R].

2. Brief for 57 Social Scientists with Published Research on Homelessness as Amici Curiae Supporting Respondents, *Grants Pass. v. Johnson*, 603 U.S. 520 (2024) (No. 23–175); NICOLE DUBOIS, CLAIRE HERBERT, & E. MAE SOWARDS, CRIMINALIZING HOMELESSNESS WORSENS THE CRISIS, RESEARCH SHOWS 3–4 (2025), https://endhomelessness.org/wp-content/uploads/2025/02/CriminalizingWorsensTheCrisis_NAEH_2-4-25.pdf [https://perma.cc/KF6C-CCR8].

3. Transcript of Oral Argument at 34, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23 –175).

4. U.S. DEP'T OF HOUS. & URB. DEV., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS, 12 (2023), https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf [https://perma.cc/WJX4-Z5AS] (last visited Oct. 24, 2025) [hereinafter *2023 Annual Homelessness Report*].

5. NAT'L L. CENTER ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 106–118 (2019), [https://perma.cc/Y8T8-VMFV] [hereinafter *Housing not Handcuffs*] (last visited March 9, 2025).

Black Americans make up approximately 14.4% of the population,[6] they make up roughly 32% of the population experiencing houselessness.[7] Between 2022 and 2023, unhoused rates for people who identify as Asian American or Hispanic American also rose.[8] Thus, the fight to tear down the existence of the unhoused is not only one based upon housing status, but also a fight that impacts other marginalized characteristics like race.

As the number of people experiencing houselessness rises, so too does the number of jurisdictions that criminalize the basic functions of houseless existence, like sleeping and building shelters for protection. For example, a 2019 study conducted by the National Homelessness Law Center examined 187 cities and found that approximately 180 cities had laws restricting camping in public places, with 69 of those cities prohibiting camping publicly in the entire city, while 107 of those cities prohibit camping in particular parts of the cities.[9] The same study found that the total number of ordinances prohibiting camping in any form throughout cities had increased significantly throughout the years[10]—a 92% increase from 2006 and a 15% increase since 2016.[11] Likewise, a supplemental report studying municipal laws regulating unhoused individuals found that 48 of the 50 U.S. states and the District of Columbia have some form of law that restricts conduct of unhoused individuals.[12] Over 20 states prohibit camping in public places, either state-wide or in particular places.[13] While these anti-camping ordinances differ, they range anywhere from prohibiting individuals from sleeping outside to erecting campsites outside to protect themselves from the elements.

Thus, the *Grants Pass* decision leaves an already vulnerable population even more exposed to being drawn deeper into the carceral net. Housing advocates argue that criminalizing houseless existence will make it difficult for people experiencing houselessness to escape it because they will become stuck in a cycle of alternating between being charged criminal fines and fees that they cannot afford and spending time in jail—exacerbating the difficulty in attaining economic

6. Gracie Martinez & Jeffery S. Passel, *Facts About the U.S. Black Population*, PEW RESEARCH CENTER (Jan. 23, 2025), https://www.pewresearch.org/race-and-ethnicity/fact-sheet/facts-about-the-us-black-population/ [https://perma.cc/2HAK-QL5R].

7. U.S. DEP'T OF HOUS. & URB. DEV., THE 2024 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS, 6 (2024), https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf [https://perma.cc/5BSA-38HZ] (last visited Nov. 7, 2025).

8. *2023 Annual Homelessness Report*, *supra* note 4.

9. *Housing not Handcuffs*, *supra* note 5, at 105–118.

10. *Id.* at 12.

11. *Id.*

12. *Id.* at 105–118.

13. *Id*.

stability and permanent housing.[14] Likewise, advocates argue that obtaining stable employment, and thus permanent housing—or any employment, for that matter—becomes exceedingly more difficult with a criminal record, which many unhoused people acquire due to these draconian ordinances.[15]

Worse still, stigma and anti-homeless animus continue to grow. Along with the increase in laws targeting unhoused existence, violence against the unhoused has escalated,[16] and discrimination against the unhoused has reached staggering highs.[17] Many of these injustices are steeped in a history of anti-homeless animus and represent a continuation of this discrimination. Now, increasingly—as seen in *Grants Pass*—many, without strong empirical support, claim that encampments "breed crime."[18] The idea that the unhoused are violent criminals is a prevalent one,[19] borne out of stigma, discrimination, and fear.[20] In reality, empiricists who have studied the topic for years have yet to determine the causal connection

14. *E.g.*, Jeff Olivet, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS, (Oct. 26, 2022) https://www.usich.gov/news-events/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address [perma.cc/SHN6-MFNE] ("[T]hese discriminatory laws are not effective. Some laws punish people with up to $5,000 fines they cannot afford and with jail time that puts jobs in jeopardy and sends people back out to the streets, where their new criminal records will only make it harder to find housing and jobs.").

15. *Civil Rights and Homelessness*, NATIONAL COALITION FOR THE HOMELESS, https://nationalhomeless.org/civil-rights-criminalization-of-homelessness [perma.cc/NT4W-HALR] ("A criminal record adds to the already difficult situation of finding employment, getting housing, or being eligible for certain services.") (last visited March 9, 2025).

16. *Violence and Hate Against Unhoused Americans: 2020–2022*, NATIONAL COALITION FOR THE HOMELESS (May 2024), https://nationalhomeless.org/wp-content/uploads/2024-Hate-Crimes-Report_for-web.pdf (last visited March 9, 2025).

17. Howard Padwa, Jessie Chien, Benjamin F. Henwood, Sarah J. Cousins, Edward Zakher, Randall Kuhn, *Homelessness, Discrimination, and Violent Victimization in Los Angeles County*, 67 AM. J. OF PREV. MED. 666, 666 (2024).

18. Transcript of Oral Argument at 53, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23 –175). This sentiment seems to be shared among many: including the government, prominent thinkers, and general members of the public. *E.g.*, Exec. Order No. 14321, 90 Fed. Reg. 35817 (July 24, 2025) ("The Federal Government and the States have spent tens of billions of dollars on failed programs that address homelessness but not its root causes, leaving other citizens vulnerable to public safety threats."); *see also* John Hirschauer, *Yes, the Homeless Are More Violent*, THE AMERICAN CONSERVATIVE, (May 16, 2023, 6:15 PM) [https://perma.cc/W5NP-VE6J]. Some argue that this viewpoint has become increasingly common due to unhoused people becoming more visible. This may come from Pandemic-era policies that make unhoused people more visible in cities. *See* Martin Kaste, *Homeless Camps Are Often Blamed for Crime but Experts Say It's Not So Simple*, NPR (Jan. 24, 2022), https://www.npr.org/2022/01/24/1074577305/homeless-crime-experts [https://perma.cc/U26C-WSFD]. Some argue that it comes from more frequent news coverage of violence committed in high profile cities across the US. *See* Nicole Wetsman, *Why Experts Say Some Unhoused People Are Unfairly Assumed to Be Dangerous*, ABC NEWS (Oct. 17, 2023), https://abcnews.go.com/Health/unhoused-people-perceived-dangerous/story?id=103751928 [https://perma.cc/JH68-DMLL].

19. *See, e.g.,* Hirschauer, *supra* note 18 (arguing that unhoused people are more likely to be violent than housed people).

20. *See* Wetsman, *supra* note 18.

between the experience of houselessness and criminal activity.[21] Worst of all, as is at issue in *Grants Pass* and is the focus of this Article, local municipalities and states are coming together to create laws that cause pain and harm to the already vulnerable individuals experiencing homelessness, causing this discrimination to take legal effect. [22]

Given the foregoing, this Article takes the position that advocates should bring Fourteenth Amendment Equal Protection claims against municipalities that have enacted laws like those at issue in *Grants Pass*. At the same time, it also takes the position that the Court in *Grants Pass* is fundamentally incorrect and should provide Eighth Amendment protection to unhoused individuals for biological functions like sleeping and sitting.

However, even if the Court never revisits *Grants Pass*, the Fourteenth Amendment provides a reasonable alternative to protect the unhoused from the most draconian ordinances and statutes where their government exhibits a "bare desire" to harm unhoused individuals.[23] While housing status is not a protected classification under Equal Protection, thus not meriting intermediate or strict scrutiny, there is a strong argument to be made that some of the most draconian anti-homeless statutes exhibit an animus meriting heightened rational basis review. Although this may not protect unhoused rights as comprehensively as the Eighth Amendment, this Article will argue that it is the next logical step to secure at least some of the rights that were lost in *Grants Pass* and may provide some relief to the houseless individuals that are currently facing displacement as a result of the Supreme Court's decision in *Grants Pass*.

This Article makes two primary contributions. First, it argues that the *Grants Pass* decision was made contrary to legal precedent and was incorrectly decided. It will examine a series of landmark Eighth Amendment cases concerning crimes prohibited by the Eighth Amendment, ranging from *California v. Robinson* in the 1960s to the recent Supreme Court ruling in *City of Grants Pass v. Johnson* in June 2024. It critically analyzes how these decisions, including seminal rulings like *Texas v. Powell*, have interacted with Ninth Circuit precedents that aim to shield the involuntarily unhoused from criminalization. The discussion will

21. Empiricists have long attempted to establish a causal link between houselessness and property crime and have reached different results. *E.g.,* Kevin Y. Xu, Jessica A. Gold, Hannah S. Szlyk, Stephanie A Rolin & Morgan C. Shields, *Mental Illness and Violence Among People Experiencing Homelessness: An Evidence-Based Review*, 121 MO. MED. 14, 15–16 (2024) (finding that there is no causal link between houselessness and property crime); BENJAMIN ARTZ & DAVID WALSH, HOMELESSNESS AND CRIME: AN EXAMINATION OF CALIFORNIA 3 (2024) (finding a causal link between an increase in houselessness and violent crimes). Causality is incredibly difficult to disentangle, largely because criminal legal involvement and houselessness are "driven by the same structural factors and exacerbate one another in a feedback loop." Dallas Augustine & Margot Kushel, *Community Supervision, Housing Insecurity, & Homelessness*, 701 ANNALS AM. ACAD. POL. & SOC. SCI. 152, 152 (2022).

22. *E.g.,* Petition for Writ of Certiorari app. at 119–21, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175) (discussing denying unhoused people service of "food, clothing, bedding, and hygiene" for the purpose of causing them enough "pain" to "encourage prosocial behavior").

23. *See infra* Part III.

culminate in an assessment of the majority and dissenting opinions in *City of Grants Pass v. Johnson*, arguing that the majority's endorsement of criminalizing essential life-sustaining activities like sitting and sleeping is inconsistent with established Eighth Amendment jurisprudence. Ultimately, it finds that the *Grants Pass* decision was both legally and morally wrong.

Second, this Article offers an alternative legal theory that may give hope to the future of some of these claims, allowing for the unhoused affected by the statutes like the ones in *Grants Pass* to receive some form of constitutional protection. It joins the voices of other scholars who have argued that a court conducting rational basis review of a piece of legislation can engage in a much more meaningful level of scrutiny than typical constitutional law doctrine has opted for.[24] Diverging from those voices who express concern over so-called "animus doctrine" or "rational basis with bite," this Article argues that, if any treatment of an unpopular group merits elevated rational basis review, it is the treatment to which many local governments have subjected the unhoused. After tracing the relevant legal doctrine, I will use the *Grants Pass* ordinance as an example to argue similar statutes violate the Fourteenth Amendment guarantee of equal protection under the law, while providing other relevant examples from across the country to show that the local government in *Grants Pass* is not alone in its [hateful] treatment of the unhoused.

This Article proceeds in four parts. Part I traces Eighth Amendment jurisprudence on status and conduct, leading up to and culminating in the Supreme Court's decision in *Grants Pass*. Part II discusses the historic and current social and legal status of those experiencing houselessness in the United States and will include a discussion of the discrimination that this group has faced and continues to face. Part III begins by describing and analyzing the relevant Fourteenth Amendment rational basis review precedent in both the Supreme Court and lower courts, and then moves on to analyze anti-homeless ordinances in light of these precedents. Part IV ends with a brief discussion on the use of animus doctrine to combat anti-homeless ordinances as a policy matter, ruminating on the intentions of the constitutional framers and the role of government.

I.
THE ROAD TO GRANTS PASS: THE UNHOUSED & THE EIGHTH AMENDMENT

When the Supreme Court granted certiorari to hear *City of Grants Pass v. Johnson*, it was confronted with a difficult set of questions, chief among them whether instituting fees and jailtime against involuntarily unhoused individuals for acts like sleeping and sitting in public constituted cruel and unusual punishment under the Eighth Amendment.[25] Along the way, the Court tackled several ancillary questions, such as what exactly constituted an involuntary status,

24. *E.g.*, William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 155 (2019); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1320, 1322 (2018).

25. *See* City of Grants Pass v. Johnson, 603 U.S. 520, 521 (2024).

whether the prohibition against Cruel and Unusual Punishment in the Eighth Amendment applied to types of crimes or only types of punishments, and if the Eighth Amendment prohibited criminalization of certain types of activities that are inherent to the experience of being unhoused, what those activities were.[26] The Court eventually ruled that anti-camping ordinances, even if they were primarily enforced against the unhoused, did not violate the Eighth Amendment prohibition against cruel and unusual punishment.[27]

This section takes the position that the majority in *Grants Pass* came to the wrong conclusion. The legal precedent set by the majority in *California v. Robinson* and five justices in *Texas v. Powell* should have controlled the Court's decision in *Grants Pass*. However, now that the Court has closed one avenue that protected the unhoused under the Constitution, an alternative way that the unhoused can gain protection must be explored: the Equal Protection Clause. Below, I discuss the ways that the Fourteenth Amendment can be used to strike down statutes around the country just like those promulgated in *Grants Pass*. However, to understand the path to *Grants Pass*, it is necessary to have a detailed discussion of seminal Eighth Amendment cases that ask whether statuses—and actions that flow from those statuses—can be criminalized.

A. Robinson v. California: States Can't Criminalize Statuses

Grants Pass finds roots all the way back in the 1962 Supreme Court case *Robinson v. California*.[28] *Robinson* marks a unique moment for the Court because it is one of the only times that it uses the Eighth Amendment to announce a broad constitutional prohibition against certain types of crime.[29] As such, *Robinson* spawned a unique line of legal scholarship that attempted to create legal protections for those who carried marginalized and stigmatized statuses.[30] It also produced a line of scholars who expressed fear and hesitation around extending the reaches of *Robinson* too broadly, arguing that it could usurp states' power to determine the substance of the criminal law.[31] Both of these throughlines are found

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26. *See infra* Part I.D.

27. *Grants Pass,* 603 U.S. at 557.

28. *See id.* at 522 (analyzing the applicability of the holding in *Robinson v. California*, 370 U.S. 660 (1962)).

29. *E.g., id.* at 521 ("The Eighth Amendment's Cruel and Unusual Punishments Clause 'has always been considered, and properly so, to be directed at the method or kind of punishment' a government may 'impose for the violation of criminal statutes.'") (quoting Powell v. Texas, 392 U.S. 514, 531–32 (1968)); *see also* Furman v. Georgia, 408 U.S. 238, 239–240; (1972); Trop v. Dulles, 356 U.S. 86, 100 (1958); Weems v. United States, 217 U.S. 349, 377 (1910).

30. *See* Lauren Bennett, *Punishing Poverty: Robinson & the Criminal Cash Bond System*, 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315, 316 (2019); Elyn R. Saks, *The Status of Status Offenses: Helping Reverse the Criminalization of Mental Illness*, 23 S. CAL. REV. L. & SOC. JUST. 367, 367 (2014); Martin R. Gardner, *Rethinking* Robinson v. California *in the Wake of* Jones v. Los Angeles, 98 J. CRIM. L. & CRIMINOLOGY 429, 429 (2008); E.J. Walters, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1619 (1995).

31. *E.g.,* West Menefee Bakke, *Against the Status Crimes Doctrine*, 73 S.M.U. L. REV. F. 232, 233 (2020).

in the cases that follow *Robinson*, most notably in the famous divided plurality and concurrence in *Powell v. Texas*.

In *Robinson v. California*, Defendant Robinson was arrested for being a drug addict under a California statute that made it a misdemeanor for a person to be present in California while "addicted to narcotics."[32] Robinson's drug addiction was discovered because a police officer happened to examine his arm on the street and find needle scars and tissue discoloration.[33] The arresting officer insisted, after questioning Robinson, that he admitted to the "occasional use of narcotics,"[34] even though Robinson himself denied ever admitting to drug use.[35] In Robinson's trial, the judge instructed the jury that they could convict Robinson of being a drug addict, specifying that being drug addicted was a continuous status that the addict carried until they beat their addiction.[36]

The question the Court confronted was whether convicting someone for an addiction to narcotics constituted cruel and unusual punishment under the Eighth Amendment.[37] Acknowledging the State of California's "broad" discretion to use its police powers to regulate the sale of drugs within its borders,[38] the Court answered yes—punishing someone for being addicted to drugs was tantamount to punishing someone for being "mentally ill, or a leper, or . . . [being] afflicted with a venereal disease."[39]

Thus, the problem in *Robinson* was that the California statute punishes not the use of drugs, but the affliction of being a drug addict. In other words—the statute punishes the status of being an addict. The *Robinson* Court notes that drug addiction is an "illness," and one which might be contracted "innocently or involuntarily," as some may innocently contract a drug addiction from the use of prescribed medications.[40] The Court expressed aversion to a state law which criminalized someone for being addicted to drugs even if they had never "touched any narcotic drug within the State or been guilty of any irregular behavior."[41] In other words, it was especially abhorrent to the Court that a person may become addicted to drugs while engaging in acts that were not criminally culpable, like taking prescription drugs.[42]

An important aspect of *Robinson v. California* is also its insistence that certain types of crimes are unconstitutional under the Eighth Amendment even if the punishments for those types of crimes are not especially severe or unusual. Justice Stewart notes that while the punishment under the California law for being a drug

32. Robinson v. California, 370 U.S. 660, 660 (1962).
33. *Id.* at 661.
34. *Id*.
35. *Id.* at 662.
36. *Id.* at 662–67.
37. *Id.* at 661.
38. *Id.* at 664.
39. *Id.*at 666–67.
40. *Id*.
41. *Id.* at 667.
42. *Id.* at 670.

addict—90 days in jail—is not necessarily cruel and unusual punishment for criminally culpable behavior, "[e]ven one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold."[43] Thus, an integral component of the *Robinson* ruling is that regardless of the severity of the punishment, the Eighth Amendment still prohibits certain types of crimes.

B. Powell v. Texas: Criminalizing Conduct Arising Out of a Status

The idea that punishing statuses was unconstitutional was tested six years later in *Powell v. Texas*.[44] The *Powell* Court was a deeply divided one, with Justice Marshall penning the plurality and representing the opinions of four Justices,[45] two of those plurality Justices penning the first concurrence,[46] Justice White penning a tie-breaking second concurrence,[47] and four Justices penning the dissent.[48] The case is particularly difficult to analyze because Justice White's tie-breaking second concurrence in many ways seems to agree more with the dissent's reasoning, despite ultimately voting with the plurality.[49] What's more, as discussed in *Marks v. United States* a decade later, plurality opinions such as the one in *Powell* only carry persuasive weight, rather than the binding authority of the Court.[50] According to *Marks*, the persuasive precedential effect of a plurality decision comes from the narrowest consensus of five Justices, not just from the Justices that penned the plurality.[51] This has left some courts—including the ones in *Grants Pass*—unsure of the best way to interpret the precedent set forth in *Powell*.[52]

The principal question the plurality confronted in *Powell* was whether activities that flow from statuses could be punished under the Eighth Amendment.[53] Petitioner and defendant Powell was tried and convicted under a Texas statute that

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43. *Id*. at 667.

44. *See* Powell v. Texas, 392 U.S. 514 (1968).

45. *Id.* at 516–37.

46. *Id.* at 537–48.

47. *Id.* at 548–54.

48. *Id.* at 554–69.

49. *Id.* at 548–49. Agreeing with the dissent's reasoning, Justice White notes that "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics, [citing *Robinson*], I do not see how it can constitutionally be a crime to yield to such a compulsion." *Id.* at 548. However, Justice White ultimately finds that while the defendant was able to show that he had an irresistible impulse *to drink*, he was not able to show that he had an irresistible impulse to *do that drinking outside*. *Id.* at 550.

50. *See* Marks v. United States, 430 U.S. 188, 193 (1977); Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 795 (2017) (discussing how the precedential value of plurality decisions is determined by the plurality rule announced in *Marks*, and also how the Court has said little else regarding the precedential value of plurality decisions.).

