# CALL IT BY ITS NAME

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Thank you, Professor Bent.** It is such an honor to be standing here today, in front of such an accomplished group of scholars who have gathered for the purpose of discussing my book and the ideas it contains. I'm deeply flattered, and I hope to maintain the scholarly and personal connections that are being developed here today.

I need also to thank the people here at Stetson who have put on such a wonderful event. Shannon and Mercy, the administrators who have made the details tick, thank you so very much. The Stetson faculty who have stepped up to serve as moderators on panels, thank you as well. The student editors of the *Stetson Law Review*—thank you, and I'll look forward to working with you this summer in putting together the symposium edition. Finally—and with the most feeling—I want to thank my friend and colleague Lou Virelli, who's on the faculty here. It was Lou who suggested this symposium way back last summer. Without him, it would not have happened. Lou couldn't be here this weekend, but I do want to give him a shout-out for his friendship, his generosity, and his wonderful collegiality.

Because many of you have read my book,[1] I'm not going to use this opportunity simply to restate the arguments that I make there. One of the points of this symposium is to discuss those arguments, and my view is that I've already had the first at-bat in that discussion via the book itself. I'll leave it to others to respond, as has already started to happen this morning.

Nevertheless, I do want to say something that is related to the animus concept. So, what I will do in these remarks is make a plea for calling things what they are. As you might expect, a major part of this plea concerns animus and urges that we be willing to call animus what it is, when in fact it exists. But that's not the only

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

component of this argument. Rather, I would urge that courts and scholars be willing to subdivide equal protection into different inquiries, each one focused on the particular issue presented by the type of law being challenged.

First, I'd like to address the animus idea.[2] Scholars have been deeply divided on the helpfulness of the animus concept, either as a matter of workable legal doctrine or at higher, more conceptual levels. Certainly some scholars, including our own Susannah Pollvogt, here today, have applauded the Court's use of animus in equal protection cases.[3] Law and religion scholars have also shown a willingness to make animus-based arguments, most notably in the litigation against President Trump's travel ban.[4] Moving into the realm of courts, animus arguments played a prominent role in lower court litigation about both same-sex marriage[5] and the travel ban litigation[6] and have also cropped up from time to time

2. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (noting the Supreme Court implicitly referred to the idea of animus as "a bare . . . desire to harm a politically unpopular group").

3. *See, e.g.*, Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 888 (2012) (explaining that a law based on animus will not survive even the most deferential scrutiny).

4. Br. for Interfaith Group of Religious and Interreligious Org. as Amici Curiae Supporting Resp'ts at 6, 37, *Trump v. State of Hawaii*, 138 S. Ct. 923 (2018) (No. 17-965).

5. United States v. Windsor, 570 U.S. 744, 770 (2013); Latta v. Otter, 771 F.3d 456, 495–96 (9th Cir. 2014) (Berzon, J., concurring); Baskin v. Bogan, 766 F.3d 648, 666 (7th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1236 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in part); De Leon v. Perry, 975 F. Supp. 2d 632, 662–63 (W.D. Tex. 2014).

6. *See generally* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 628 (4th Cir. 2017) (en banc) (finding that the third executive order was "likely borne of the President's animus against Muslims," which exceeds Congress' intent of delegating to the President unconstrained authority to deny entry to any class of aliens); Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 627–29 (D. Md. 2017) (finding the third executive order not to have expunged the anti-Muslim animus of the previous order, thus striking it down on that ground); Hawaii v. Trump, 245 F. Supp. 3d 1227, 1236 (D. Haw. 2017) (pointing to the record to demonstrate the unrebutted evidence of President Trump's statements of religious animus towards Muslims preceding the first executive order); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 558–59 (D. Md. 2017) (explaining that President Trump's direct and explicit statements of animus towards Muslims entering the United States is a convincing case of why the first executive order was accomplished as soon as possible); Hawaii v. Trump, 241 F. Supp. 3d 1119, 1136 (D. Haw. 2017) (using anti-Muslim animus as a unique and significant factor into the analysis of the second executive order's constitutionality); Aziz v. Trump, 234 F. Supp. 3d 724, 737 (E.D. Va. 2017) (rejecting the argument that anti-Muslim animus cannot be inferred by the court if the animus does not target a group as a whole). *But see* Sarsour v. Trump, 245 F. Supp. 3d 719, 739–40 (E.D. Va. 2017) (rejecting the anti-Muslim animus argument). Unlike most of the inferior courts, the Supreme Court rejected the animus argument. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2420–21 (2018) (explaining that "[t]he [travel ban] Proclamation does not fit th[e] pattern" of cases as the Court described that pattern).