51. *Marks*, 430 U.S. at 193–94.

52. As will be discussed further below, the majority in *Grants Pass* seems to ignore that five Justices thought that acts that arose out of status should escape criminalization under the Eighth Amendment. They exclusively discuss Justice Marshall's plurality, disregarding Justice White's crucial concurrence, along with the integrally important dissent. *See* City of Grants Pass v. Johnson, 603 U.S. 557–58 (2024).

53. Powell v. Texas, 392 U.S. 514, 532–33 (1968).

criminalized getting drunk or being found drunk in a public place.[54] Powell was tried, convicted, and fined $20.[55] Because the constitutional defect in *Robinson* was the lack of a criminally culpable act, Powell argued that as a chronic alcoholic, becoming drunk was not a volitional act and was inherent to his status.[56] Consequently, he could not stop himself from being in public while drunk.[57] Powell argued that, in the same way that being a drug addict is a status, being in public while drunk was part of the status of being a chronic alcoholic, as being in public while he was drunk was a "compulsion symptomatic of the disease of chronic alcoholism."[58] Thus, he argued, *Robinson* prohibited its punishment under the Eighth Amendment.

In order to determine whether actions that flow from statuses can be criminalized, the plurality wrestled with the related issue of whether repeatedly drinking to excess was voluntary for those who experienced chronic alcoholism. The expert in Powell's trial testified as to the ongoing debate within the medical community about whether alcohol was actually physically addicting or merely "psychologically 'habituating,'" which speaks to the issue of whether the act of drinking could constitute a volitional act.[59] The expert elaborated, after examining Powell, that he was a chronic alcoholic and that by the time he had reached the state of being drunk, he was powerless to control his behavior and had only reached that state because he had an "uncontrollable compulsion to drink."[60] Thus, Powell argued that his uncontrollable compulsion to drink caused him to be unable to control whether he appeared in public drunk.[61] Powell's expert testimony was ambivalent as to whether taking a drink was voluntary for people who are chronic alcoholics.[62] He noted that when Powell was sober, he knew the difference between right and wrong. He also stated that, even though taking the first drink for an alcoholic was a "voluntary exercise of his will," most alcoholics have a compulsion, which is not "completely overpowering" but an "exceedingly strong influence."[63] Furthermore, Powell testified that he had been arrested multiple times for his intoxication and that when he drank, he could not stop himself from drinking more.[64]

In delivering the plurality, Justice Marshall showed some skepticism about whether the initial drink that a chronic alcoholic takes is a voluntary or involuntary act.[65] He noted that the facts on the record indicated that taking a drink for Powell

54. *Id.* at 517.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 521.
59. Powell v. Texas, 392 U.S. 514, 557 (1968).
60. *Id.*
61. *Id*. at 558.
62. *Id*. at 518.
63. *Id*. at 518–19.
64. *Id.*
65. *Id.* at 524–26.

was voluntary.[66] Yet, he highlighted that the state made no effort to obtain psychiatric reports of their own, or to explore the substantial disagreement within the medical community over what alcoholism was and whether or not it was a disease.[67] He also expressed skepticism that the majority of alcoholics can be said to suffer from an irresistible impulse to drink. Pointing to the mixed opinions among alcoholism experts, Justice Marshall found that there are five types of alcoholics throughout the U.S. that display different symptoms, and that only two of these types of alcoholics can be said to be suffering from alcoholism as a type of disease, where drinking is involuntary.[68]

Justice Marshall also argued that creating a constitutional rule that prohibits the criminalization of public drunkenness for alcoholics is undesirable as a matter of public policy. He gestured to the fact that medical professionals disagree about the best manner to treat alcoholism; some even believed that it is impossible to treat altogether.[69] Additionally, he pointed to the fact that there are few facilities that treat indigent alcoholics, and that brief incarceration may afford indigent alcoholics a chance to "sober up," an opportunity that they may not get outside of jail.[70] Because of this, Justice Marshall argued that as a matter of public policy, Powell had not convinced the Court that medical treatment would have been superior to jailing alcoholics for a brief period of time.[71] Similarly, Justice Marshall opined that jail time may be superior to civil commitment for alcoholism because there is a statutorily limited time that alcoholics may be imprisoned. He remarked that usually, jailtime for alcoholism is short in duration, whereas civil commitment for alcoholism may be considerably longer, and may ultimately be ineffective.[72]

Turning to whether the public drunkenness ordinance violates the Eighth Amendment, the plurality first noted that the primary purpose of the Eighth Amendment prohibition against cruel and unusual punishment is to regulate the "method or kind of punishment imposed for the violation of criminal statutes."[73] Justice Marshall pointed out, however, that while petitioners argue that *Robinson v. California* should be controlling, the case at hand can be distinguished from *Robinson* in that the petitioner in *Robinson* was challenging a California statute that criminalized the mere status of being an alcoholic.[74] Here, however, Texas rather sought to regulate public behavior "which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the

66. For example, during cross-examination at the trial court, Powell testified that he was able to only have one drink on the day of his trial and stop himself from drinking anymore so that he could be clear-headed for his trial. Powell v. Texas, 392 U.S. 514, 519 (1968).

67. *Id.* at 520.

68. *Id.* at 522–23.

69. *Id.* at 527–28.

70. *Id.* at 528.

71. *Id*.

72. Powell v. Texas, 392 U.S. 514, 529, 539 (1968).

73. *Id.* at 531–32.

74. *Id.* at 532.

community."[75] For the plurality, the constitutional defect in *Robinson* was that there was no actus reus required for a defendant to be held criminally culpable. Thus, for the plurality, the question of whether conduct is voluntary or involuntary does not bear on whether it is constitutionally punishable.[76]

Justice Marshall also cautioned against using *Robinson* to limit the types of behaviors that are punishable under criminal law, as he argued that doing so would make the Court the "ultimate arbiter of the standards of criminal responsibility."[77] To this end, he posited that *Robinson* should be narrowly construed to only cover statutes that contain no *actus reus* requirement.[78] Otherwise, courts may find themselves excusing away a number of crimes that states should have the authority to regulate.[79] For example, if *Robinson* was construed to prohibit criminalizing acts that flow from statuses, the state would not be able to hold someone criminally culpable for committing murder if they suffered from a "'compulsion' to kill, which is an 'exceedingly strong influence,' but 'not completely overpowering.'"[80] Justice Marshall instead suggested that a better venue for defendants to find redress would be through the various insanity tests that states have promulgated in order to assess a defendant's criminal responsibility.[81]

But the analysis of criminalizing actions flowing from statuses did not stop with the plurality. Given that *Powell* is a plurality opinion, the concurrences hold special weight in divining its persuasive, precedential weight. There were two concurrences in *Powell*, one written by Justices Black and Harlan, and another by Justice White. Justice Black and Harlan's concurrence is noteworthy because it demonstrates a wide deference for the power of state and local legislatures to determine criminal culpability in their jurisdictions. Delivering the concurrence, Justice Black noted that, while he does not personally think it wise to enact criminal sanctions against alcoholics, states have always had "wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime."[82] Justice Black also argued that there are wide ramifications in finding that conduct that is inherent to a status cannot be punishable. States would not be able to punish the use of many drugs, and people who commit sex offenses and can show that their sex offenses arise from a compulsion also won't be able to be punished.[83] Justice Black further remarked that this test would necessitate engaging in extensive fact finding, determining what is constitutive of the disease, what is a part of the disease, and what are symptoms of the disease.[84] Such determinations would make it difficult for the Court to announce an all-encompassing rule,

75. *Id*.
76. *Id.* at 533.
77. *Id*.
78. *Id.*
79. *Id.* at 534–35.
80. *Id*. at 535.
81. *Id.* at 536.
82. *Id.* at 545 (Black, J., concurring).
83. *Id.*
84. *Id.* at 546 (Black, J., concurring).

as it would require granular determinations of detail.[85] While not much is stated in this concurrence that is dissimilar to Justice Marshall's plurality, Justice Black explained that he read *Robinson* to only require that criminal laws contain an actus reus component, and that the state can't simply criminalize a propensity to commit crime or a status.[86]

Justice White's concurrence is striking because, while he voted with the plurality, he indicated that he ultimately agrees with the dissent's reasoning. But nonetheless, Powell was unable to clearly demonstrate that appearing drunk in public was truly beyond his control.[87] Instead of reading *Robinson* to merely prohibit the promulgation of criminal statutes that are devoid of an actus reus, Justice White argues that, if punishing a status is prohibited, punishing conduct that inherently flows from that status should also be prohibited, as long as that conduct occurs proximate in time to the gaining of the status.[88] This concurrence becomes integrally important in the Ninth Circuit cases, as in *Grants Pass*, because Justice White's reasoning comports with the dissent's conclusion that punishing actions that flow from statuses is not constitutional and disagrees with the plurality's opinion that those actions can be punished under the Constitution. As further elaborated below, because *Powell* is a plurality opinion, the Supreme Court has stated that the persuasive precedential effect should be the prevailing reasoning of the greatest number of judges on the Court, construed as narrowly as possible.[89] Unconvinced by the Court's distinction between status and conduct that is inherent to that status, Justice White famously argued that "[p]unishing an addict for using drugs convicts for addiction under a different name," gesturing towards the idea that punishing involuntary conduct that flows from a status does not comport with the Eighth Amendment.[90]

85. *Id*.

86. *Id*. at 542–43.

87. *Id.* at 548 (White, J., concurring) ("If it cannot be a crime to have an irresistible compulsion to use narcotics, *Robinson v. California* . . . , I do not see how it can constitutionally be a crime to yield to such a compulsion."); *Id.* at 551 n.3 (". . . [O]n the record before us there is some question whether Powell possessed that degree of compulsion which alone would satisfy one of the prerequisites that I deem essential to an assertion of an Eighth Amendment defense. It is nowhere disputed, however, that there are chronic alcoholics whose need to consume alcohol in large quantities is so persistent and so insistent that they are truly compelled to drink.").

88. *Id.* at 551–52 n.2.

89. Marks v. United States, 430 U.S. 188, 193 (1977).

90. *Powell,* 392 U.S. at 548, 551 (White, J., concurring).

Justice White argued that if an individual is able to make a showing that the act inherently flows from an involuntary status, this should keep the act out of the reach of the state to criminalize under the Eighth Amendment.[91] Seeming to anticipate *Grants Pass*, Justice White remarked that "chronic alcoholics must drink and . . . must drink somewhere," essentially, that alcoholics without homes would have to appear drunk on the street.[92] As such, their action should be protected from criminalization by the Eighth Amendment.[93] However, Justice White noted that there is no showing that Powell becoming drunk on the street was involuntary, which is why he voted with the plurality.[94]

In order to differentiate acts that flow from involuntary statuses from acts that do not flow from involuntary status, Justice White suggested a rough time limit as a guide.[95] Under Justice White's standard, the proper inquiry into whether incidental acts that flow from a condition can be criminalized under the Eighth Amendment is: 1) "whether volitional acts brought about the 'condition' and 2) whether those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'"[96] Using Powell as an example, Justice White argues that the relevant inquiry is whether the alcoholic's intoxication stems from a volitional act; if it does not, and the appearance in public while intoxicated is sufficiently proximate to that compelled condition, the Eighth Amendment may prohibit criminal punishment. Thus, key factual questions for Justice White are first, whether a condition is involuntary, and second, the timing of the acts that flow from the condition.

Here, the dissent's reasoning is crucial because it is closest to Justice White's, creating the five Justices needed for precedential effect under Marks. Writing for the dissent, Justice Fortas opened with some additional facts from the record. Justice Fortas notes that Powell has been arrested for public drunkenness approximately 100 times.[97] Since he usually cannot afford to pay the fine, he often works off his $20 to $25 during short stints in jail at a rate of $5 per day. Once a week, Powell gets drunk and falls asleep in public places.[98]

Justice Fortas argued that the record supported the notion that Powell is suffering from a disease, which he narrowly construed to mean that Powell's alcoholism is "caused and maintained by something other than the moral fault of the alcoholic."[99] Taking a very disease-centric view of *Robinson*, the dissent noted

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91. *Id.* at 550–51.

92. *Id.* at 551 (White, J., concurring).

93. *Id*.

94. *Id.* at 553–54. When discussing the precedential value of *Powell* years later, the Ninth Circuit also noted that the outcome of the *Powell* case may have been very different if appellant Powell were able to demonstrate on the record that appearing in public to drink was involuntary. *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1134 (9th Cir. 2006).

95. *Powell,* 392 U.S. at 548, 550 n.2 (White, J., concurring).

96. *Id.*

97. *Id.* at 555 (Fortas, J., dissenting).

98. *Id*.

99. *Id.* at 560.

that the *Robinson* Court held that the state cannot punish people for being "ill."[100] The dissent also takes the view that being "drunk in public" is a condition,[101] a point Justice White seems to disagree with in his concurrence. Because the state must only prove that someone was in an intoxicated condition in a public place—a condition that, according to the dissent, is a condition that flows from a status—public drunkenness ordinances such as the one in *Powell* violate the Eighth Amendment.[102]

The dissent's insistence that being drunk in public is a condition is difficult to sustain based on the precedent created in *Robinson*. In *Robinson*, the status of being a narcotics user was "continu[ous]."[103] While the *Robinson* Court does not offer much guidance does not offer much guidance about how to distinguish between acts and statuses or conditions, it does list several statuses or conditions, such as "chronic alcoholi[sm], mental . . . ill[ness], [and being a] leper."[104] All of these conditions last several months, years, or are even are lifetime afflictions, while being drunk in public is a temporary state until the drinker sobers up in a couple of hours. Justice White also notes that he does not agree with the dissent's view that being drunk in public constitutes a "condition," as it is a transient state and it is of much smaller importance in one's life than the condition of being a chronic alcoholic.[105]

Here is where the dissent and Justice White do, however, agree. The dissent would have the proper constitutional inquiry be whether the "condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of that disease."[106] For Justice Fortas, criminalizing Powell's behavior would be cruel and unusual because Powell is a "chronic alcoholic," who cannot "resist the 'constant excessive consumption of alcohol,'" and "does not appear in public by his own volition but under a 'compulsion' which is part of his condition."[107] Thus, the act of constantly drinking essentially defines what a chronic alcoholic is; if it's unconstitutional to criminalize being an alcoholic, for the dissent and Justice White, it should be unconstitutional to criminalize the acts that make one an alcoholic, i.e., chronic drinking. This is the persuasive precedent of Powell, as it is the narrowest terms under which five out of nine Justices agree.

Justice White, on the other hand, did not agree with the reasoning provided by the plurality opinion, wondering, if it cannot be a "crime to have an irresistible compulsion to use narcotics," how it could "constitutionally be a crime to yield to such a compulsion,"[108] directly rebuking the plurality's reasoning. Thus, given the

100. *Id*. at 556 (Fortas, J., dissenting).
101. *Id.* at 568.
102. *Id*.
103. Robinson v. California, 370 U.S. 660, 662 (1962).
104. *Id*. at 666.
105. *Powell*, 392 U.S. at 551 n.3 (White, J., concurring).
106. *Id.* at 569 (Fortas, J., dissenting).
107. *Id*. at 570.
108. *Id.* at 549 (White, J., concurring).

rule announced in *Marks v. United States*—one of the few cases in which the Court has given explicit guidance on the precedential authority of plurality decisions—the precedential power of *Powell* should be the most narrowly construed proposition agreed upon by the greatest number of Justices.[109] The narrowest proposition espoused by a majority of judges is that acts that inherently flow from a status and are proximate in time to that status cannot be criminalizable should be the persuasive precedential value of *Powell*.

C. The Ninth Circuit: The Unhoused, the Eighth Amendment, and Anti-Camping Ordinances

Fast-forward to nearly forty years later, the Ninth Circuit used the constitutional principles found in *Robinson v. California* and *Powell v. Texas* to vindicate the rights of the unhoused. Relying on the prohibition against criminalizing status in *Robinson*, and the narrowest holding by five Justices in *Powell*, the Ninth Circuit found that it was cruel and unusual punishment to criminalize the unhoused for sleeping outside while there was a lack of shelter beds to support the unhoused population.[110] However, this rule created difficult policy problems in enforcement—creating a false distinction between "voluntary" and "involuntary" houselessness, thereby setting the stage for *Grants Pass*.

In *Jones v. City of Los Angeles*, six unhoused individuals brought suit against the City of Los Angeles, alleging that an ordinance that criminalized the "sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within Los Angeles's city limits" violated their constitutional right to be free from cruel and unusual punishment.[111] The Ninth Circuit agreed and found Los Angeles in violation of the Eighth Amendment.[112]

Delivering the opinion of the court, Judge Wardlaw remarked that the critical factor in determining whether an act or condition can be criminalized is whether the act or condition is voluntary.[113] To the issue of whether acts that flow from an involuntary condition can be criminalized, Judge Wardlaw relied on the dissent and Justice White's reasoning in *Powell*, arguing that the state cannot punish someone for acts that they are "powerless to avoid."[114] Judge Wardlaw noted that both Justice White in his concurrence and the dissenters in *Powell* agreed on a constitutional standard where acts that flow from an involuntary condition are

109. Marks v. United States, 430 U.S. 188, 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'") (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976)).

110. Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006).

111. *Id*. at 1120–25.

112. *Id.* at 1138. (". . .the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles.").

113. *Id.* at 1132.

114. *Id.* at 1133.

"impossible" to avoid and, therefore, must be prohibited from criminalization under the Eighth Amendment.[115]

Echoing Justice White in *Powell*, Judge Wardlaw recognized the slippery slope between acts and statuses and argued that courts should not be "preoccup[ied]" with the distinction between these two concepts.[116] For example, she explained that many consider falling asleep on the sidewalk an act but being asleep on the sidewalk a condition; however, both the act and condition are close in time to each other and at some points are indistinguishable.[117]

Because she viewed Justice White's standard to have the most precedential weight, Judge Wardlaw adopted Justice White's standard in *Powell*.[118] Judge Wardlaw stated that the proper inquiry into the Los Angeles statue is whether "volitional acts brought about the 'condition.'"[119] Under this standard, the court finds that the Eighth Amendment prohibits the enforcement of the statute against "involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles."[120] In turn, Judge Wardlaw impliedly deems the status of being unhoused conditionally involuntary by announcing a rule that is adopted in later cases: if the number of unhoused people in a jurisdiction exceeds the number of available shelter beds, then being unhoused cannot be constitutionally punished.[121] Judge Wardlaw notes that the ruling is narrow and does not prohibit the enforcement of the statute on its face, nor does the ruling necessarily cover jurisdictions in which the number of unhoused does not exceed the number of beds available. Notably, however, there was a settlement between the two parties in Jones, meaning the Ninth Circuit's decision in this case was eventually vacated.[122]

Despite this, in 2019, the Ninth Circuit decided *Martin v. City of Boise*, a case that employed similar reasoning and reached the same conclusion as *Jones v. City of Los* Angeles. In *Martin*, six unhoused residents of Boise, Idaho brought suit against the City of Boise, arguing that its anti-camping and disorderly conduct ordinance violated the Eighth Amendment.[123] The anti-camping ordinance at issue made it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time."[124] "Camping" was defined as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence."[125] The disorderly conduct ordinance prohibited "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . .

115. *Id.* at 1134.
116. *Id.* at 1135.
117. *Id*.
118. *See id.* at 1134.
119. *Id.* at 1136.
120. *Id.* at 1138.
121. *Id*.
122. *Id*. at 1006.
123. Martin v. City of Boise, 920 F.3d 584, 603–04 (2019).
124. *Id*.
125. *Id.*

without the permission of the owner or person entitled to possession or in control thereof."[126]

Delivering the majority opinion of the court, Judge Berzon noted that although the *Jones* decision is not binding on the court given the settlement between the two parties, the majority agreed with the central reasoning and conclusion in Jones.[127] Therefore, the majority found that an ordinance that criminalizes sleeping outdoors violates the Eighth Amendment if there is no "alternative shelter available." Thus, it is unconstitutional to punish actions, like sleeping and sitting, that inherently flow from the status of houselessness if the houselessness is deemed 'involuntary' due to the lack of beds to support the number of unhoused people in that jurisdiction.[128]

After noting that *Ingraham* brings the content of criminal law under Eighth Amendment review,[129] Judge Berzon asserted that statutes that criminalize "sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter" did not pass constitutional muster.[130] Similar to the court in *Jones*, Judge Berzon was not concerned with the distinction between conduct and status because conduct like "sitting, lying, or sleeping" are biological necessities, and are inseparable from human existence.[131] This is conduct that results from the "unavoidable consequence of being homeless."[132]

In *Martin* and *Jones*, the Ninth Circuit arrived at the right conclusion constitutionally while announcing a rule that is difficult to enforce and, ultimately, had the potential to create conditions in which unhoused people are criminalized for sleeping outside, even if sleeping in a shelter would be untenable or unbearable for them. The formula (hereinafter the "*Martin* formula") that determined whether houselessness is voluntary or involuntary was properly based on the narrow proposition established by Justice White in the concurrence of *Powell*:[133] involuntary statuses should remain exempt from criminalization, and actions that flow from those involuntary statuses should also be exempt.[134] The *Martin* formula is a framework that deems the status of being houseless involuntary if there are insufficient beds in a jurisdiction to support the number of houseless people in a jurisdiction, and voluntary if there are a sufficient number of beds to support the number of unhoused people in a jurisdiction.[135] This formula comports with precedent: an individual, fact-specific determination doesn't need to be made concerning

126. *Id.* at 604.

127. *Id*.

128. *Id*. at 617.

129. Ingraham v. Wright, 430 U.S. 651, 667 (1977) ("[The] Cruel and Unusual Punishments Clause . . . imposes substantive limits on what can be made criminal and punished as such, e.g., *Robinson v. California*.").

130. *Martin,* 920 F.3d at 618.

131. *Id.* at 617.

132. *Id*.

133. Powell v. Texas, 392 U.S. 514, 551 n.3. (1968).

134. *Id*.

135. *Martin*, 920 F.3d at 604.

whether sleeping outside is proximate to having the involuntary status of houselessness—sleeping outside while being houseless is always proximate in time to that condition, since unhoused individuals, by definition, lack a permanent place to sleep.

Furthermore, the *Martin* formula properly excluded a determination of the voluntariness of an individual becoming unhoused in the first place. The Robinson majority was clear—there are a number of reasons that may lead a person to gaining a status, some of them voluntary—like the taking of recreational drugs—and some of them involuntary—like the taking of prescription drugs.[136] Disregarding the varied reasons that someone could become addicted to drugs, criminalizing being a drug addict was still constitutionally impermissible.[137] Therefore, the courts in *Jones* and *Martin* properly disregarded the varied reasons that one may gain the status of being unhoused.

But the ultimately unwieldy nature of this rule is demonstrated in the text of the *Martin* opinion itself. Because the rule does not announce any maximum capacity standards for shelters,[138] shelters are free to claim that they have capacity for more residents while residents are living in severely overcrowded conditions. For example, during pending litigation, the City of Boise announced a new policy that law enforcement could not enforce the anti-camping ordinances if all of the shelters in the area were full for the night; shelters, relying on their own discretionary policies that determined capacity, reported their capacity every night to law enforcement.[139] One shelter had a policy never to turn away shelter seekers due to a lack of space, even if they, in practice, had no space.[140] This meant that law enforcement never stopped enforcing the Boise anti-camping ordinances.[141] While the shelter may be willing to make room for as many people as request it, there is no safeguard to ensure that shelters are not overcrowded or unsafe, as many shelter-users perceive shelter access to be.[142]

Likewise, the *Martin* rule improperly designates unhoused people as "voluntarily" unhoused when, in reality, they may not feel they have a meaningful choice as to whether to sleep on the streets. The *Martin* rule contains no room for the

136. Robinson v. California, 370 U.S. 660, 667 (1962) (prohibiting the criminalization of the status of drug addiction "innocently or involuntarily" or through the use of illegal drugs.).

137. *Id*.

138. *Martin*, 920 F.3d 584 at 607.

139. *Id.*

140. *Id*.

141. *Id*.

142. *See* Greg B. Smith & Suhail Bhat, *Homeless Shelters Are Overflowing–and Most Likely in Poor Areas, Despite Fair Share Promises*, THE CITY, (July 26, 2022, 6:30 PM), https://www.thecity.nyc/2022/07/26/homeless-shelters-are-overflowing-and-most-likely-in-poor-areas-despite-fair-share-promises/ [https://perma.cc/D56X-SGTX]; Nick Kerman, Sean A. Kidd, Joseph Voronov, Carrie Anne Marshall, Branagh O'Shaughnessy, Alex Abramovich & Vicky Stergiopoulos, *Victimization, Safety, and Overdose in Homeless Shelters: A Systematic Review and Narrative Analysis*, 83 HEALTH & PLACE 1, 13 (2023) ("fears of violence and other forms of harm, including non-violent victimization and overdose risk, are prominent concerns for people experiencing homelessness when accessing shelters.").

event that, while there are adequate shelter beds for the unhoused, conditions in shelters are less safe than those on the street.[143] There have been indications across the country that some unhoused individuals sleep on the streets rather than sleep in shelters because some consider shelter conditions more unsafe than the conditions on the streets.[144] The *Jones* and *Martin* courts fail to take this into account. So, too, does the majority in *Grants Pass* (discussed below), focusing on the unsanitary and unsafe conditions that the unhoused face while living in encampments but not addressing the harsh reality that many shelters across the country also have unsafe conditions.[145]

D. City of Grants Pass v. Johnson*: Eroding Eighth Amendment Safeguards for the Unhoused*

In *Grants Pass v. Johnson*, a class of unhoused individuals sued the city of Grants Pass, Oregon for an anti-camping ordinance that prohibited individuals, under penalty of fine, and then jail time, from "sleep[ing] on public sidewalks, streets, or alleyways at anytime as a matter of individual and public safety."[146] The same ordinance also forbade "occupy[ing] a campsite in or upon any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct."[147] The ordinance defined campsite as "any place where bedding, [a] sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained *for the purpose of maintaining a temporary place to live*. . . ."[148] Notably, by definition, the ordinance also does not criminalize sleeping outside if one is doing so for a purpose other than building a temporary place to live, such as sleeping outside under the stars or napping in the park.

The *Grants Pass* Court answered the ambiguity left by many of the unanswered questions in Robinson and Powell by declining to extend Eighth Amendment protections to actions incidental to living while unhoused, like sleeping and sitting, regardless of if there are not enough beds in a jurisdiction to render the

143. The Martin formula is a simple numerical calculation of the availability of shelter beds as compared to the number of unhoused people in a jurisdiction. *Martin*, 920 F.3d at 617 ("As long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors. . . .").

144. LINDSEY DAVIS, VIEW FROM THE STREET 6 (2021), https://www.coalitionforthehomeless.org/wp-content/uploads/2021/04/View-from-the-Street-April-21.pdf [https://perma.cc/U4TG-G48S] (last visited Nov 8, 2025); Rina Palta, *Why Do Thousands of L.A.'s Homeless Shelter Beds Sit Empty Each Night? Rats, Roaches, Bedbugs, Mold*, KQED, (May 16, 2018), https://www.kqed.org/news/11668623/why-do-thousands-of-l-a-s-homeless-shelter-beds-sit-empty-each-night-rats-roaches-bedbugs-mold [https://perma.cc/W5RQ-MMDW] (last visited March 9, 2025).

145. *See infra* Part I.D.

146. GRANTS PASS MUN. CODE, tit. 5, ch. II, § 5.61.020(A) (2023) (repealed; previous code available at: https://perma.cc/4X6P-YBNP).

147. GRANTS PASS MUN. CODE, tit. 5, ch. II §§ 5.61.030, 5.61.010 (2023) (repealed; previous code available at: https://perma.cc/4X6P-YBNP).

148. *Id.* (emphasis added).

unhoused status "involuntary" under the *Martin* formula.[149] The Court also confusingly declines to overturn *Robinson v. California*—a case which prohibits a classification of crimes that criminalize status—while at the same time definitively stating that the Eighth Amendment should only be used to prohibit certain types of punishments.[150] Finally, pretending as if the plurality opinion was the only opinion in *Powell*, the Court adopts the plurality's view, ignoring the five Justices that would have prohibited criminalizing actions that inherently flow from involuntary statuses.[151]

1. Grants Pass *Majority: The Powell Plurality is Controlling*

Justice Gorsuch delivered the majority opinion, which was decided entirely across political lines. As a general matter, the Court held that the enforcement of anti-camping ordinances did not violate the Eighth Amendment prohibition against cruel and unusual punishment.[152] The majority also ruled that, based on the "original meaning" of the Eighth Amendment, it should only be used to prohibit certain types of punishments, not proscribe prohibitions on whole categories of crimes.[153] Further, it found that the punishments of a "civil fine" and up to 30 days in jail do not constitute cruel and unusual punishment for sleeping outside.[154] This is notably in sharp contrast to the *Robinson* Court's assertion that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[155]

Because the Court adopted the *Powell* plurality's view of *Robinson*, Justice Gorsuch declared that *Robinson* does not protect plaintiffs in *Grants Pass* because the ordinance does not criminalize status, but conduct.[156] As a final point, and again echoing the *Powell* plurality, the Court noted that extending *Robinson* to protect certain acts from criminalization risks creating a constitutional insanity law, where there is a constitutional minimum by which actions can be criminally culpable, which the Court felt improperly steps into the realm of the state judiciary.[157]

Turning to public policy, Justice Gorsuch painted a dire picture of the homelessness crisis in the United States. Instead of focusing on the plight that unhoused folks suffer by living a difficult life in the streets, his sympathy appears to lie with

149. City of Grants Pass v. Johnson, 603 U.S. 520, 557 (2024).

150. *Id.* at 543.

151. *Id*. at 547–50.

152. *Id.* at 560.

153. *Id*. at 542–43. (Justice Gorsuch argues that the Eighth Amendment was originally designed to protect against the "barbaric punishments" that were tolerated by Eighteenth Century English law, like "disemboweling, quartering, public dissection, and burning alive.") (quoting Bucklew v. Precythe, 587 U.S. 119, 130 (2019). For the majority, therefore, the Eighth Amendment should only protect against certain types of punishment rather than certain classifications of crimes.

154. *Id.* at 543.

155. Robinson v. California, 370 U.S. 660, 667 (1962).

156. *Grants Pass*, 603 U.S. at 546–47.

157. *Id.* at 551.

the cities that have dealt with the housing crisis by criminalizing their unhoused residents.[158] While he acknowledged that there are many causes of homelessness, much of the majority opinion appears to be driven by anti-houseless sentiment. While there are several reasons that unhoused people may choose to live together, eschewing shelter—including mental health and even fear of shelter conditions themselves[159]—Justice Gorsuch ignored such reasons and selectively showcased factors like freedom from shelter rules and easy access to drugs as reasons driving unhoused people to sleep in the streets.[160] Justice Gorsuch also cited statistics indicating that encampments lead to more drug trafficking, violence, and sexual crimes.[161] Many of the statistics that Justice Gorsuch cited arise from amici brief from law enforcement, and few of these sources are backed by empirical data verifying the veracity of these claims.[162] In reality, the data around houselessness, encampments, and crime is much more complicated. Social scientists are still working to disentangle the causal relationship between experiencing homelessness, the factors that are attendant to that experience—lack of food, lack of money, etc.—and offending and victimization.[163]

While the Court stated that issues of public policy should be left up to the democratic system to deal with, Justice Gorsuch spent significant time discussing public policy. Justice Gorsuch addressed the communities that have tried a variety of approaches in addressing these issues, arguing that the holding in *Martin* has taken criminalization off the table for them, significantly narrowing the tools that they have at their disposal to address these issues. Justice Gorsuch also intimated that the holding in *Martin* has caused many unhoused folks to refuse offers of shelter.[164] While minimizing the effect that camping ordinances have on these communities, the Court remarked that anti-camping ordinances are commonplace in many states and are often only used as a last resort or to clear encampments that "'pose significant health and safety risks.'"[165] In sum, the majority viewed *Martin*

158. *See id.* at 533–38.

159. *E.g., Talk of the Nation: Why Some Homeless Choose the Streets over Shelters*, NPR RADIO BROADCAST (Dec. 6, 2012, 1:00 PM) (transcript available at https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters) [https://perma.cc/Z6NZ-U5A].

160. City of Grants Pass v. Johnson, 603 U.S. 520, 529 (2024).

161. *Id*. at 529–30.

162. For example, Justice Gorsuch cites the California State Sheriffs Association amicus brief that states that the "exponential increase in the homeless population and encampments in recent years have has resulted in an increase in crimes both against the homeless and by the homeless." Brief for California State Sheriffs' Association et al. as Amici Curiae Supporting Petitioners 21, *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520 (2024). This is a broad claim, but no sources or data are cited in the brief.

163. Bill McCarthy & John Hagan, *Homelessness, Offending, Victimization, and Criminal Legal System Contact*, 7 ANN. REV. OF CRIMINOLOGY 258, 275–76 (2024) (annual criminology review that concludes with noting that more research is needed to determine the causal nexus between the experience of homelessness, the factors attendant to that experience, and criminal offending.).

164. *Grants Pass,* 603 U.S. at 534–37.

165. *Id.* at 533.

as a decision that impertinently took an important policy "tool off the table" for legislators.[166]

Justice Gorsuch then turned to the Grants Pass ordinance and addressed whether its purpose was to criminalize the status of being unhoused. The Court noted that the Grants Pass police officer policy manual stated that "[h]omelessness is not a crime" and that officers were instructed to provide aid to unhoused residents whenever possible.[167] According to the majority, the statute did not criminalize the status of being homeless, but actions like "'occupying a campsite' on public property 'for the purpose of maintaining a temporary place to live.'"[168] Gesturing to the City's insistence that the anti-camping ordinance was one of general applicability, Justice Gorsuch further noted that the statute did not discriminate on the basis of housing status, and that anyone, a person who is "homeless, a backpacker, . . . a student who abandons his dorm room . . ." could be criminalized under the statute. In dealing with the dissent's view that allowing the criminalization of certain bodily functions like sleeping and sitting effectively criminalized the status of houselessness, Justice Gorsuch simply gestured to the plurality in *Texas v. Powell*, summarily stating that the Court already "rejected that view."[169] Justice Gorsuch said nothing about the five out of nine Justices who felt differently. Thus, according to the majority, the purpose of the statute was not to criminalize the mere status of being unhoused but to criminalize conduct.[170]

Next, Justice Gorsuch argued that the Eighth Amendment was not the proper avenue to protect the rights of the unhoused because of its original meaning. In the majority's view, the Eighth Amendment only guards against certain types of punishments, not certain types of crimes.[171] After a brief discussion of the original use, meaning, and purpose of the Eighth Amendment, Justice Gorsuch suggested that the punishments employed against the unhoused that violate the anti-camping ordinance were not cruel or unusual punishment because they were not "designed to 'superadd' 'terror, pain, or disgrace.'"[172] Justice Gorsuch dismissed the plaintiff respondents' use of Robinson to bolster their case and argued that "the Court stressed the limits of its decision" to prohibit only criminal statutes that do not carry an actus reus requirement.[173] Justice Gorsuch also repeatedly emphasized that extending Robinson would "cast doubt on the States' 'broad power'" to regulate criminal law.[174]

The majority also dealt with *Robinson* in a perplexing way that failed to provide guidance for future litigants who might seek protection under the Eighth

166. *Id*.

167. *Id.* at 538.

168. *Id.* at 546.

169. *Id.* at 548. Here, Justice Gorsuch impermissibly treats the plurality in *Powell* was if it was a majority opinion.

170. *Grants Pass,* 603 U.S. at 555.

171. *See id.* at 541–42.

172. *Id.* at 543 (quoting Bucklew v. Precythe, 587 U.S. 119, 130 (2019)).

173. *Id.* at 544.

174. *Id.* at 544, 546 (quoting Robinson v. California, 370 U.S. 660, 664, 667–68 (1962)).

Amendment. Emphasizing the unique nature of *Robinson*, Justice Gorsuch noted that the Court has declined to proscribe the enforcement of certain types of criminal law in the 62 years that have passed since *Robinson* was decided.[175] After repeating that the Eighth Amendment is only properly used to prohibit certain types of punishment, and then failing to overturn *Robinson*—a case that uses the Eighth Amendment to proscribe certain types of crimes—the Court created an ambiguous and contradictory precedent.[176] Justice Gorsuch stressed that the Court was not overturning *Robinson* and heavily distinguished the case before him from the California statute in *Robinson*.[177] Yet, the majority still held that one of the main tenets of *Robinson*—that the Eighth Amendment is properly used to proscribe certain types of crimes—was wrong.[178] Moving forward, it will be difficult for future advocates to fully understand the precedential value of *Robinson* since the majority provides conflicting guidance on whether the Eighth Amendment can be used to prohibit certain types of crimes, or if it can only be used to prohibit certain types of punishments.

Like Justice Marshall in *Powell*, Justice Gorsuch cautioned away from prohibiting the criminalization of certain acts as an extension of status because he believed that this would effectively create a constitutional insanity test, improperly usurping the power of the states.[179] The Court then turned to the discussion that Justice Marshall engaged in in Powell concerning the dangers of *extending Robinson*. Focusing only on the plurality opinion written by Justice Marshall, Justice Gorsuch noted that the Court declined to extend *Robinson* to involuntary acts, further touching on Justice Marshall's cautionary remarks around creating an "insanity test in constitutional terms," as well as on Justice Marshall's opinion that doing so would usurp the function of democracy.[180]

Here, Justice Gorsuch acted as if *Powell* definitively foreclosed the Court finding that involuntary acts could be protected from criminalization under the Eighth Amendment. In doing so, he sidestepped that Justice Marshall's opinion in *Powell* was a plurality decision and that its precedential effect should be limited to the narrowest grounds of agreement among the majority of Justices.[181] As the

175. *Id.* at 546.

176. *See Grants Pass,* 603 U.S. at 546 ("Still, no one has asked us to reconsider *Robinson*. Nor do we see any need to do so today. Whatever its persuasive force as an interpretation of the Eighth Amendment, it cannot sustain the Ninth Circuit's course since *Martin*.").

177. *Id.*

178. Yet the *Robinson* Court's prohibition against criminalization of status is an express prohibition against a certain kind of crime. *Id.* at 546 ("The [*Robinson*] Court held only that a State may not criminalize the 'status' of being addict.").

179. *Id.* at 551.

180. *Id.*

181. Constitutional law scholars have noted that the Court has said very little about the binding precedential effect of plurality opinions. Although, in *Marks v. United States*, the Court notes, concerning the precedential value of a plurality opinion, that the "holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Williams, *supra* note 50, at 795. Most courts take this to mean that the precedential value of a case can come from an agreement between the plurality and the concurrence, or an agreement between the dissent and the concurrence.

Grants Pass dissent noted, five Justices—four in the dissent, and Justice White in his concurrence—did think acts that inherently flow from an involuntary status could be protected from criminalization under the Eighth Amendment.[182] The *Grants Pass* decision would have been the perfect opportunity for the Court to clarify the precedential effect that plurality opinions hold, but instead, both the majority and dissent talked past each other and only gave air to the reasoning found in the side of Powell that justified their own conclusions.[183]

Turning to the administration of the *Martin* formula, Justice Gorsuch argued that the *Martin* rule—whereby houselessness is considered involuntary if the number of unhoused people in a jurisdiction exceeds the number of shelter beds—has been "impossible to administer in practice."[184] For one, keeping an accurate tally of the number of unhoused people who live in a jurisdiction has proven difficult. For example, in a large jurisdiction like Los Angeles, it takes three days to count the unhoused population through a block-by-block estimate, a time-intensive undertaking that is difficult to execute on a regular basis.[185] Furthermore, Justice Gorsuch noted that *Martin* provides little guidance as to what should be considered an adequate and available shelter bed.[186] For example, the Martin formula does not provide any guidance as to whether a bed is "adequate and available" if the unhoused person in question is an atheist and a shelter requires that that person attend church services.[187] There are difficult fact-specific questions that require a complex constitutional framework to understand what kinds of eligibility requirements that shelters may impose upon shelter-seekers in order for beds to be considered meaningfully available.[188]

Justice Gorsuch concluded with another appeal towards democracy and an admonition against judicial activism. Noting that the experience and causes of homelessness are complex, he states that the policies used to address these issues should be just as complex, and, therefore, it is not appropriate for the Court to administer a broad constitutional rule.[189]

2. The Dissent: Robinson *is Controlling, Biological Conduct is Inherent to Status*

Justice Sotomayor penned the dissent. Justices in the dissent embraced the view espoused by Justice White and the dissenters in *Powell*, powerfully arguing that the criminalization of acts of biological necessity amounts to criminalization

182. Powell v. Texas, 392 U.S. 514, 546 (1968) (Fortas, J., dissenting).

183. *Grants Pass*, 603 U.S. at 551, 585.

184. *Id.* at 553.