in other contexts.[7] Most notably, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[8] the Supreme Court concluded that a state civil rights commission acted based on anti-religious animus when it refused to grant a baker an exemption from the state's public accommodation ordinance in a case dealing with the baker's refusal to provide a wedding cake to a same-sex couple.[9]

At the same time, scholars have objected to the use of animus. Some, including Daniel Conkle, also here today, have argued in a very practical vein that animus is a phenomenon that is fundamentally unknowable.[10] This argument would presumably apply with special force to challenges to legislation resulting from direct citizen legislating, such as initiatives and referenda.[11] But even challenges to laws enacted through the traditional legislative process trigger concerns that the subjective nature of animus renders the creation of the law next-to impossible to accurately discern when animus played a role in its enactment. For example, consider the fact that, of the three city council members in Cleburne, Texas who voted against allowing the intellectually disabled to establish the group home in question in the *City of Cleburne*[12] case, one of the members had sat on the board of a school for intellectually disabled children, and another had an intellectually disabled grandchild.[13] Given such facts, how can one credibly determine that animus lurked in the city's decision?

But scholars also raise more foundational objections to animus. Some scholars express deep concern with the allegedly corrosive effects an animus finding—or even an animus

7. *See, e.g.*, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1200–01 (9th Cir. 2018) (finding some evidence of animus in a challenged "ag-gag" law but concluding that the law served legitimate government interests and was thus constitutional).

8. 138 S. Ct. 1719 (2018).

9. *See id.* at 1729 ("The Civil Rights Commission's treatment of [the baker's] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.").

10. *See* Br. of Amici Curiae Steven G. Calabresi et al., In Support of Cert. and Opposing a Ruling Based on Voters' Motivations at 10–13, *Herbert v. Kitchen*, 135 S. Ct. 265 (2014) (No. 14-124) (noting this argument). Professor Conkle was a co-signatory on this brief.

11. *See, e.g.*, DeBoer v. Snyder, 772 F.3d 388, 409–10 (6th Cir. 2014) (acknowledging the difficulty of divining the intent of a large group of voters in initiative elections involving same-sex marriage rights).

12. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435–37 (1985) (noting that this case revolved around the potential animus of a city council in passing a zoning ordinance that excluded group homes of the intellectually disabled for permitted uses in the zoning district in question).

13. ARAIZA, *supra* note 1, at 39.

allegation—can have on political and social discourse. Most notably, Steven Smith argues that such claims constitute what he calls a "jurisprudence of denigration."[14] Such a jurisprudence, he argues, has predictably bad results. The side accused of animus is embittered, while the side making the accusation self-consciously occupies the moral high ground. As a result of this dynamic, future prospects diminish not only for a post-conflict settlement but also for a renewal of normalized relations between the two sides.[15]

These critiques are serious. Any legal doctrine needs to be amenable to competent judicial administration if it's to play a useful role in deciding actual cases. At the same time, the experience with other doctrines that have generated bitterness and refusal to compromise cautions us about a take-no-prisoners attitude toward constitutional adjudication. Some progressives may have had a fleeting affair with such an attitude during the summer of 2016, when Mark Tushnet wrote his now infamous posting on *Balkinization* urging an end to what he called "Defensive Crouch Liberal Constitutionalism."[16] To be sure, I think Tushnet's post was likely misunderstood—perhaps on purpose in some circles. And at any rate, he very quickly put up a second post that explicitly recognized the likelihood, if not the desirability, of accommodating what he described as the losers of the culture wars.[17] But leaving those details aside, the larger point about a take-no-prisoners attitude remains, and perhaps with even more force in light of the political polarization that has only gotten worse since President Trump's election. And who would have thought it could get worse?

Moving beyond the polarization issue, perhaps more generally we can criticize the Supreme Court decisions that come to mind when we think of cases where the Court reached out to rule unnecessarily broadly in cases with extremely high political salience—cases like *Dred Scott*[18] and *Roe v. Wade*.[19] To be sure, no

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

15. *See id.* at 690–91 (expressing this concern).

16. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html.

17. Mark Tushnet, *Abandoning Defensive Crouch Liberalism Redux*, BALKINIZATION (June 30, 2018, 9:41 PM), https://balkin.blogspot.com/2018/06/abandoning-defensive-crouch-liberalism.html.