185. Christopher Weber, *Annual Count of Homeless Residents Begins in Los Angeles, Where Tens of Thousands Live on the Streets*, ABC 10, (Jan. 24, 2024, 4:14 AM), https://www.news10.com/news/ap-annual-count-of-homeless-residents-begins-in-los-angeles-where-tens-of-thousands-live-on-streets/.

186. *Grants Pass*, 603 U.S. at 554.

187. *Id*.

188. *Id*.

189. *Id.* at 556.

of a status and is cruel and unusual under the Eighth Amendment.[190] Touching on policy matters, Justice Sotomayor noted that there are a large number of unhoused individuals who will be harmed by the *Grants Pass* decision because it leaves them without protection.[191] She pointed to the "destabilizing cascade of harm" that can result from criminalizing houselessness, from creating a costly revolving door between the streets and the criminal justice system, to contributing to chronic unemployment, to causing fear of calling law enforcement when one fears bodily harm.[192] Justice Sotomayor also argued that the majority's intimation that *Martin* is causing the unhoused to decline offers of shelter is not supported, as social scientists have shown that most would choose to live inside if ". . . safe and affordable options were available."[193]

The dissent also argued that the Eighth Amendment can be properly used to proscribe both types of crimes and types of punishment.[194] This is supported by *Timbs v. Indiana*, which stands for the proposition that the Eighth Amendment serves as a substantive limit on the power to punish,[195] as well as *Ingraham v. Wright*, which states that the Eighth Amendment "imposes substantive limits on what can be made criminal and punished."[196] It is notable that the majority does not deal with either *Ingraham* or *Timbs*, which explicitly allow for the Eighth Amendment to be used in the way that it is in *Robinson*.[197] It simply states that *Robinson* is the only time in which the Eighth Amendment has been used to proscribe certain types of criminal law.[198]

Furthermore, the dissent argued that a proper interpretation of *Robinson* requires finding a constitutional prohibition on the criminalization of necessary bodily functions, as they are inherent to statuses. Justice Sotomayor argued that the majority's understanding of *Robinson* fails to take into account the true meaning of criminalizing a status.[199] For the dissent, criminalizing necessary bodily functions like "blinking, sleeping, eating or breathing" is just "another way to ban the person."[200] By the majority's logic, Justice Sotomayor poignantly argued that the Eighth Amendment won't tolerate criminalizing being an addict but will tolerate "'being an addict and breathing.'"[201] Justice Sotomayor stressed that the text, purpose, and enforcement of the Grants Pass ordinances denoted the very criminalization of status envisioned by the Court under *Robinson*.

190. *Id.* at 563–64 (Sotomayor, J., dissenting).
191. *Id.* at 568 (Sotomayor, J., dissenting).
192. *Id*.
193. *Id*. at 569.
194. *Id*. at 572–73.
195. Timbs v. Indiana, 586 U.S. 146, 154–55 (2019).
196. Ingraham v. Wright, 430 U.S. 651, 667 (1977).
197. *See Grants Pass*, 603 U.S. at 546.
198. *Id.*
199. *Id*. at 585. (Sotomayor, J., dissenting).
200. *Id*. at 578.
201. *Id*.

Turning towards the Grants Pass ordinance in particular, the dissent concluded that the aim of the ordinance is to criminalize the status of homelessness.[202] For Justice Sotomayor, the text, purpose, and enforcement of the ordinance is specifically tailored towards those who are unhoused, thereby criminalizing only the unhoused, in violation of the principles espoused in *Robinson*.[203] She notes that the purpose of the statute was perfectly captured in a community roundtable with the city council that was convened for the purpose of "identify[ing] solutions to current vagrancy problems.[204] City council and other community members discussed a variety of tactics to address this, including creating a "most unwanted list" of unhoused people in the area in order to disseminate to all service agencies, as well as denying "'food, clothing, bedding, hygiene, and those types of things'" to unhoused Grants Pass residents. In constructing the Grants Pass ordinance, one city council member remarked that unhoused residents perhaps weren't ". . . hungry enough or cold enough . . ." to leave Grants Pass of their own volition, intimating that the community should find ways to make them colder or hungrier.[205] In discussing the goal of the meeting, one councilmember stated summarily, "[t]he point is to make it uncomfortable enough [for the unhoused] in our city so they will want to move on down the road.[206] The goal of the ordinance is explicit: to inflict discomfort and pain, and to inflict it specifically on the unhoused. Justice Sotomayor noted that the year following the city council meeting saw a significant increase in the enforcement of anti-camping and anti-sleeping ordinances, all against the unhoused.[207] Thus, the purpose of the Grants Pass ordinance is to criminalize the unhoused for their status of being unhoused.

Next, Justice Sotomayor argued that the text of the ordinance criminalizes the status of homelessness by only making it illegal to sleep outside if for the purposes of "maintaining a temporary place to live."[208] Those who have the privilege of sleeping outside for purposes other than maintaining a temporary place to live are not criminalized. Conduct becomes criminalizable only when the actor is unhoused. Thus, the ordinance fulfills its aim of criminalizing the status of houselessness by its text. Notably, the majority did not deal with this crucial element of the construction of the statute, and instead repeatedly insists that the statute is one of general applicability.

Justice Sotomayor also argued that the statute fulfills its aim to criminalize the status of houselessness by its sole enforcement against unhoused individuals. The deputy chief of police questioned on the record claimed that he did not know of anyone who faced criminalization under the statute who had secure housing.[209]

202. *Id*. at 575.
203. *Id.*
204. *Id.*
205. *Id*. at 575–76.
206. *Id*. at 576.
207. *Id.*
208. *Id*.
209. *Id.* at 580.

While the city claimed that the ordinance is one of general applicability, Justice Sotomayor noted that those who "bring a sleeping bag to 'look at stars' would not be punished," and that someone is only criminalized under the statute if they don't "'have another home to go to.'"[210]

The dissent also criticized the majority for suggesting that the Grants Pass ordinance is dealt with so squarely in *Powell*. The dissent believed that *Powell* is distinguishable from the case in front of the Court because the *Powell* Court dealt with voluntary conduct—drinking—that could be made involuntary by a status—alcoholism, whereas the Grants Pass ordinance deals with conduct that defines a status, i.e., sleeping outside while not having a home,[211] which is central to the definition of the experience of houselessness.[212]

Furthermore, Justice Sotomayor argued that the majority gives too much weight to the plurality, disregarding that there was little consensus on a "controlling rationale."[213] Justice Sotomayor did not go as far as the Ninth Circuit in claiming that there was a unifying rationale shared by Justice White and the four dissenting Justices, but does say that the distinction between status and conduct is an open question in *Powell*.[214] She argued, however, that Justice White does not take a position one way or the other on whether the Eighth Amendment prohibits the criminalization of any condition the defendant is "powerless to change," given a deficit in the record.[215]

The dissent also criticized the majority's multiple remarks about the large numbers of cities and states that have written to the Court to express their disdain

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210. *Id.*

211. While few would disagree that sleeping is a biological function, it could plausibly be called an act for the purposes of criminal law and thus cannot be squarely decided by *Robinson*. Even though all living beings must engage in acts like sleeping and sitting at some point, they can––at least for a while—choose to abstain from those actions. Of course, biological functions like sitting and sleeping could also plausibly be characterized as conditions because they are inherent to life—if one abstains from doing them for a long amount of time, the bodily function will take over and force one to do them. Nevertheless, Justice White did foresee that there would be difficulty distinguishing between acts and conditions, and thus, his concurrence in *Powell* should properly decide this issue. I agree with Justice White that the distinction between an act and a condition is slippery. Resting rules of constitutional laws on such slippery distinctions seems untenable. Justice White's standard in *Powell* avoids many of these slippery distinctions and argues that, for actions to be protected from criminalization under the Eighth Amendment, the actions that flow from the status must be proximate in time to the status being obtained. In *Robinson*, the constitutional defect with the California statute that criminalized addiction was that it criminalized a "propensity" to use drugs alone, or the "bare desire" to commit an act, not the use of drugs. The defect in *Robinson* was the lack of an *actus reus*, which (arguably) is not the case here. Thus, the proper precedent for the facts in *Grants Pass* is *Powell*, not *Robinson*.

212. *Grants Pass*, 603 U.S. at 577. Another definition of houselessness in the context of the Grants Pass case is discussed in the oral argument transcript. Grants Pass litigants derived a definition of being unhoused from universal attributes shared by all unhoused people, which they say is the lack of a regular, fixed nighttime address. Transcript of Oral Argument at 143, City of Grants Pass v. Johnson, 603 U.S. 52 (2024) (No. 23 –175) ("homelessness is lacking a regular, fixed, nighttime address.").

213. *Grants Pass*, 603 U.S. at 585 (Sotomayor, J., dissenting).

214. *Id*. at 584–85.

215. *Id.*

over the *Martin* rule. She argued that the majority used the large municipal and state audience in order to ruminate on policy matters that are beyond the scope of the Court's purview while purporting to only interpret the Constitution. Justice Sotomayor stressed that the majority also cites the numerous amici briefs to make it appear that the "homelessness crisis" is unsolvable without jurisdictions having the ability to criminalize it. However, Justice Sotomayor rightly highlighted that multiple jurisdictions—including the Federal Government—have adopted the Martin rule and have written amici briefs supporting it.[216]

In closing, Justice Sotomayor invoked the Court's obligations as constitutional interpreters to apply the law fairly and evenly.[217] Concluding ominously, she noted that the Court has the responsibility to safeguard the constitutional rights of society's most vulnerable and that the majority has "abdicate[ed]" that role.[218]

In dwelling excessively on policy matters which should be beyond the scope of the Court, and in utilizing harmful stereotypes about the unhoused to bolster their ideas about how dangerous and criminogenic encampments are, the *Grants Pass* Court furthered much of the discrimination and hatred against the unhoused that continues to proliferate today. These harmful stereotypes have historical roots in racial discrimination and laws that were aimed at regulating the poor and unhoused. To understand the roots of some of these sentiments, Part II will provide an overview of anti-homeless discrimination, as well as related ideas of anti-poverty animus.

II.
THE UNHOUSED AS A POLITICALLY UNPOPULAR GROUP: PAST & CURRENT ANTI-HOMELESS DISCRIMINATION

While the promulgation of so-called "anti-camping" ordinances have risen in the last few decades, these types of laws are not a modern invention. The following section explores the development of vagrancy laws—laws that were enacted to regulate the poor, unhoused, and marginalized. It will also examine *Papachristou v. City of Jacksonville*, a seminal Supreme Court case that struck down vagrancy laws as unconstitutional.

A. Laws that Regulated the Poor, the Unhoused, and the Marginalized

Ordinances like those in *Grants Pass* are just one of the most recent iterations of a long line of laws aimed at regulating the poor and marginalized. These laws often stemmed from discrimination against people that were seen as outsiders in society—whether they didn't work jobs that were seen as "typical", were non-white, or were poor. Surveying the history of these types of laws reveals that many

216. *Id.* at 586–87.

217. *Id.* at 591.

218. *Id.* at 592 ("The Court, too, has a role to play in faithfully enforcing the Constitution to prohibit punishing the very existence of those without shelter. I remain hopeful that someday, in the near future, this Court will play its role in safeguarding constitutional liberties for the most vulnerable among us.").

of them both conflate and regulate these marginalized characteristics at the same time, so as to control those who are considered outsiders in society. The animus towards unhoused people embodied by *Grants Pass* is wrapped up in an interlapping web of discrimination against those who are considered the social "other" for reasons of race, class, immigration, and occupation.

Many trace the start of these types of laws to old English laws like the "poor laws."[219] While the precise origins of such laws are contested, it is thought that their origin can be traced back to laws that regulated labor.[220] England's Ordinance of Laborers of 1349 mandated that anyone who is sixty or younger, without land, and without a craft must work.[221] Scholars agree that The Ordinance of Laborers was instituted, in part, as a response to large masses of laborers dying off due to the Black Death.[222] The law also prescribed prison time for those who refused to work or left their positions early, as well as setting a maximum wage that laborers were to be paid.[223] Furthermore, prior to 1834, welfare in Britain guaranteed subsistence to vulnerable groups, including children, the elderly, and the poor.[224] The policy of providing welfare to all was seen paternalistically as "demoraliz[ing] the working class [and] promot[ing] population growth."[225] Partially because of the idea that providing subsistence to poor people would cause their moral degradation, after the Poor Law Amendments of 1834, welfare was only guaranteed to people who worked under "strict supervision" in the workhouse.[226]

Similar labor-controlling laws were enacted in the United States during the 19th Century. After the American Emancipation of slaves, many vagrancy laws were passed in order to control the newly freed Black laborers in the South.[227] The infamous Black Codes were promulgated with an eye towards reinstituting Black subjugation after slaves were freed. Some of the laws that came out of this period regulated Black labor by making labor compulsory for the incarcerated, as well as by requiring workers to obtain discharge certificates from former employers.[228] While principally targeted, Black laborers were not the only workers who were

219. *See, e.g.,* RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 2 (2016); William J. Chambliss, *A Sociological Analysis of Vagrancy*, 12 SOC. PROBS. 67, 68 (1964).

220. GOLUBOFF, *supra* note 219.

221. L.R. Poos, *The Social Context of Statute of Labourers Enforcement*, 1 LAW & HIST. REV. 27, 29 (1983).

222. Mark Bailey, *The Implementation of National Labour Legislation in England After the Black Death, 1349–1400*, 78 ECON. HIST. REV. 529, 529–31 (2025).

223. *Id.*

224. Gregory Clarke & Marianne Page, *Welfare Reform, 1834: Did the Poor Law in England Produce Significant Economic Gains?*, 13 CLIOMETRICA 1, 1 (2019).

225. *Id*. at 2.

226. *Id*.

227. Christopher Roberts, *Discretion and the Rule of Law: The Significance and Endurance of Vagrancy and Vagrancy-Type Laws in England, the British Empire, and the British Colonial World*, 33 DUKE J. OF COMPAR. & INT'L L. 181, 211 (2023).

228. *Id.* at 211–12.

regulated by such laws: vagrancy laws served similar purposes—criminalizing being able-bodied and out of work, regardless of race.[229]

After the 1880s, a number of events converged in order to cause a rise in the number of unhoused who lived the so-called "hobo" lifestyle, creating new sets of stereotypes and new avenues for discrimination.[230] As railroads expanded between 1865 and 1880, unhoused people were afforded new opportunities to travel to different parts of the country.[231] Post-Emancipation, a number of Black laborers were freed and found less discrimination living the life of a wandering laborer than staying and working in the South.[232] During the Industrial Revolution, many workers' jobs became redundant or were eliminated, forcing some into unemployment.[233] Some workers also witnessed the economic instability for laborers caused by rapid industrialization, and made the decision to take to the road themselves as an act of self-determination.[234]

The rising population of unhoused people, as well as their improved mobility, increased their visibility to the American population.[235] This, in turn, caused new stereotypes to emerge concerning the personality traits that the public believed resulted in wandering unhoused people to become unhoused in the first place.[236] Many considered the wandering unhoused lazy and un-American, which caused the creation of a persistent stereotype that the wandering unhoused must be immigrants who had yet to assimilate to American values.[237] When wandering unhoused people were not being stereotyped as Irish immigrants, they were often stereotyped as the ominously, vaguely foreign other whose propensity to wander came from his supposedly inferior genes.[238] Many of the wandering unhoused were male, as there were more services dedicated to assisting impoverished women.[239] As a consequence, much of the vitriol aimed at the wandering

229. Ahmed A. White, *A Different Kind of Labor Law: Vagrancy and the Regulation of Harvest Labor*, 75 U. COLO. L. REV. 667, 683 (2004). Notably, however, Southern law enforcement did use vagrancy laws as a tool of racial subjugation: Black workers were rounded up and forced to work for low wages when white planters faced labor shortages. Roberts, *supra* note 227, at 213.

230. KENNETH L. KUSMER, DOWN AND OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY 71 (2003).

231. *Id*. at 39.

232. *Id* at 10.

233. *Id*. at 9.

234. *Id*.

235. *Id.* at 19.

236. *Id*. at 21–22.

237. *Id.* at 46.

238. *Id*. at 46. ("Animalistic features were often combined with vague ethnic stereotypes that reinforced the notion that the new vagrants were immigrants. . . [wandering unhoused people] were depicted as having black, 'piercing' eyes; he is 'tall and dark-complexioned, with a sinister look . . . [and] a low, receding brow.' [Their] propensity to wander is inherited, since he is 'of g*psy [sic] blood.").

239. *Id*. at 25. This is largely attributable to prevailing cultural ideas that women were less able to care for themselves than men were.

houseless people derived from an anger at their perceived abdication of male responsibility to be a provider, husband, and father.[240]

Vagrancy laws in the 20th century continued to be used to regulate and control people who were considered social others by reason of race, class, immigration status, and occupation status, as well as other marginalized characteristics. In her 2016 book on vagrancy laws, Risa Goluboff charts the ways in which the police targeted members of politically unpopular groups who were merely existing, in both public and private places.[241] For instance, police used vagrancy laws to arrest key Civil Rights movement leaders, gender non-conforming individuals, groups of people living in hippie communes, and women that they suspected of engaging in sex work.[242] Vagrancy laws were not the only way to socially control marginalized groups but served as one important mechanism in a legal apparatus of social control to regulate and create a normative society.[243] Many of these statutes and ordinances were incredibly vague and broad, giving the police an enormous amount of discretion in enforcing them.[244]

During this time period, actions that were criminalized under anti-vagrancy laws varied across states.[245] For example, the 1940 California vagrancy law made anyone a vagrant who "wanders . . . and prostitutes . . . [and who is] willfully unemployed and lewd."[246] The 1940s Jacksonville, Florida ordinance made anyone a vagrant who was a "rogue and vagabond . . . or dissolute person who goes about begging . . . persons who use juggling or unlawful games or plays, common drunkards . . . common railers and brawlers. . . ." The statute continued on to name dozens of different types of people who could be prosecuted under the ordinance.[247] Because of the broad definitions of vagrancy, law enforcement officers were afforded wide discretion to determine what behavior constituted vagrancy, and thus, wide discretion to punish as they saw fit.[248]

These laws worked to affect social normativity, as many marginalized groups changed their behavior to avoid arrest. Goluboff documents the ways vagrancy laws created a sense of anxiety in socially marginalized groups to act in ways that inculcated them from these vagrancy charges—often by performing their allegiances in some ways to the mainstream.[249] For example, LGBTQ advocacy groups warned their members to dress in gender normative ways to avoid arrest, Black newspapers told their readers not to act "racially presumptuous," and civil

240. *Id*.
241. GOLUBOFF, *supra* note 219, at 2.
242. *Id*. at 2–3.
243. *Id.* at 9.
244. *Id*. at 63.
245. *Id.* at 1.
246. *Id*.
247. *Id*.
248. *Id*. at 2.
249. *Id*. at 3.

rights organizations provided their members with forms that attested to their work status so that they remained safe from police's vagrancy accusations.[250]

Notably, social actions to secure rights for marginalized groups coincided with legal movements against these vagrancy laws. A number of anti-vagrancy cases swept the nation in the 1960s and 1970s, which helped narrow the scope of many of the country's vagrancy statutes.[251] Professor Goluboff attributes this anti-vagrancy law movement to the fact that many social movements that advocated for marginalized groups were threatened by anti-vagrancy laws, as well as the social upheavals of the 1960s which made it less acceptable to criminalize poverty and social difference.[252] An important case in dismantling a lot of the so-called vagrancy laws was *Papachristou v. City of Jacksonville*, discussed below. But even though vagrancy laws don't exist today in the way that they existed in the mid-20th Century, anti-camping ordinances have risen across the country to take their place.[253]

B. The End of Vagrancy Laws: Papachristou v. City of Jacksonville

Anti-vagrancy laws suffered a crushing defeat in the 1972 Supreme Court decision in *Papachristou v. City of Jacksonville*, which found the previously mentioned Jacksonville, Florida, statute as void for vagueness, as it gave "almost unfettered discretion" to the police.[254] This case, for the movement to vindicate the rights of the poor, has much bearing on the present-day criminalization of the unhoused.

Justice Douglas delivered the majority opinion for the Court. The suit originated from an appeal of several defendants who were arrested under the Jacksonville anti-vagrancy ordinance. These individuals were arrested for different reasons: "prowling by auto," loitering, "being a common thief," or stopping by a used car lot.[255] Notably, none were actually committing the crimes that they were suspected of—i.e., thieving, etc.; they were simply arrested under the vagrancy ordinance. For example, one man was known to be a thief in the area, so was arrested for being a thief, without any indication that he had actually committed any acts of thievery.[256]

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250. *Id.* at 4.

251. *Id.* at 10–11.

252. *Id*.

253. Police today have similarly unfettered discretion to enforce anti-camping and similar ordinances against unhoused people that they did to enforce anti-vagrancy laws. *See* JAVIER ORTIZ & MATTHEW DICK, THE WRONG SIDE OF HISTORY: A COMPARISON OF MODERN AND HISTORICAL CRIMINALIZATION LAWS 22–24 (Sara K. Rankin ed., 2015). Police use this unfettered discretion to discriminatorily control the use of public space so that people who are marginalized by their housing status cannot use public space in the same way that housed people do. *See* Shoshanna Coalson, *The New Banishment*, 56 SETON HALL L. REV. (forthcoming 2026) ("innocent activities like leaning up against a wall or sitting on a curb for someone who is housed escapes criminalization, while engaging in these same activities while unhoused results in criminalization.").

254. Papachristou v. City of Jacksonville, 405 U.S. 156, 156 (1972).

255. *Id.* at 159.

256. *Id.* at 159–60.

Stressing the archaic nature of anti-vagrancy laws, Justice Douglas struck them down for vagueness and further elaborated that none of the acts made criminal by the ordinance required a criminally culpable mental state or act.[257] The ordinance contained "no ascertainable standards for guilt."[258] Due to its vagueness, the police officers could have chosen to enforce the laws as they please, giving Jacksonville police "unfettered discretion."[259] Thus, these anti-vagrancy laws may have acted as a "cloak for a conviction which could not have been obtained on the real but undisclosed grounds for the arrest."[260] In other words, the laws were void because they allowed the police to arrest for virtually any reason—permissible or impermissible—while acting under cover of law.

While *Papachristou* supposedly put an end to laws that targeted marginalized people for their status under the guise of targeting them for conduct, anti-camping and similar ordinances that give the police largely unfettered discretion to criminalize marginalized people for existing have emerged.[261] The *Grants Pass* Court insisted that these laws target conduct,[262] and that their purpose is not to criminalize being unhoused.[263] In reality, however, these laws are operating in the same way that the laws that were struck down in *Papachristou* were: they are acting as a "cloak" that allows governments to target socially unpopular groups.

III.
ANIMUS DOCTRINE AS APPLIED TO ANTI-HOMELESS ORDINANCES

The victory in *Papachristou* was a substantial one for activists fighting for the rights of the marginalized, the poor, and the unhoused, and many of the fights that housing advocates are engaged in today echo those from the 20th Century. Being unhoused should be viewed as a marginalized characteristic that causes houseless people to face similar levels and types of discrimination as other marginalized groups. For instance, unhoused individuals have been shown to face employment discrimination when disclosing shelters as their addresses to employers.[264] They are also frequently victims of violent attacks that are perpetrated against them because of their housing status.[265] They report facing discrimination and stigma when seeking medical care.[266] As a result, researchers have found that

257. *Id.* at 161–63.

258. *Id.* at 165.

259. *Id.* at 168.

260. *Id.* at 169.

261. *See, e.g.*, Coalson, *supra* note 253.

262. City of Grants Pass v. Johnson, 603 U.S. 520, 546–47 (2024).

263. *Id*. at 538.

264. Sarah Golabek-Goldman, *Ban the Address: Combatting Employment Discrimination Against the Homeless*, 126 YALE L. J. 1788, 1788 (2017).

265. Raegan Joern, *Mean Streets: Violence Against the Homeless and the Makings of a Hate Crime*, 6 HASTINGS RACE & POVERTY L.J. 305, 306 (2009) (arguing that attacks against unhoused individuals due to their housing status should be considered hate crimes).

266. Denise De Las Nueces, *Stigma and Prejudice Against Individuals Experiencing Homelessness, in* STIGMA AND PREJUDICE: TOUCHSTONES IN UNDERSTANDING DIVERSITY IN HEALTHCARE 94 (Ranna Parekh & Ed W. Childs eds., 2016).

those experiencing houselessness report "minority stress" or similar stress of that which "stigmatized social categories are exposed to as a result of their social, and often minority position."[267] Because unhoused people face similar levels and types of the discrimination that other socially unpopular groups do, regulations that implicate unhoused people should receive heightened scrutiny under animus doctrine. The origins of Animus Doctrine, Rational Basis Review, and Equal Protection more generally are given below.

A. Meaningful Rational Basis Review

1. Equal Protection Doctrine Overview

In its most basic form, the Fourteenth Amendment ensures that the government is not arbitrarily singling out a distinct class for different treatment or depriving such class from benefits that they are providing to others.[268] In Equal Protection cases, the threshold question is whether the distinction that the government has created to award or deprive a certain class of benefits is constitutionally permissible.[269] To ascertain this, the court first inquires into the government's definition of the group that will be awarded or deprived of the benefit, for the purpose of determining how much they should scrutinize the legislation in question.[270] Second, the court ascertains the government's ultimate goal of the proffered program. The type of goal that the court will accept varies by the type of proffered classification.[271] Finally, the court asks whether there is a sufficient fit between the government's classification and its ultimate goal.[272]

There are three levels of judicial scrutiny, with the court's analysis becoming more exacting as the levels of scrutiny become higher. Rational basis review is the most deferential level, followed by intermediate scrutiny and strict scrutiny. Classifications that the court does not consider suspect will receive the lowest level of

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267. Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCH. BULL. 674 (2003). Research also shows that unhoused people suffer social consequences as an outcome of discrimination against them because of their housing status. *See* Melissa Johnstone, Jolanda Jetten, Genevieve A. Dingle, Cameron Parsell & Zoe C. Walter, *Discrimination and Well-Being Amongst the Homeless: The Role of Multiple Group Membership*, 6 FRONTIERS IN PSYCH. 1, 1 (2015).

268. *See* Slaughter-House Cases, 83 U.S. 36, 126 (1872).

269. *See* Hernandez v. Texas, 347 U.S. 475, 478 (1954) ("When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.").

270. Most legislation that doesn't implicate a fundamental right or a suspect classification like race or sex receives rational basis review. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

271. Craig v. Boren, 429 U.S. 190, 197–98 (1976) (discussing permissible government purposes when sex-based classifications are implicated).

272. U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (holding that a food stamps act that was set up for the purposes of improving the nutrition of low-income people did not have a tight enough nexus to the government requirement that people who live with other unrelated adults be excluded from the program).

scrutiny, what the court deems rational basis review. Classifications such as "sex" are considered "quasi-suspect" and therefore receive intermediate scrutiny. Finally, regulations that implicate a classification that has historically been considered "suspect" by the court, like race, or that implicates a fundamental right, will receive the highest level of scrutiny. The Court has refused to elevate poverty or other class-based classifications for heightened scrutiny.[273] Being unhoused may not meet the traditional qualifications for strict scrutiny,[274] but, as some Supreme Court justices have noted before, the invidious discrimination that people living in poverty face can be worthy of careful judicial review.[275] For these reasons, I argue below that being unhoused is worthy of at least heightened rational basis review; but first I will give a general overview of rational basis review.

2. Garden Variety Rational Basis Review

Traditional constitutional education considers rational basis review an almost uniformly deferential standard. Generally, to pass constitutional muster under rational basis review, a piece of legislation needs only to be rationally related to any conceivable legitimate purpose.[276] Justice White stated that the Court will defer to the legislature's decisions in most cases because even "improvident" decisions will eventually be "rectified through the democratic processes.[277] Many consider rational basis to be so deferential to the government that if a court invalidates a piece of legislation while conducting rational basis review, it may be said they are engaging in a more exacting standard of review—"rational basis review with bite."[278]

When a court is engaging in rational basis review, it will first ask whether the legislation in question has a legitimate government purpose. A government purpose is legitimate if the court can "reasonably presume . . . [the purpose] motivated an impartial legislature."[279] The court does not necessarily have to determine the actual purpose of the legislature, as legislators may vote to pass a piece of legislation for many conflicting reasons.[280] The court is usually fairly deferential to legislatures in declaring government interests legitimate. For instance, mundane interests such as "reducing administrative costs" have been found legitimate in upholding legislation that consisted of purely economic transactions.[281] However,

273. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

274. *Id*. at 121–22 (Marshall, J. dissenting) ("But personal poverty is not a permanent disability; its shackles may be escaped. Perhaps most importantly, though, personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have.").

275. *Id*. at 121–23 (Marshall, J. dissenting).

276. Schweiker v. Wilson, 450 U.S. 221, 221 (1981).

277. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

278. Gayle Lynne Pettinga, *Rational Basis Review with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779–80 (1987).

279. United States R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J. concurring).

280. *Id*.

281. Armour v. City of Indianapolis, 566 U.S. 673, 684 (2012).

the Court has noted that a "bare congressional desire to harm a politically unpopular group" is not a legitimate government interest.[282] For example, as will be discussed further below, the Court rejected a restriction on food stamp allocations to exclude any household containing an individual who is unrelated to any other members of the household, explicitly intended to harm "hippie" communities, as it was not supported by a legitimate government purpose.[283]

Furthermore, the legislation's proffered classification must be rationally related to a legitimate government interest, meaning it must in some way "rationally advance" the government interest.[284] A classificatory scheme may rationally advance the government interest even if there are other preferred methods for advancing that interest.[285] Likewise, a plaintiff cannot successfully invalidate legislation by simply demonstrating that the legislature acted irrationally where the question presented before it was at least debatable.[286] Thus, as long as a government can show some nexus between its legitimate end goal and the means advanced to get to that end goal, the court will generally uphold the piece of legislation.

3. Elevated Rational Basis Review: Animus Doctrine

Even though rational basis review is a highly deferential standard, there are a number of instances in which courts have struck down statutes while engaging in this standard of review.[287]

Supreme Court Justices, lower courts, and constitutional law scholars disagree on both the terminology and the appropriate analysis for courts to employ when conducting a meaningful review of legislation under rational basis review. Where the Supreme Court has struck down legislation while purporting to conduct rational basis review, some have deemed the Court's review "rational basis review with bite,"[288] suggesting a standard of review different from traditional rational basis.[289] Some call it "animus doctrine."[290] Still, some insist that these cases are indistinguishable from traditional rational basis review cases.[291] Whatever we christen this level of review, there are many courts, including the Supreme Court, who have conducted meaningful review of legislation that does not involve a suspect classification or implicate a fundamental right. Therefore, the full spectrum of rational basis review needs to be understood and theorized, as doing so provides

282. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
283. *Id*. at 534–35.
284. Schweiker v. Wilson, 450 U.S. 221, 235 (1981).
285. *Id*.
286. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).
287. *See* Eyer, *supra* note 24.
288. *E.g.*, Pettinga, *supra* note 278, at 778.
289. *Id.* at 1339–1340.
290. *E.g.*, Araiza, *supra* note 24, at 205.
291. *E.g.*, Eyer, *supra* note 24, at 1335–39.

an important understanding that future lawyers may use in their toolkit to advocate for marginalized groups.

Given the number of courts—including the Supreme Court—that have struck down legislation under a rational basis framework, some scholars have suggested that rational basis review "biting" is not as rare as the standard constitutional doctrine makes it seem to be.[292] In many of these cases, the Court found that the purported purpose of the legislation was not legitimate, or that there was no rational relationship between the professed goal of the statute and the proposed means to get to that goal.[293]

Importantly, many of the statutes that didn't survive rational basis review have been struck down because the government exhibited animus towards a politically unpopular group, which either invalidated the governmental purpose or made it so that the classification was not rationally related to the governmental purpose.[294] The following section provides an in-depth review of the Supreme Court cases that have engaged in such review and then lower court cases where legislation was similarly struck down under rational basis review. Ultimately, I argue that many of the anti-homeless statutes discussed above should be invalidated under rational basis review because—even more sinister than the legislature exhibiting a bare desire to harm a politically unpopular group—many of the ordinances exhibit a deliberate local government scheme to undermine the very existence of their unhoused residents.

B. Animus Doctrine: Fifty Years of Marginalized Advocacy

1. The Animus Framework: Multiple Approaches

Because the Court has done little work to flesh out what exactly an animus finding should look like, scholars and courts alike have established different approaches. Professor Araiza proposed the most workable animus framework, as it avoids some of the worst problems that plague animus findings: namely, the problem of proving that everyone who passed the legislation shared an animus for the class.[295] It also closely parallels other constitutional frameworks, in which evidentiary burdens are shared equally between the opponents of the legislation and the government.[296] For Araiza, animus doctrine, properly applied, is a "burden

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292. *Id*.

293. *Id*.

294. Araiza, *supra* note 24, at 166.

295. WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 139 (NYU Press, 2017). For an example of animus in the legislative history of contested legislation, *see U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). For an example of animus in the impact of legislation, *see Romer v. Evans*, 517 U.S. 620, 633 (1996) (striking down a law for engaging in the unusual discrimination of identifying a class based on a single characteristic and depriving it the benefit of antidiscrimination laws).

296. Araiza's animus framework mirrors the burden shifting framework available in employment discrimination cases. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1972).

shifting" framework.[297] First, it is up to the opponents of the legislation to show that there was animus. The plaintiffs may prove this by showing animus in the legislative history, or by showing a disparate impact on the burdened class.[298] Plaintiffs making a successful initial showing of animus shift the burden back to the government to justify its actions, and, in doing so, the government must carry a higher burden to justify the classification than it generally would under traditional rational basis review:[299] it must show that the actual reason it enacted the legislation was for a legitimate purpose.[300]

Some lower courts, however, take a different approach in deciding animus cases. They will analyze a statute for the presence of animus "only when courts can hypothesize no rational basis for the action."[301] This approach goes too far, and, in doing so, adds little scrutiny for government actions that may have been tainted with animus. Legislation that is truly tainted with animus should be scrutinized because if a statute's purpose is derived from animus, it cannot satisfy the legitimate purpose inquiry.

For example, even if legislation was promulgated specifically to single out one individual, one court was not willing to find animus because the legislation could have plausibly been applied to others. In *Flying J Inc. v. City of New Haven*, a restriction on large developments over two acres that only applied to the plaintiff was found not to be evidence of animus.[302] Even when the plaintiff showed that a zoning board member owned adjacent land and would have benefitted from the zoning decision, animus was still not found.[303] These facts were not enough to overcome the legitimate government interests that the district court was able to "hypothesize"—namely, controlling the "secondary impact of large service stations."[304] Thus, the Seventh Circuit gives much more leeway to the government, and the court itself is willing to "hypothesize" about what some legitimate government interests the government may have relied on in promulgating the ordinance.

Still, other courts find that any hint of animus destroys the legislation altogether. This approach swings too far in the other direction, straying into gross oversimplifications that Steven Smith cautions against in his work.[305] Smith argues that discriminatory practices or laws that come out of individuals' beliefs don't just come from a place of hate—human beings are complicated, and have mixed motives and feelings for their actions, even if the outcome is

297. *E.g.*, Araiza, *supra* note 24.
298. *Id.* at 184.
299. *Id*. at 187.
300. *Id*.
301. Flying, J, Inc. v. City of New Haven, 549 F.3d 538, 547 (7th Cir 2008).
302. *Id*.
303. *Id*. at 547–48.
304. *Id.* at 545.
305. Steven D. Smith, *Against "Civil Rights" Simplism: How Not to Accommodate Competing Legal Commitments*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECT FOR COMMON GROUND 238 (William N. Eskridge Jr. & Robin Fretwell Wilson eds., 2018).

discriminatory.[306] When promulgating laws, many legislators cast their votes for disparate, and sometimes conflicting, rationales; thus attributing a shared rationale to everyone is ultimately fruitless. For example, the Tenth Circuit employs a framework in which a finding of animus destroys the legislation altogether. Explicitly using the words "animus doctrine," but also expressing skepticism over whether there is much difference between animus doctrine and so called "rational basis with bite," the court outlines a two-step process in which courts should engage in heightened rational basis review.[307] These courts review the legislative motivation behind the law and not the "various post-hoc rationalizations that could conceivably have justified the laws," as is customary under ordinary rational basis review. According to *Bishop*, analyzing a statute for animus doctrine starts with detecting whether animus towards the group is present.[308] If it is present, the inquiry is over, and the piece of legislation fails to pass constitutional muster. If there are no blatant indications of animus present, the court will inquire into whether there are both "wide-ranging" and "novel deprivations" on the group in question and whether the law "strays from the historical territory of the law-making sovereign just to eliminate privileges that a group would otherwise receive."[309]

2. Animus Doctrine in the Supreme Court

Prior to the Court finding that gender-based classifications should receive heightened scrutiny, it invalidated a gender-based classification that preferred men over women using rational basis review. The 1971 decision in *Reed v. Reed* marked one of the Court's first forays into using rational basis review to invalidate legislation that has as its purpose a bare desire to harm a marginalized group.[310]

In *Reed*, an adopted minor died without a will, and both of his adopted parents sued to be administrators of his estate. The probate court heard the petitions of both parents and found for the decedent's father because the controlling state statute created a preference—between equally qualified family members—for

306. *Id*. For example, Smith discusses the Arlene Flowers case, in which the defendant considered the plaintiff—a gay man—a friend for many years, frequently supplying him with flower arrangements that she knew would be a gift to his same-sex partner. However, when he asked her to do the flower arrangement for his wedding, she declined. She did not decline because she hated him as an individual, but because she had the belief that marriage should only take place between a man and a woman. This isn't to say that this belief is not discriminatory—however, it demonstrates that motivations that result in discrimination often come from mixed motivations.

307. Bishop v. Smith, 760 F.3d 1070, 1099 (10th Cir. 2014).

308. *Id.* at 1099–1101.

309. *Id*.

310. 404 U.S. 71, 76 (1971). *See* Eyer, *supra* note 24, at 1326.

males.[311] The Court noted that preferring one family member over another solely on the basis of sex is "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[312]

It is important to note that the Court does not mention animus at all. The majority opinion, dictated by Chief Justice Burger, merely noted that a classification which is made on the basis of legal expediency to the detriment of one class of people is void under the Fourteenth Amendment.[313] Here, however, the constitutional defect seems to be the "arbitrary" nature of the classification solely drawn on the "basis of sex."[314]

The Court picked up the *Reed v. Reed* line of reasoning in 1975 when deciding the constitutionality of legislation that assigned different ages of majority for the purposes of paying out child support to male and female children in *Stanton v. Stanton*.[315] After a Utah husband and wife divorced, the husband paid child support to his ex-wife for his male and female child. The age of majority for the purposes of child support in Utah was 18 for female children and 21 for male children.[316] The purpose that Utah offered for the difference was that "[it] generally…is the man's primary responsibility to provide a home and its essentials. . . it is therefore a salutary thing for him to get a good education and/or training before he undertakes these responsibilities."[317]

Finding *Reed* controlling, the Court ruled that the classification does not pass constitutional muster, concluding that there is no rational relationship between the purpose set out by the government and the classifications offered.[318] Here, the Court went much farther than the *Reed* Court in explicitly stating that the classification is void because it was drawn based on gender stereotypes, noting that "[n]o

311. *Reed*, 404 U.S. at 72–73. The statute at issue classified eleven different types of claimants, all of whom had descending rights to administer their decedents' estates, giving spouses the highest priorities, and the decedents' more distant relations priority in descending order. Because both father and mother were considered in the same "class" by the statute, the Idaho legislature instituted a tie-breaking rule that preferred the male in the dispute. In providing the preference for the decedent's father over the decedent's mother, the probate court made no inquiry into the relevant capabilities of either party and instead only justified their decision by referring to the language preferring men over women in the statute.

The Court found this classification to be "arbitrary," and thus void under the Fourteenth Amendment. The Idaho legislation purportedly instituted the tie-breaking rule to free the Idaho probate courts from having to hear the merits of each matter, or to be a resource-conserving mechanism. The Court acknowledges that this is a legitimate government purpose but says that the classification selected by the legislature is not rationally related to fulfilling that government purpose. *Id.* at 76.

312. *Id*. at 76.

313. *Id.* at 75.

314. *Id.*

315. Stanton v. Stanton, 421 U.S. 7, 13–15 (1975).

316. *Id.* at 8–9.

317. *Id*. at 14. In order to offer additional support for the legislation, the state noted that "girls tend generally to mature physically, emotionally, and mentally before boys," and that "they tend to marry earlier," which gives support to the state's decision to require they be financially supported for a shorter period of time. *Id* at 10.

318. *Id.* at 13–14.

longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[319]

The Court has also invalidated statutes that not only exhibited animus towards immutable characteristics like gender, but also membership in a politically unpopular social group. For example, the 1973 decision *U.S. Department of Agriculture v. Moreno* is arguably the most well-known "rational basis with bite" case and is exemplary of the Court's unwillingness to let the government engage in bare animus toward its marginalized citizens.[320] In *Moreno*, the Court struck down a food stamp program that prohibited people who lived with those unrelated to them from receiving food stamps due to a lack of a legitimate government purpose.[321] The Food Stamp Act of 1964 was established for the purpose of "alleviat[ing] hunger and malnutrition among the more needy segments of our society."[322] Eligibility for food stamps was determined on a household-by-household basis and prior to 1971, households could be eligible if occupants were "related or non-related."[323] After January of 1971, however, Congress changed the definition of household to only include households whose members are "all related to each other."[324] A group of petitioners who would have otherwise been eligible for the food stamp program if they did not live with other unrelated adults brought suit against the government. Many of the individuals in the suit lived together for the purposes of alleviating their need for public assistance by sharing expenses.[325]

The Court first found that excluding people who live with unrelated persons was "clearly irrelevant" to the Food Stamp Act's purpose of alleviating hunger and malnutrition among needy people in society.[326] Because the Court was conducting rational basis review, it stated that the classification may still be upheld if it is rationally related to some other purpose.[327] In searching for another rational government purpose, the Court turned to the Food Stamp Act's legislative history. The legislative record showed that the classification was created to "prevent so-called 'hippies' and 'hippie-communities' from participating in the food stamp program."[328] The Court famously notes that this was "clearly" not a legitimate

319. *Id*. at 14–15. Here, the Court also notes that if the legislature determines that boys must receive training up until a certain age, so must girls. To seemingly demonstrate the arbitrariness of the proffered classification, the Court then goes onto enumerate the myriad other ways that men and women who are the same age are treated equally under the law, such as eligibility for jury duty, practicing law, and entitlement to public assistance, as well as the eligible age in which one could serve as legislators. While the Court is not willing to take the step into animus doctrine yet, *Reed* and *Stanton* set up precedents where the Court will strike down legislation as arbitrary if it is premised on stereotypes concerning marginalized groups.

320. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

321. *Id.* at 528, 538.

322. *Id.* at 529.

323. *Id.* at 530.

324. *Id*.

325. *Id.* at 532. For example, one petitioner had only $10 per month for food and other miscellaneous expenses after she paid all her bills.

326. *Moreno*, 413 U.S. at 534.

327. *Id*.

328. *Id*. at 534.

congressional purpose because, "if the constitutional conception of 'equal protection of the laws' means anything, it must, at the very least, mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[329]

Likewise, in 1985, the Court clarified the appropriate level of scrutiny that politically unpopular groups should receive when conducting a Fourteenth Amendment analysis in *Cleburne*–a case in which a government classification affected people with intellectual disabilities.[330] Even though the Court declined to affirm the lower court's decision to grant people with intellectual disabilities heightened scrutiny, the Court granted meaningful scrutiny under rational basis review.[331]

In *Cleburne*, the city of Cleburne, Texas classified a group home as a "hospital for the feebleminded," which required a special permit under the municipal zoning code.[332] After a special hearing, the Cleburne City Council voted to deny the special use permit. Cleburne Living Center then sued, alleging that the zoning ordinance violated the Fourteenth Amendment rights of Cleburne Living Center and its occupants.[333]

The majority clarified that the lower court inappropriately applied higher scrutiny to this case given that it involved intellectually disabled individuals. Writing for the majority, Justice White explained that the appropriate level of scrutiny in this case was rational basis review, not intermediate scrutiny.[334] Making a comparison to classifications involving age, Justice White clarified that heightened scrutiny is appropriate where a classification implicates individuals who have been subject to a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities," such as race or national origin.[335] Furthermore, White argued that classifications that are related to individual characteristics that the government has the power to regulate should not be "closely scrutinize[d]" by the Court.[336] Some mentally disabled people have characteristics that make it more difficult for them to function in the everyday world, and some do not. Their management and care

329. *Id*.

330. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 432 (1985).

331. *Id.* at 437–38, 447–51. The petitioner in this case purchased a home with the intention to lease the facility to Cleburne Living Center, Inc, a company that intended to establish a group home for the mentally disabled. Thirteen mentally disabled individuals would have lived at the group home, under the supervision of Cleburne Living Center Staff.

332. *Id.* at 437.

333. *Id.*

334. *Id*. at 442.

335. *Id.* at 441 (citation omitted).

336. *Id.* at 441–442.

are technical and specific, a determination which should be overseen by the legislature who are guided by the knowledge of experts, not the judiciary.[337]

Even though rational basis review was deemed the proper level of scrutiny, the Court still invalidated the statute.[338] Justice White showed that the government offered no legitimate reason to treat a group home for the mentally disabled differently from—for example—a hospital or a boarding school.[339] The reason that the group home was denied the special permit was because of the negative attitude of the property owners in the immediate surrounding area, as well as the fear felt by the neighborhood's elderly residents.[340] Famously, Justice White cautioned that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally [disabled] differently from apartment houses, multiple dwellings, and the like."[341] Thus, the constitutional defect in *Cleburne* is the nexus between the government interest and the classification, as the record did not indicate "any rational basis for believing that the [group home for mentally disabled people] would pose any special threat to the city's legitimate interests."[342]

Finally, Justice White turned to the more detailed components of the special permit application, concluding that logistical concerns about the location of the group home and the occupation limits are not warranted given that those who are mentally abled don't have to comply with the same location and occupancy regulations.[343] In denying the permit, the City Council cited concerns around the home being located on a flood plain, as well as concerns about the size of the home versus the number of people that would occupy the home.[344] The Court noted that there is no indication in the record as to why mentally disabled individuals should be subject to flooding and occupancy regulations, while those who are mentally abled are not subject to these regulations.[345]

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337. The lower courts disagreed on whether a higher level of scrutiny should be applied to the mentally disabled. The District Court applied rational basis review because they found no fundamental right implicated, that mental disability was neither a "suspect nor a quasi-suspect classification," and thus upheld the exception as being rationally related to any legitimate government interest. *Id.* at 442–47. The Court of Appeals reversed, holding that intermediate scrutiny, not rational basis review or strict scrutiny was appropriate for classifications involving mental disability. *Id.* at 447. Strict scrutiny was inappropriate for classifications involving mental disability because mental disability was often relevant to legislative actions. *Id.* at 442 n.10. The Court of Appeals found intermediate scrutiny to be appropriate given the "history of 'unfair and often gross mistreatment'" of the mentally disabled, their lack of political power, as well as the immutable condition of being mentally disabled. *Id.* at 438. The Court then struck down the ordinance, finding that it did not substantially further any important government interests. *Id.*

338. *Id.* at 442–447.

339. *Id.* at 448.

340. *Id.*

341. *Id.*

342. *Id.* at 448.

343. *Id.* at 450.

344. *Id.* at 449.

345. *Id.*

Some constitutional law scholars have commented on *Cleburne*'s oddity.[346] Justices themselves have also noted this oddity. In his partial concurrence and dissent, Justice Marshall makes two compelling points that signal the uniqueness of *Cleburne*: first, the Court decided *Cleburne* on very narrow, as-applied terms, whereas Justice Marshall noted that it is generally the Court's practice to decide broader rules of constitutional law.[347] Secondly, Justice Marshall highlighted that Justice White referred to a lack of a record on the issue of a legitimate government purpose, and stressed that while engaging in rational basis review, the Court generally does not search the record to determine whether a government purpose has a basis in fact.[348]

After Cleburne, the Court struck down legislation that targeted a politically unpopular group in its 1996 decision *Romer v. Evans*, again finding no legitimate government purpose, and also finding an insufficient nexus between the proffered government purpose and the classification.[349] In response to a number of local ordinances that were enacted across Colorado prohibiting discrimination against LGBTQ individuals in various public exchanges and activities, Colorado instituted Amendment 2 to its state constitution.[350] Amendment 2 prohibited all action at any level of government that was designed to protect LGBTQ individuals.

Justice Kennedy delivered the majority opinion of the Court. Applying rational basis review, the Court argued that Amendment 2 serves no legitimate state interest, nor does the proffered classification bear a rational relationship to a legitimate state interest.[351] Additionally, Justice Kennedy struck down the proffered classification altogether, noting that it is impermissible to place a "broad and undifferentiated disability on a single, named group."[352] Justice Kennedy rejected the "sheer breadth" of the statute, arguing that the nexus between the statute's classification does not pass constitutional muster because it is not attributable to anything other than "animus towards the class it affects," and thus lacks the required rational relationship.[353] For Justice Kennedy, the classification itself is void because, generally, classifications must not be delineated for the purpose of

346. *E.g.*, William D. Araiza, *Was Cleburne an Accident?*, 19 U. PA. J. CONST. L. 621 (2017).

347. *City of Cleburne*, 473 U.S. at 456.

348. *Id*. at 458.

349. Romer v. Evans, 517 U.S. 620 (1996).

350. *Id.* at 624.

351. *Id.* at 631–32. The primary purpose that Colorado argues supports Amendment 2 is to protect "other citizens' freedom of association . . . who have personal or religious objections to homosexuality." *Id.* at 621. The Court's rationale, however, is somewhat vague: it simply notes that the means to achieve this purpose are impermissibly overbroad and that the legislature does not make a proper factual showing that Amendment 2 would achieve these ends. *Id*. The State offers up as a legitimate government purpose that the legislation is intended to "conserve resources to fight discrimination against suspected classes," which the Court swiftly rejects. Again, there is not much explanation of this rejection here except that the classification is impermissibly overbroad. *Id.* at 630–31.

352. *Id.* at 632–33.

353. *Id*. at 632.

disadvantaging the individuals that fall within the class.[354] He noted that identifying a broad class of people by a single characteristic for denial of a protection is "unprecedented" in constitutional doctrine, and also that classifications that are of an "unusual character" have been considered by the Court in the past to be a potential indicator of a constitutional violation.[355] Justice Kennedy argued persuasively that when a law denies a broad swath of citizens the protection of their government, it constitutes "a denial of equal protection of the laws in the most literal sense," thereby striking at the heart of antidiscrimination principles.[356]

If any of these cases are a squarely "animus doctrine" case, it is *Romer v. Evans*. Adopting language from *Moreno*, Justice Kennedy emphasized that a "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest."[357] Justice Kennedy remarked that most laws can pass constitutional muster under rational basis review, with justifications such as a simple appeal to broad policy interests that justify the "incidental disadvantages that they impose" on certain groups of people.[358] However, Justice Kennedy stated that Amendment 2 cannot meet that standard because it imposed "immediate, continuing, and real injuries" on LGBTQ+ individuals that are not made up for by any of the justifications offered by the state.[359]

In Justice Scalia's dissent, he disavowed the majority's assertion that the enactment of Amendment 2 is representative of legislative animus against LGBTQ+ individuals and argued against the idea that LGBTQ+ individuals are a "politically unpopular group." While this dissent is full of hateful stereotypes of the gay community,[360] the arguments that Justice Scalia presents give form to some of the strongest objections to the Court engaging in meaningful rational basis review. First, Justice Scalia argued that the guarantee of equal protection of the laws translating into a prohibition on legislatures from engaging in animus against its citizens has no constitutional merit.[361] Drawing on examples of a wide number of activities, like murder, cruelty towards animals, and polygamy, Justice Scalia asserts that legislatures throughout history have expressed moral disapproval towards these acts, and that is the only kind of "animus" that Colorado engaged in when enacting Amendment 2.[362]

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354. *Id.* at 633 (quoting Justice Stevens's concurrence in *Railroad Ret. Bd. v. Fritz*, 449 U.S. 166, 181(1980)).

355. *Romer*, 517 U.S. at 633.

356. *Id.*

357. *Id.* at 634.

358. *Id*. at 635.

359. *Id*.

360. *E.g*., *id*. at 636*; infra* note 362 and accompanying text.

361. *Romer*, 517 U.S. at 644.

362. Of course, activities like cruelty and murder towards animals are distinguishable from simply seeking protection from the law while existing as an LGBTQ+ individual—both murder and cruelty towards animals involve physical bodily harm to another individual. Polygamy is a closer case but is different in that involves the act of marrying multiple people, whereas seeking protection from discrimination as an LGBTQ+ individual does not, it involves seeking the state's protection from just existing authentically in one's own identity.

Secondly, Justice Scalia's assertion—however meritless—that the LGBTQ+ community represents a "politically powerful minority" underscores the line-drawing problems inherent in identifying "politically unpopular" groups under the Cleburne standard.[363] This mischaracterization of the LGBTQ+ community demonstrates the failure, up until this point, to define what exactly constitutes a politically unpopular group.

Finally, in the 2013 case *United States v. Windsor*, the Court demonstrated that classifications which impermissibly usurp the state's role will become more suspect for the Court, especially if those classifications are a result of animus towards a marginalized group. In *Windsor*, two women married in Ontario, Canada and returned back to their home in the New York.[364] When one woman died, she left her entire estate to her wife, Windsor. When Windsor tried to claim an estate tax exemption for surviving spouses, the Defense of Marriage Act (DOMA) barred her from doing so.[365] While DOMA afforded several rights to spouses, including housing and social security, it excluded same-sex spouses from the meaning of "spouse" for the purpose of federal statutes despite the state of New York recognizing same-sex marriage as a right.[366]

Addressing the conflict between state and federal law, Justice Kennedy wrote that the purpose, effect, and design of DOMA are in contravention of New York state's right to determine and control marriage policy.[367] Justice Kennedy stated that there are limited carve outs for the state's rights to control and determine marriage policy, such as Congress's right to control marriage policy in order to further federal policy, as well as courts' rights to limit state marriage policy if they contravene some established right. However, Justice Kennedy argued that DOMA goes much farther than these limited carve-outs and, absent these limited exceptions,[368] marriage is the "exclusive province of the States."[369] Thus, DOMA violated the rule that the "incidents, benefits, and obligations of marriage are uniform for all married couples within a state," even though it is permissible for these to vary from state to state.[370]

Furthermore, as DOMA departs from the tradition of allowing states to define marriage and its incidents, it constituted "discrimination of an unusual

363. As evidence that LGBTQ+ individuals are a politically powerful minority, Justice Scalia points to a few amici briefs that state that members of the gay community tend to have "high disposable incomes" and live in "certain communities," listing cities like "New York, Los Angeles, San Francisco, and Key West", leading them to "possess political power much greater than their numbers." *Id.* at 636. Other scholars have noted the weak foundation that Justice Scalia rests on with this claim, noting the few wins that LGBTQ+ Americans had been able to claim with Congress. *E.g.*, Jane S. Schachter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 386 (1997).

364. United States v. Windsor, 570 U.S. 744 (2013).

365. *Id*. at 750–51.

366. *Id.* at 771.

367. *Id*.

368. *Id.* at 767.

369. *Id.* at 765.

370. *Id.* at 768.

character."[371] Bringing *Windsor* into the province of *Romer*, DOMA became suspect to the Court, and thus requires "careful consideration" to determine whether it passes constitutional muster.[372]

To begin, the Court noted that the purpose of DOMA was to single out same-sex married couples for stigma, imposing on them a separate burdened status.[373] To support this, Justice Kennedy gestured towards the act's legislative history: first, DOMA's House Report stated that it is "appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage."[374] Second, the Court comments on another line in the House Report that argued that legally legitimizing gay marriage would be a "truly radical" act that would "fundamentally alter the institution of marriage."[375] Thus, altogether, these purposes show that the DOMA's demonstrated purpose is to make same-sex married couples marriages be "second class marriages" as compared to heterosexual couples.[376]

Justice Kennedy reasoned that the effect of DOMA confirmed its purpose to stigmatize same-sex couples, as the effect is to categorize a subset of state-approved marriages and single them out.[377] He opined that DOMA demeans same-sex couples by making these couples live a dual life—their marriage is valid for state purposes, but not for federal ones.[378] Furthermore, Justice Kennedy found that DOMA "humiliates" the numerous children who are being raised by same-sex families.[379] Given the federal government's broad reach over the daily aspects of many people's lives, its definition of marriage controls whether couples will be treated as married or not in diverse matters such as federal healthcare benefits, bankruptcy court for purposes of domestic support, tax purposes, and veterans' support. It also raises the healthcare costs for children of same-sex couples in some instances and makes death benefits less accessible to same-sex spouses and their children, as well as making less accessible a number of other benefits generally entitled to married couples.[380]

Justice Kennedy closed by stating summarily that "no legitimate purpose" could overcome the government's desire to injure those that the state has decided to protect.[381] Therefore, the statute is invalid for seeking to displace this protection

371. *Id*. at 771 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

372. *Id*. Justice Kennedy analyzes the stated purpose in the legislative history, DOMA's operation in practice, and design of DOMA, and finds that all these factors indicate that DOMA does not pass rational basis review. *Id*. at 77–74.

373. *Id*. at 771.

374. *Id*. at 770.

375. *Id*.

376. *Id.* at 770.

377. *Id*. at 772.

378. *Id*.

379. *Id*. at 800.

380. *Id.* at 773.

381. *Id.* at 775.

offered by the state, and *Windsor* is confined only to states that have legitimated gay marriage.

Windsor is different from many of the other elevated rational basis review cases: because it implicates the fundamental right to marry, the Court ultimately decides the case on Substantive Due Process and Equal Protection grounds. It is also one of the cases that leans the most heavily into animus doctrine, giving real substance and form to the meaning of exhibiting a "bare desire to harm a politically unpopular group." Here, the Court shows that even the government's statement of its moral disapproval can be used to prove animus.

Conversely, the Court took a different approach in its 2018 case *Trump v. Hawaii*.[382] Instead of considering all of the ample evidence of animus that was available for them on the record, they narrowed their focus to the stated purpose of the legislation in front of them, ignoring decades of animus precedent from *Moreno*, *Romer*, and *Windsor*. In 2017, President Trump—relying on the Immigration and Nationality Act—promulgated an executive order which restricted immigration by foreign nationals from several countries, many of which were majority-Muslim countries.[383] Eight countries were included in the executive order, including Chad, Iran, Iraq, North Korea, Syria, Venezuela, and Yemen.[384] The Court decided that the President had authority to issue these restrictions under the Act,[385] and then decided that the Act did not violate the Establishment Clause because there were countries implicated within the ban that were not majority Muslim countries, and, likewise, few Muslim countries had been affected by the restriction.[386]

The Court distinguished its reasoning from *Romer* and *Cleburne*, providing that the executive order's travel restrictions pass rational basis review because it had not been enacted with the "bare . . . desire to harm a politically unpopular group."[387] Instead, writing for the majority, Justice Roberts asserted that there is "persuasive" evidence that the restrictions are grounded in "legitimate . . . national security concerns," because its purpose is to prevent the entry of foreign nationals "who cannot be adequately vetted," as well as to encourage other countries to have more robust vetting processes.[388] The Court also noted that the determinations that these countries don't have adequate vetting processes were discerned after a "worldwide review" of different countries' immigration processes.[389] Finding that

382. 585 U.S. 667 (2018).
383. *Id*. at 676.
384. *Id.* at 676.
391. *Id.* at 671.
386. *Id.* at 702.
387. *Id.* at 705 (quoting U.S. Dep't of Agric. v. Moreno, 413 U. S. 528, 534 (1973)).
388. Trump v. Hawaii, 585 U.S. at 706.
389. *Id*. at 707.

immigration is the province of the President, Justice Roberts remarked that the President's interpretation of this matter is entitled to great deference.[390]

Justice Roberts argued that the travel restrictions do not constitute a bare desire to harm a politically unpopular group because they have not globally harmed all Muslim foreign nationals, and have harmed foreign nationals who are not from majority Muslim countries; there are also case-by-case assessments available to individuals from restricted countries that provide them with relief.[391] To substantiate this, Justice Roberts pointed to the three majority-Muslim countries who were removed from the travel restriction list.[392] He also pointed to several other available forms of relief that immigrants from restricted countries can take advantage of: various carve-outs that allow foreign nationals to travel to the United States on non-immigrant visas,[393] individualized assessments from immigration officers,[394] and a waiver program in which consular officers may look at the individual circumstances of each case.[395]

As stressed by the dissent, further discussed below, the majority was willfully ignorant of the blatant animus that the Trump administration displayed while enacting these travel bans.[396] Precedent set by cases above would dictate that these travel bans be invalidated because they display a bare desire to harm a politically

390. *Id*. at 686. It is important to note on this point that this case is distinguishable from *Windsor*. Here, the President acted on matters related to immigration and national security, a zone of power which lies squarely with the president. However, in *Windsor*, Congress enacted legislation which had a substantial effect on the state's power to regulate marriage, a zone of power that lies squarely with the states. United States v. Windsor, 570 U.S. 744 (2013).

391. Trump v. Hawaii, 585 U.S. at 708.

392. *Id*.

393. *Id*. at 708–09.

394. *Id*. at 689.

395. *Id*. at 667–68.

396. Before taking office, President Trump stated, "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." *Id*. at 737 (Sotomayor, J., dissenting). He also promised to enact a "total and complete shutdown of Muslims entering the United States." *Id.* at 738. He also asked one of his advisors to find a "legal" way to enact a Muslim ban." *Id*. at 738. President Trump also likened his proposed Muslim Ban to the long condemned Japanese internment camps of WWII, by saying "President Franklin D. Roosevelt 'did the same thing.'" *Id*. at 732.

unpopular group.[397] Unfortunately, however, the *Trump v. Hawaii* Court ignored that precedent.

In his dissent, Justice Breyer argued that the travel restrictions should be voided if there is animosity towards Muslim individuals, arguing that the travel restrictions are not rooted in a legitimate government interest absent national security concerns.[398] Gesturing towards the majority's proposition that the restriction is not the product of anti-Muslim animus, he argued that the restrictions affecting North Korea and Venezuela—two non-Muslim majority countries—are nothing but a smokescreen thrown up by the Trump administration in order to escape accusation of anti-Muslim animosity.[399] The minor restrictions on North Korea or Venezuela were "completely insubstantial, if not entirely symbolic," thus the idea that the travel restriction meaningfully affects anyone from a non-Muslim country is a farce.[400] Moreover, Justice Breyer expressed that many of the legitimate interests that may have reasonably been served by the restrictions are invalid because they are duplicative of many existing immigration vetting that is achieved by Congress as well as other offices in the government.[401]

In light of the ruling, some may argue that *Trump v. Hawaii* is the Supreme Court case that signals the death knell of animus doctrine, but this is not the case. First, and most importantly, the facts of *Trump v. Hawaii* cover only a very limited set of issues and should not be seen as foreclosing the application of animus doctrine in other settings. Given that immigration and national security policy is a legal arena in which the President is usually given great deference, other policy matters that do not fit so squarely in subject matter where the government is entitled to great deference may enjoy more success in arguing under a theory of animus.[402]

Secondly, cases that pursue an animus argument where every member of a class in a given jurisdiction is affected by the law in question may have more

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397. For legislation to be sustained under rational basis review, a challenged classification must be related to a legitimate purpose. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533–34 (1973). However, if there is ample evidence before the Court that the legislation in question was enacted with a bare desire to harm a socially unpopular group, the Court can and should consider legislative purpose and history to discern whether animus was the true purpose in instituting a piece of legislation. *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); United States v. Windsor, 570 U.S. 744, 770 (2013). Here, even though the purpose of the Proclamation on its face was neutral, the dissent cites several examples of statements by President Trump, as well as statements by top executive officials, that express obvious anti-Muslim animus. Trump v. Hawaii, 585 U.S. 667, 739–743 (2017) (Sotomayor, J., dissenting). Importantly, the dissent also points to President Trump's efforts to "water down" the original version of the Proclamation that was struck down due to constitutional deficiencies, demonstrating an attempt on President Trump's part to, on paper, comply with constitutional requirements, but in practice enact legislation imbued with animus. *Id*. at 735–36. All of this evidence together should evidence a "bare desire" to harm a socially unpopular group. *Dep't of Agric. v Moreno*, 413 U.S. 528, 534 (1973).

398. Trump v. Hawaii, 585 U.S. at 721.

399. *Id*. at 744.

400. *Id*.

401. *Id*. at 746.

402. *Id*. at 669.

success than the plaintiffs in *Trump v. Hawaii*. While the legislation at issue in cases such as Romer, Windsor, and Reed prevented every member of a class from gaining a benefit, the legislation in question in *Trump v. Hawaii* blocked only 8% of that class from receiving the benefit.[403] This provides some hope for future animus cases, especially cases that may be brought against the ordinances seen in *Grants Pass*, as every unhoused person in a local jurisdiction is affected by these ordinances.

Finally, there is ample room to argue—as others have—that *Trump v. Hawaii* was incorrectly decided and should be overturned.[404] The Court chose to willfully ignore all the blatant signs of animus exhibited by both President Trump and those who worked for him. The *Trump v. Hawaii* Court is in the minority of Supreme Court cases that have engaged in heightened rational basis review and have chosen to disregard animosity towards an unpopular group. By contrast, the Court in *Windsor* and *Romer* did not ignore these signs of animus that were far less overt. By ignoring the obvious bias displayed toward this unpopular group, and in the face of the great weight of the precedent that took this bias into account, there is room for advocates to argue that *Trump v. Hawaii* was incorrectly decided. While I take the position that the majority in *Trump v. Hawaii* was wrong, its holding is distinguishable from many other cases that may be brought under animus doctrine, and it is therefore not necessary to overturn in order to proceed in future cases under theories of animus. Thus, animus doctrine is not yet dead.

C. Confronting Animus Doctrine's Critics

Animus doctrine has faced numerous critiques throughout the fifty years that the doctrine has existed. The two pieces of criticism that this section tackles directly are 1) the idea that labeling legislation the product of animus simplifies and alienates the viewpoints of the legislation's proponents, thereby shutting down important social discussions around divisive topics; and 2) the difficulty in identifying a singular, unifying purpose of a piece of legislation given the varying and often conflicting viewpoints under which many legislators cast their vote.

Many criticize animus doctrine and related heightened rational basis review for being a form of "constitutional name-calling."[405] As a rebuttal to this assertion, Dale Carpenter has elegantly stated, "consider the simple idea that it is wrong for one person to treat another person malevolently."[406] Critics, who claim that

403. *Id*. at 706 ("Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.").

404. *See, e.g.*, Brian Owlsley, *Is the Supreme Court Irrational: Trump v. Hawaii*, 29 S. CAL. INTERDISC. L. J. 591, 591 (2020); Cristina M. Rodriguez, *Trump v. Hawaii, and the Future of Presidential Power over Immigration*, AMERICAN CONSTITUTION SOCIETY, https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/ [https://perma.cc/63HP-XN8C] (last visited Oct. 30, 2025).

405. Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 184 n.4, 185 (2014) (collecting scholarly critiques of animus doctrine).

406. *Id*. at 185.

dubbing legislation's purpose "animus" shuts down conversations, miss the important point that hateful behavior should be called what it is, and that the cessation of dialogue when one side's motivation is to eradicate the existence of another is a social benefit. Moreover, the Court has stopped meaningful social dialogue about a number of important topics by issuing broad constitutional rules that change the legal rights guaranteed to certain classes of people.[407] This practice contravenes the long-honored legal principle of stare decisis: once past courts have interpreted the law, future courts must work within the precedent declared or make exceedingly persuasive arguments that the law should be different. Every legal determination that the court makes will have the effect of shutting down some avenues of argument or discussion. What makes animus doctrine any different?

It is also especially important to be able to call out animus where it exists for politically vulnerable groups like the unhoused. As discussed above, empirical data shows that the unhoused face severe discrimination and mistreatment from broader society.[408] Discrimination and mistreatment can sometimes result in legislatures scheming to cause these vulnerable groups severe pain and deprivation. Because they are a demographically disparate group, there is no word like "racism" or "sexism" that can account for the discrimination that they often face. Perhaps "houselessness" is a status that is ripe for elevation to heightened scrutiny, and perhaps the Court will one day elect to do so. For now, however, employing the term "animus" is an important word to identify actions that are taken as a result of anti-homeless animus because, as of yet, there is no other legal word that encapsulates the vitriol and discrimination that the unhoused face daily and which the legislature is subjecting them to.

Finally, it has been argued that animus doctrine is imprecise in that courts cannot purport to find a singular purpose that motivated legislators' votes.[409] However, as others have noted, this is a problem that plagues other well-known and well-recognized areas of anti-discrimination law.[410] Notably, I reject the stance that any animus at all taints a piece of legislation. The Araiza burden-shifting framework deals with many of these concerns by placing the onus on the government to state a purpose,[411] so that the judiciary does not guess what the actual purpose was based on a spotty legislative history.

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407. For example, the Court largely stopped the legal contestation of the around the legitimacy of same-sex marriage when it ruled that the guaranteed right to marry also applies to same-sex couples. Obergefell v. Hodges, 576 U.S. 644, 665 (2015).

408. *See supra* notes 261–263.

409. William D. Araiza, *Why Bother (With Animus?)*, 74 ALABAMA L. REV. 649, 653 (2023) (". . . critics can point to the intuitive sense that animus—indeed, as reflected in that very word—necessarily implies the bad subjective intent of individual human actors. And again, those critics can reasonably suggest that such subjective intent is not knowable. That's especially the case when the government actor is a multi-member body."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("The chances that of several hundred men each will have exactly the same determinate situations in mind . . . are infinitesimally small.").

410. Carpenter, *supra* note 405, at 233–34.

411. *See* Araiza, *supra* note 24.

D. Current Legal Challenges: Anti-Camping Ordinances

Life-sustaining acts like sitting, sleeping, and building rudimentary shelter for protection from the elements have been criminalized by anti-camping ordinances throughout the country.[412] The number of anti-camping ordinances has increased dramatically over the past several years.[413] While some of these ordinances issue a total ban against unhoused individuals sleeping in public spaces, some apply more selective sleeping bans, restricted to only certain areas of a city. Many of them were created with a governmental desire to harm a politically unpopular group: unhoused people. This section examines two such ordinances in depth to assess the ordinances' purpose, text, and enforcement. States, and local governments by delegation, have the right to use their police powers to regulate and ensure public safety.[414] However, many of these local ordinances go a step further by deliberately making existing while houseless a criminal act. The Grants Pass, Oregon ordinance is used as an exemplar, and this section take the stance that the ordinance, as stands, exhibits animus toward unhoused people in violation of the Fourteenth Amendment.

As the majority in *Grants Pass* stated, many states and municipalities throughout the US have promulgated similar versions of anti-public sleeping and anti-camping ordinances, like the ordinance that was at issue in *Grants Pass*.[415] Below, I provide a brief overview of some of the local ordinances that have been considered the most draconian and discriminatory. While the ordinances this section discusses exemplify particularly strong anti-homeless animus, a review of cities across the U.S. suggests that these cities are not outliers.

A 2019 study conducted by the National Law Center on Homelessness and Poverty on 187 cities across the U.S. found that the enactment of anti-homeless ordinances has increased throughout the country.[416] A majority of the cities surveyed had at least one law that prohibited sleeping in public.[417] Many cities also had laws that prohibited merely resting by sitting or lying down if a person is unhoused.[418] Half of the cities surveyed also had laws that prohibited living in one's vehicle.[419] Additionally, 55% of cities prohibited the public storage of private property.[420] Finally, 76% of cities had laws prohibiting "scavenging" in public or searching through dumpsters for life-sustaining items, such as food or clothing.[421] Given the ubiquity of laws similar to the ones at issue in *Grants Pass*, and the research that suggests that unhoused people face anti-homeless discrimination

412. *See supra* Part II.
413. *Housing not Handcuffs, supra* note 11.
414. Berman v. Parker, 348 U.S. 26, 32 (1954).
415. *See* City of Grants Pass v. Johnson, 603 U.S. 520, 532 (2024).
416. *Housing not Handcuffs*, *supra* note 5.
417. *Id*. at 12.
418. *Id.* at 13.
419. *Id.* at 14.
420. *Id*.
421. *Id*.

in this country discussed above, it is probable that the cities discussed here are not anomalies.

1. Case Study of Grants Pass, Oregon Ordinance & Other Jurisdictions

In Grants Pass, Oregon, local ordinances are enacted by the Grants Pass City Council.[422] While the Grants Pass archival records contain little detail about the internal discussions surrounding the ordinance's enactment, discussions from more recent City Council meetings provide insight into the Grants Pass Council members' intentions in passing the ordinance at issue. The manner in which the City enforces its ordinances demonstrates the City's purpose of criminalizing houselessness.[423] So while little information is available surrounding the historical intent of the city council members who first promulgated the statute, information around the intent of the city council members who continue to support the law (by not repealing it), as well as other city officials, is available from community roundtables in 2013.

The ordinances in question prohibit sleeping and camping in public.[424] Camping is defined as maintaining bedding or sleeping material for the "purpose of maintaining a temporary place to live."[425] The anti-sleeping ordinance prohibits sleeping on "public sidewalks, streets, or alleyways . . . as a matter of individual and public safety."[426] This same section prohibits sleeping in entryways, allowing individuals who are found to be in violation to be removed immediately.[427] Finally, the anti-camping ordinance prohibits a person from occupying a campsite on any "sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct," unless they have obtained prior approval.[428]

The text of the Grants Pass ordinance evidences an animus towards unhoused individuals by only criminalizing activities like sleeping or sitting outside when a person is unhoused. Camping outside is only prohibited if it is done for the purpose of "maintaining a temporary place to live.[429] Thus, those who are camping outside for reasons other than lack of housing are not criminalized for their behavior. There is also a separate ordinance that prohibits sleeping outside, which the City of Grants Pass insists is a neutral ordinance that prohibits anyone, regardless of

422. *What is an Ordinance?*, CITY OF GRANTS PASS, https://www.grantspassoregon.gov/Faq.aspx?QID=73# [https://perma.cc/G5N7-CCW6] (last visited July 1, 2025).

423. Enforcement can show the purpose of an ordinance. City of Grants Pass, Oregon v. Johnson, 603 U.S. 520, 575 (2024) (Sotomayor, J., dissenting) ("Start with their purpose. The Ordinances, as enforced, are intended to criminalize being homeless.")

424. GRANTS PASS MUN. CODE §§ 5.61.010, 5.61.020, 5.61.030 (2023) (repealed; previous code available at: https://perma.cc/4X6P-YBNP).

425. *Id.* § 5.61.010.

426. *Id.* § 5.61.020(A).

427. *Id.* § 5.61.020(B).

428. *Id.* § 5.61.030.

429. *Id.* § 5.61.010.

housing status, from sleeping outside.[430] However, law enforcement that was questioned in connection with the *Grants Pass* litigation noted that the ordinance was almost never enforced against individuals who had homes.[431]

This, again, is an indication of animus. According to the City, the purpose of these ordinances is to "protect the health and safety of everyone."[432] Although, if litigated, the City may offer some reason as to why people with permanent housing sleeping outside can do so more safely than people without housing sleeping outside, it does not seem likely that they will be able to do so. For example, it seems unlikely that the City could defend that a person who slept in an encampment for the night—for the purpose of staying with a friend who lived in the encampment—is engaging in behavior that is any less safe than a person who sleeps in an encampment because they do not have other housing. This kind of differentiation that lacks purpose is often repugnant to the Fourteenth Amendment and is an indication of animus.[433]

Indications of animus can also be found documented in a City Council roundtable meeting.[434] The Council members' views of their unhoused residents are made clear in a community roundtable with the purpose to "identify solutions to vagrancy."[435] Justice Sotomayor made a number of references to the content of this meeting when discussing the meaning and purpose of the Grants Pass ordinance, but the full content of the meeting evinces a higher level of discrimination than Justice Sotomayor captured in her dissenting opinion. The meeting in question occurred between City councilmembers, community members, and charitable organizations that provided humanitarian services to unhoused individuals in the Grants Pass area.[436] Perhaps most striking about this meeting is that most discriminatory voices came from Grants Pass City Council members—those who were charged with protecting the wellbeing of Grants Pass.[437] Many of the City Council members exhibited the same types of stereotyping and discrimination that

430. *Id*. § 5.61.020; Transcript of Oral Argument at 41, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175) ("[The ordinance] applies generally to everyone. The law does not say on its face it is a crime to be homeless.").

431. Transcript of Oral Argument at 9–11, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175).

432. *Id.* at 29.

433. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432,450 (1985) (finding animus when the city was unable to justify its requirement that mentally disabled group homes require a special zoning application when other similarly situated group facilities like hospitals did not require an application).

434. *City Council Community Roundtable*, GRANTS PASS, https://grantspassoregon.gov/AgendaCenter/ViewFile/Minutes/_03282013-181 [https://perma.cc/S4T6-FP9F] (last visited Sept. 25, 2025).

435. *Notice: Grants Pass City Council is Hosting a Community Roundtable Discussion on Homelessness & Vagrancy*, GRANTS PASS, https://grantspassoregon.gov/AgendaCenter/ViewFile/Agenda/_03282013-181 [https://perma.cc/3GJK-MD2R] (last visited Sept. 25, 2025).

436. *City Council Community Roundtable*, *supra* note 434.

437. City of Grants Pass v. Johnson, 603 U.S. 520, 575–76 (2024) (Sotomayor, J., dissenting).

unhoused people have faced since the late 19th and early 20th Century.[438] On top of this, several of the comments and sentiments made by City Council members exhibit a bare desire to harm unhoused people—a socially unpopular group.[439]

The community meeting concerned strategizing around what some community members and City Council members considered to be a problem of "vagrants" or "homeless persons . . . who are not really seeking assistance or interested in bettering themselves . . . ."[440] Even though many in the meeting recognized that few unhoused people were actually being disruptive to the community, many of the "solutions" posed to confront this harmful behavior implicated all unhoused people living within Grants Pass.[441] Likewise, observing an increased houseless presence downtown, one City Council member felt that the unhoused residents of Grants Pass must not be locals and instead be, "coming here from other places."[442] As discussed above, historical stereotypes employed against the wandering unhoused often cast them as immigrants who failed to assimilate to American culture.[443] Similar to the situation here, the unhoused in Grants Pass were seen as not being real Grants Pass natives because of their housing status.

This meeting also evidenced a desire to expel unhoused individuals from the community when a group of community members asked the City Council if "repeat offenders" could be driven outside of the Grants Pass city limits and "left there."[444] The Public Safety Director commented that in the past, they have bought unhoused individuals bus tickets outside of their jurisdiction, but these individuals have been returned with requests not to send them back again. Seeming to have exhausted all other possibilities, one Council member remarks that "the point is to make it uncomfortable for them in our city so they will want to move on down the road."[445]

Worse still, City Council members schemed in this meeting to devise ways to undermine the existence of their unhoused residents. Reminiscent of the Poor Amendment laws from Victorian Era England,[446] City Council members and

438. *See id.* at 575–76 ("'[m]aybe they aren't hungry enough or cold enough . . . to make a change in their behavior. . .' The council president summed up the goal succinctly: '[T]he point is to make it uncomfortable enough for [homeless people] in our city so they will want to move down the road.'); Some at the meeting hypothesized that the unhoused people in the community couldn't actually be Grants Pass natives. *City Council Community Roundtable*, *supra* note 434. These ideas harken back to popular depictions of the tramp from the late 19th and early 20th Century. The idea that unhoused people are lazy pests that couldn't possibly be natives of their communities were prominent in discussions of tramps from the 1870s to early 1900s. *See* KUSMER, *supra* note 230, at 8–11.

439. Petition for Writ of Certiorari app. at 119-21, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175) (discussing denying unhoused people service of "food, clothing, bedding, and hygiene" for the purpose of causing them enough "pain" to "encourage prosocial behavior").

440. *Id*. at 113.

441. *City Council Community Roundtable*, *supra* note 434.

442. Petition for Writ of Certiorari at 114, *Grants Pass*, 603 U.S. 520 (No. 23-175).

443. KUSMER, *supra* note 230, at 8.

444. Petition for Writ of Certiorari at 113, *Grants Pass*, 603 U.S. 520 (No. 23-175).

445. *Id*. at 114.

446. *See* Clarke & Page, *supra* note 224.

community members discussed ways of depriving unhoused Grants Pass residents of life-sustaining services so that they will be "hungry enough or cold enough to make a change in their behavior."[447] One Council member argued that denying unhoused Grants Pass residents life-sustaining items like "food, clothing, bedding, hygiene . . ." would "encourage prosocial behavior."[448] In devising ways to deny these critical services, certain community members and service providers discussed various tactics, like taking pictures of people who were cited by their Public Safety Division—for violations that could be as innocuous as sleeping in an alley––and making "'most unwanted lists'" where the people on these lists were denied services.[449]

According to Justice Sotomayor in her *Grants Pass* dissent, enforcement of the anti-camping and anti-sleeping ordinances "saw a significant increase" in the year following this meeting,[450] lending credence to the idea that the purpose of the statute was captured in the sentiments expressed during this meeting.

It is noteworthy that the level of animus demonstrated by City Council members during this meeting exceeds the typical animus observed in landmark cases such as *Moreno*, *Cleburne*, *Romer*, and *Windsor*. In those cases, the government strove to deprive a vulnerable group of a benefit, whether that was access to food stamps or the legitimatization of their marriages. Here, City Council members are taking animus to another level: they are scheming to deprive their unhoused residents of their method of survival, forcefully making residents "cold," "hungry," and "uncomfortable." If this is the true purpose of the Grants Pass ordinance, it cannot pass constitutional muster.

Affirmatively, the Grants Pass anti-camping and anti-sleeping ordinance should be struck down because it does not serve legitimate government interests. As noted in Part III, the Supreme Court has stated that a "bare desire to harm" a politically unpopular group is not a legitimate government interest.[451] The kind of anti-homeless animus shown by local legislations across the country stretches beyond a bare desire to harm and instead constitutes a ploy to undermine the existence of a politically unpopular group. Because of this, statutes that exhibit a bare desire to harm the existence of the unhoused should be void as a violation of the Fourteenth Amendment equal protection guarantee.

An examination of laws across the country reveals that Grants Pass, Oregon is likely not alone in enacting legislation out of animus. For example, the Kentucky state legislature recently enacted a bill that makes camping unlawful, and also authorizes the use of deadly force against those who are camping if the property owner believes that the person who is camping is "trying to dispossess [the

447. City of Grants Pass v. Johnson, 603 U.S. 520, 575–76 (Sotomayor, J., dissenting). Welfare amendments in Victorian Era England also took away forms of subsistence in order to improve what were seen as moral failings. *See* Clarke & Page, *supra* note 224.

448. Petition for Writ of Certiorari app. at 121, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175).

449. *Id.*

450. *Grants Pass*, 603 U.S. at 576 (Sotomayor, J., dissenting).

451. U.S. Dep't of Agric. v Moreno, 413 U.S. 528, 534 (1973).

property owner] of his or her dwelling . . ."[452] Housing advocates worry that this change would empower property owners to kill unhoused people camping on their property.[453] While this is not a slam dunk finding of animus, a statute that permits the use of deadly force against unhoused individuals is a possible indicator of animus. It is hard to imagine a legitimate government purpose that must go as far as allowing its property owners to take unhoused people's lives to satisfy any governmental need.

Likewise, Sarasota, Florida's anti-homelessness ordinances also contain indications of animus: in 2013, Sarasota, Florida removed all the benches in an area that was highly frequented by unhoused people. These benches were removed because city officials were upset that unhoused people were using them for their originally intended purpose—resting on them.[454] Like the Grants Pass City Council members, Sarasota city officials also display a desire to make their unhoused more uncomfortable by taking away their means of sustaining themselves. As one City Commissioner stated, she felt that the benches were "enabling" the unhoused, and there was a difference between "helping people and enabling people."[455] After removing these benches, in 2022, Sarasota passed a local ordinance that prohibited sitting and lying down on public sidewalks.[456] Initially, the sit-lie ordinance would have only applied to certain areas in downtown Sarasota,[457] as many downtown business owners complained of "aggressive begging" in their business core.[458] However, as enacted, it applies to the entire city of Sarasota. Again, while these are not sure signs of animus, comments from city officials that indicate that unhoused people engaging in life-sustaining activities like sitting is "enabling" them may be an indication of animus, as it indicates a desire to undermine the existence of these individuals. Consequently, similar to the Grants Pass ordinance, it seems that Sarasota City Council members are acting to undermine the existence of their unhoused residents.

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452. KY. REV. STAT. ANN. § 511.110 (LexisNexis 2023); KY. REV. STAT. ANN. § 503.080 (LexisNexis 2024).

453. Roshan Abraham, *Republicans Push to Legalize 'Property Owners' Killing Homeless People in Kentucky*, VICE, (Jan. 22, 2024, 10:53 AM), https://www.vice.com/en/article/jg54mg/republicans-push-to-legalize-property-owners-killing-homeless-people-in-kentucky [https://perma.cc/Z9WZ-Z8DM].

454. Robin Roy, *Benches to Be Removed from Park*, OBSERVER, (May 19, 2011), https://www.yourobserver.com/news/2011/may/19/benches-be-removed-park/ [https://perma.cc/BE7J-2MNX].

455. *Id*.

456. SARASOTA, FLA., MUN. CODE § 30-3 (2023).

457. City of Sarasota, *Agenda Backup Materials Ordinance No. 22-5413*, at 3 (2022) https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/1292986/Ord._No._22-5413__Sit-Lie_.pdf.

458. Ben Montgomery, *Sarasota to Criminalize Sitting or Sleeping on Sidewalks*, AXIOS TAMPA BAY (Apr. 7, 2022), https://www.axios.com/local/tampa-bay/2022/04/07/sarasota-to-criminalize-sitting-or-sleeping-on-sidewalks (last visited Oct. 31, 2025) [https://perma.cc/L9HN-ZWL3].

IV.
ANIMUS DOCTRINE TO COMBAT DRACONIAN ANTI-HOMELESS LEGISLATION: THE POLICY PERSPECTIVE

Courts should engage in heightened review when confronted with legislation fueled by animus against unhoused community members because these pieces of legislation are repugnant to the Fourteenth Amendment. Too long have legislatures been able to use facially neutral ordinances as a "cloak"[459] to hide behind legislation that they've promulgated with the purpose of making the already difficult existence of unhoused people more unlivable. The problems with legislation that is enacted for the purpose of causing pain or undermining the survival of a politically unpopular group are two-fold: 1) this legislation undermines the principles of democracy, which dictate that a government is supposed to, at the very least, do no harm to its citizens; and 2) the legislation uses the legal system as a conduit to power to this hatred, something that the legal system has already rejected in other areas of constitutional law.

Larger critiques that have been leveled against the use of animus doctrine must also be addressed. Others have diligently detailed and analyzed these critiques against the doctrine.[460] This section, however, I instead focus on legislation in which the government has not only singled out a politically unpopular group to be deprived of a benefit but has aimed to make that group suffer pain because of the deprivation. Thus, the section addresses each critique of the doctrine from that lens, focusing on anti-homeless ordinances like the ones in Grants Pass, Oregon, the state of Kentucky, and Sarasota, Florida.

A. Animus Doctrine in the Larger Policy Context: A Government's Desire to Harm its Citizens

1. Legislation that Undermines the Existence of Unhoused People Undermines Long-Established Ideas of a Properly Functioning Government

Legislative bodies, at the bare minimum, should refrain from harming their constituents. This is a principle recognized implicitly in our common law and in our Constitution, and it is one of the principles upon which American democracy

459. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972). Anti-vagrancy laws were struck down because police were allowed to use them as a "cloak" to criminalize acts when done by members of unpopular social groups, while permitting those acts to be done by the members of the social mainstream. The same can be said for ordinances like those at issue in *Grants Pass*. *See e.g.*, Coalson, *supra* note 253.

460. Araiza, *supra* note 24, at 155; Carpenter, *supra* note 405, at 183.

was founded.[461] It is also a principle recognized by John Locke in political philosophy, a thinker who influenced the Declaration of Independence and the framing of the Constitution.[462] Criminalizing a class of people's biological functions is a separate endeavor from simply depriving a class of a benefit. Prohibiting unhoused people from engaging in biological functions like sitting or sleeping in public is an act of legislative harm.[463]

The historical context present during the Constitution's development suggests that courts should apply heightened scrutiny to laws motivated by animus towards groups that are marginalized and oppressed group.[464] According to Dale Carpenter, animus doctrine would protect against situations in which an overwhelming majority were to "carry out schemes of oppression."[465]

Additionally, the idea that constitutional law should be used to provide protection to a group who often suffers from laws that are facially neutral but enacted against them with animus is supported by the numerous constitutional laws that were enacted to prevent a despotic imbalance of power between the people and the legislature, guarding the people against legislative harm. These laws include the prohibition against bills of attainder, the prohibition against ex post facto laws, and the prohibition against titles of nobility.[466] Bills of attainder—laws that makes a specific person or entity guilty of a crime without trial—were often adopted in England as a tool used against the political enemy of the crown to maintain

461. Some of our most fundamental constitutional rights are built on the premise that citizens should be protected from harm from the government. These constitutional protections exist to protect people that happen to suffer from harm at the hands of the government. For example, the Equal Protection Clause exists to ensure that the government can't arbitrarily deprive groups of their rights. Slaughter-House Cases, 83 U.S. 36, 126 (1872). Additionally, the Due Process Clause exists to ensure that people are not harmed by the government erroneously depriving them of rights to which they should have access. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

462. There is an implied right that the government do no harm under Locke's version of social contract theory—and these principles are responsible for the reasoning behind the Declaration of Independence. Kenneth D. Stearn, *John Locke and the Declaration of Independence*, 15 CLEV. ST. L. REV. 186, 187–189 (1966). Under social contract theory, the primary purpose of establishing a government in the first place is to protect the interests of the people. If the government acts against the interests of the people, then the people have a right to overthrow their government. *Social Contract Theory*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, https://iep.utm.edu/soc-cont/#SH2b [https://perma.cc/L5Z6-J2A3] (last visited Oct. 31, 2025).

463. Justice Sotomayor articulates this eloquently in the *Grants Pass* oral argument. Ordinances that are aimed at preventing unhoused people from engaging in necessarily biological activities are inherently harmful and eradicate the existence of unhoused people. Transcript of Oral Argument at 34, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175) ("Where do we put [unhoused people] if every city, every village, every town lacks compassion—. . .–and passes a law identical to this? Where are they supposed to sleep? Are they supposed to kill themselves?").

464. THE FEDERALIST No. 10 (James Madison). The founders were concerned with the idea that people of "factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption, or other means. . ." gain power and then betray the people. Thus, the Constitution—at least in part—was made to guard against a prejudiced majority targeting minority groups.

465. Carpenter, *supra* note 405, at 227 (quoting THE FEDERALIST No. 10 (James Madison), (Roy P. Fairfielded., 2d ed. 1966)).

466. U.S. CONST. art. I, § 9, cl. 3.

power.[467] The founding fathers adopted a prohibition against bills of attainder for a number of reasons, but in part to ensure that members of the legislature did not use their powers to target those that they disfavored.[468] Worrying about the dangers of political tools for those in power to oppress a minority, the prohibition against ex post facto laws—or the practice of making an action illegal that was legal at the time that it was committed—was to secure against "tyranny," and an act of "despotism." [469] Thus, the prohibition against ex post facto laws is meant to guard the minority against the wielding of despotic power of the majority. When explaining the further prohibition against titles of nobility in the same federalist paper, Hamilton notes that this prohibition is important because it ensures that the government is "that of the people." In effect, it guards against a majority improperly exerting their will over that of the less powerful minority.

Extending this further, however, the legislative intent in the enactment of the Fourteenth Amendment itself would not tolerate laws that so blatantly create a caste system in which one group is prevented from performing acts that another group may perform—merely because of their housing status—especially if those acts are necessary biological functions.[470] In congressional discussions prior to the enactment of the Fourteenth Amendment, Congressman Sumner argued that the purpose of the Fourteenth Amendment was to prohibit "oligarchy, aristocracy, caste, or monopoly with particular privileges and powers."[471] Likewise, at the same congressional session, Senator Howard noted that the purpose of the Fourteenth Amendment was to be rid of "the injustice of subjecting one caste of persons to a code not applicable to another."[472] Ordinances that criminalize public conduct to satisfy biological urges is the very essence of the government action that the Fourteenth Amendment framers worried about; here, not only are there certain activities that become criminal only when an unhoused person engages in them, but these activities, in many cases, happen involuntarily. For one caste of people, the biological becomes criminal.[473] Existing in and of itself is criminal.

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467. Michael L. Landsman, *From Enemies of the Crown to Regional Telephone Companies*, 15 TOURO L. REV. 761, 763 (1999) ("Bills of attainder were Parliamentary acts sentencing named or described persons or groups to death without judicial decision."). Bills of attainder were often used to maintain political power. *See id*. at 763–64.

468. THE FEDERALIST No. 84 (Alexander Hamilton) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *438).

469. THE FEDERALIST No. 84 (Alexander Hamilton).

470. As Justice Sotomayor noted in her Grants Pass dissent, banning the biological functions of a person is just "another way to ban the person." City of Grants Pass v. Johnson, 603 U.S. 520, 578 (2024) (Sotomayor J., dissenting). Banning unhoused people if they satisfy their biological necessities is another way of banning people for not having a home. This is repugnant to the spirit of the 14th Amendment—an amendment whose purpose was to protect people who were denied equal citizenship and thereby were harmed for the government because their membership in a status group. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

471. CONG. GLOBE, 39th Cong., 1st Sess. 674 (1866) (discussing the enactment of the Fourteenth Amendment, ensuring that Congress can enact laws to get rid of the vestiges of slavery with a purpose of everyone being treated equally, regardless of race).

472. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

473. *See* Poos, *supra* note 221.

Moreover, the scheming that the City Council members in Grants Pass and Sarasota engaged in to make their unhoused residents' lives more painful and more uncomfortable violates the implicit duty that elected members of government must act as fiduciaries for their residents. Others have persuasively argued that politicians, as agents, should be treated as fiduciaries in other contexts.[474] Politicians planning to make the lives of their constituents more uncomfortable violate the duty of loyalty. For example, in corporate law, majority stockholders owe minority stockholders a duty of loyalty. Thus, politicians acting to create more pain and discomfort for their politically unpopular residents—unhoused individuals—also should be construed to be violating the fiduciary duty of loyalty.

Many may counter the arguments here by pointing to the state's police powers which give them the ability to regulate health, safety, and welfare within their jurisdictions.[475] Some may point to the unhealthy conditions that are present in encampments and argue that the state needs to have the ability to regulate these conditions. The purpose of this argument is not to dispute that state and local governments' ability to regulate health and safety conditions within its local jurisdictions. However, the issue that is being disputed here is the anti-homeless hostility, the unequal enforcement of these ordinances, and the ultimate purpose of driving unhoused residents out of these jurisdictions, with an eye towards making their existence more miserable. Other regulations that do not espouse such venom towards the unhoused would pass constitutional muster.

2. Legislation that Undermines the Existence of Politically Unpopular Minorities Gives Legal Power and Effect to Hatred

When legislation is enacted because of animus, it gives legal power to that animus by making the courts the administrators of hatred and prejudice. Even worse, permitting the legislature to criminalize certain individuals for their biological functions while others are not criminalized for the same acts violates the basic principle undergirding all law: that everyone is equal under the law. Finally, it contradicts the principle espoused by our Constitution's drafters that our courts should stand as impartial guardians against tyranny.

The ordinances at issue bring unhoused folks squarely into the realm of the courts for engaging in life-sustaining behaviors; the same behaviors that remain blameless for those with permanent housing become punishable for the unhoused, even, at times, criminal. The idea that courts would give effect to hateful and prejudicial laws is repugnant to the Fourteenth Amendment. Various constitutional precedents, like *Shelley v. Kramer* have already rebuked the idea that the state

474. D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2013).

475. States have police powers granted to them through the Tenth Amendment. Generally, police power is the "reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). Importantly, however, when the state exercises their police power, that power should not violate residents' constitutional rights. *Id*. ("nor any or any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument.").

should give legal effect to individuals' hatred.[476] Even worse, the courts giving legal effect to public officials' hatred amplifies the existing constitutional defect because courts should be the one place that individuals can turn in order to have their constitutional rights vindicated.

It is, of course, a terrible thing, to engage in hatred towards unhoused people as private individuals. However, it is even worse is to abuse the American court system to attach legal penalties that give substance and form to that hatred and discrimination that the unhoused face regularly. It is repugnant to use the state's police force to enforce this hate. Giving legal force to the private hatred of the unhoused slides into the territory of despotism and tyranny that the founders originally feared. In Federalist Paper No. 78, Alexander Hamilton, quoting Montesquieu, notes that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[477] Permitting the judiciary to give legal force to a legislature's biases impermissibly merges the two.

CONCLUSION

As the unhoused and housing advocates across the country awaited the *Grants Pass v. Johnson* decision, they hoped that the Court would show compassion and recognize that banning biological functions was cruel and unusual punishment. Unfortunately, as has become a trend of late, the conservative Court did not honor Supreme Court precedent. In doing so, they "abdicated" their duty to uphold the Constitution fairly and equitably.[478]

However, advocates may find some hope in challenging this cruelty under the Fourteenth Amendment, pointing out the bare desire that the legislation exhibits, in many instances, to undermine the existence of unhoused individuals. For years, unhoused individuals have faced persistent discrimination by society at large, and through these anti-camping ordinances, the legislatures which are supposed to protect them.

Animus doctrine, in particular, holds great potential for constitutional advocacy. The unhoused are a vulnerable, politically unpopular group who, in many cities and states across the country, are facing explicit discrimination by their legislature. Comments made by legislatures during the enactment of these ordinances serve as indicators of this animus. If advocates seize this strategy, it has the potential to result in the abolition of some of the most draconian anti-homeless laws throughout the U.S.

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476. *See, e.g.*, Shelley v. Kramer, 334 U.S. 1, 19 (1948) ("These are not cases… in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. . . . these are cases in which the States have made available to such individuals the full coercive power of government to deny petitioners [their constitutional rights.]"). The arm of the state that is being used to deny rights in Shelley is the courts, but why should the police—those enforcing the ordinances in question—be considered any different?

477. THE FEDERALIST No. 78 (Alexander Hamilton).

478. City of Grants Pass v. Johnson, 603 U.S. 520, 592 (2024) (Sotomayor, J., dissenting).

Unfortunately, actions that courts take—even if they do take steps to call out animus—will not fix the underlying animus and will also be somewhat of a salve on a problem that requires government dedication and funding. However, providing meaningful avenues for unhoused people to find legal relief is a necessity. Shamefully, many jurisdictions have leaned into the removal and criminalization of unhoused individuals as a result of the Court's ruling in *Grants Pass v. Johnson*.[479] These types of actions may be lessened if advocates can find a meaningful avenue for legal relief—this Article has argued that that avenue may very well be animus doctrine. But as the number of houseless people grows across the country, and as housing becomes more expensive, it is important for the public and legislatures alike to keep in mind that becoming unhoused could happen to anyone.[480] Furthermore, being unhoused is a cycle: once one becomes unhoused, it is a difficult cycle to break out of.[481] As many advocates reminded the Court, the solution to houselessness is more plentiful and accessible affordable housing, not criminalization of already marginalized people who have nowhere else to go.

Thus, given the discrimination and hatred that unhoused people face from the general public, discussed in Part II and Part III(D), courts can and should engage in heightened rational basis review when analyzing statutes that are imbued with anti-homeless animus. As discussed in Part IV, our legal tradition supports this conclusion. Finally, our shared American tradition and philosophical ideas about government, fairness, and freedom from tyranny demands this conclusion. While invalidating ordinances under animus doctrine may not fix the underlying animus, it will prevent courts from sharing in the culpability of the animus-filled legislatures that enact these ordinances and will prevent some jurisdictions from using facially neutral ordinances as a cloak to enact their anti-homeless prejudice.

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479. *See* Shawn Hubler, *Newsom Orders California Officials to Remove Homeless Encampments*, N.Y. TIMES (July 25, 2024), https://www.nytimes.com/2024/07/25/us/newsom-homeless-california.html [https://perma.cc/W4D2-FKQS].

480. Many Americans say that they can't afford to help themselves if a financial emergency arises. Many people are living one emergency away from becoming unhoused themselves. As the availability of affordable housing decreases, the number of unhoused people increases. *See* Alex Horowitz, Chase Hatchett, & Adam Staveski, *How Housing Costs Drive Levels of Homelessness*, PEW RESEARCH, (Aug. 22, 2023), https://www.pew.org/en/research-and-analysis/articles/2023/08/22/how-housing-costs-drive-levels-of-homelessness (last visited Oct. 31, 2025) ("A large body of research has consistently found that homelessness in an area is consistently driven by housing costs. . . ."). Forty percent of Americans say that they have "no spare savings" and are "living paycheck to paycheck." Hugh Cameron, *Number of Americans Living Paycheck to Paycheck Soars*, NEWSWEEK, (Oct. 6, 2025, 11:33 AM), https://www.newsweek.com/americans-living-paycheck-to-paycheck-soars-goldman-sachs-10834306 (last visited Oct. 31, 2025).

481. *E.g.*, Emo Zhao, *The Key Factors Contributing to Persistent Homelessness*, 30 INT'L J. OF SUSTAINABLE DEVELOPMENT & WORLD ECOLOGY 1, 1 (2023) (finding that the initial factors that lead to being unhoused then are exacerbated by being unhoused).