18. Dred Scott v. Sandford, 60 U.S. 393 (1857).

19. 410 U.S. 113 (1973).

animus case decided thus far has reached those levels of salience or breadth of reasoning.[20] Still, when one frames the denigration critique as one not just based on reasoning, but also one based on results that take absolutist moral positions on contested moral issues, one can understand the concern.

Having said this, one might fairly inquire into the affirmative argument for reliance on animus as a legal doctrine. If it really is hard for judges to detect animus, and if relying on animus really does embitter social and political discourse, then why embrace it?

It seems to me that there are several reasons.

First, animus really does name the phenomenon we're talking about. Leaving aside issues of proof, the fact is that the term "animus" does indeed accurately describe the sort of individualized or institutionalized intent to oppress or exclude, which often appears in the canonical animus cases.[21] In that group, I include not just the *Moreno*[22] line of cases, but also religion clause cases such as *Lukumi*.[23] Describing these cases purely in terms of the lack of adequate fit between the challenged law and the government interest asserted in its defense denudes those cases of their underlying meaning. If Justice Jackson had no hesitation about recognizing in *Barnette*[24] the reality that "[t]here are village

20. *Cf.* Steve Sanders, *Dignity and Social Meaning:* Obergefell, Windsor, *and* Lawrence *as Constitutional Dialogue*, FORDHAM L. REV. (forthcoming 2018) (Indiana Legal Studies Research Paper No. 391) (manuscript at 51–55), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3153661 (observing that the modern gay rights animus cases—*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *Lawrence v. Texas*, 539 U.S. 558 (2003) (O'Connor, J., concurring in the judgment), and *United States v. Windsor*, 570 U.S. 744 (2013)—all reached results that generally commanded public approval).

21. *See generally* United States v. Windsor, 570 U.S. 744, 770 (2013) (using animus as a factor in determining whether DOMA's enactment was motivated by a "[d]iscrimination[] of an unusual character"); Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the judgment) (explaining that identifiable classes of citizens cannot be assigned certain consequences that do not apply to everyone else by their state); Romer v. Evans, 517 U.S. 620, 632 (1996) (striking down Colorado's "Amendment 2," which afforded protection to discrimination based on sexual orientation by finding that the Amendment imposed undifferentiated and animus-related discrimination on a single, named group); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985) (establishing that mentally disabled individuals are protected individuals from animus); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (explaining that the Equal Protection Clause must mean at the minimum that a legitimate governmental interest cannot include "a bare congressional desire to harm a politically unpopular group").

22. *Moreno*, 413 U.S. at 528.

23. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

24. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

tyrants as well as village Hampdens,"[25] then we should similarly have no such hesitation.

Calling animus by its name carries with it another benefit. The reality of our current politics is that racism, xenophobia, and bias of all types have acquired a new respectability. If perhaps in the past it might have been good enough—or even affirmatively appropriate—to refrain from the kind of name-calling Professor Smith decries,[26] there may be more reason today for courts to forthrightly call it what it is.

It is again worthwhile to think about Justice Jackson in *Barnette* and recall the frankness with which he approached his task in that case. As I stated above, recall that he explicitly recognized the possibility that so-called village tyrants may thrive in small communities where conformity is expected and non-conformists are distrusted and burdened.[27] But remember also his frankness in thinking about constitutional adjudication more generally. In *Barnette*, Justice Jackson speaks in ways that sound startling to modern ears, about how constitutional principles had to evolve in the face of social, economic, and political evolution in America.[28] Of course, he was talking in part about 1937,[29] but his willingness to engage what was then recent history and to apply the lessons of that engagement to the case before him provides a model for us today. And, of course, I haven't even mentioned his explicit indictment of the totalitarian regimes with which the United States was then at war[30]—an indictment that, as we all know, he was to make true three years later in Nuremburg.

Sadly, there may be reason to be equally forthright today. As we all know, the level of frankness with which racism, xenophobia, and other hatreds have been recently expressed has been unprecedented in modern times.[31] To be sure, the news is not all

25. *Id.* at 638.

26. *See* Smith, *supra* note 14, at 678 (noting that name-calling and exaggeration are more acceptable in the court systems today).

27. *Barnette*, 319 U.S. at 637–38.

28. *Id.* at 639–40.

29. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) (recognizing broad government authority to regulate contractual relations in support of the public good).

30. *See Barnette*, 319 U.S. at 641 (analogizing domestic attempts to coerce patriotism to "the fast failing efforts of our present totalitarian enemies").

31. *See, e.g.*, Brian Levin et al., *New Data Shows U.S. Hate Crimes Continued to Rise in 2017*, CBS NEWS (June 26, 2018, 11:52 AM), https://www.cbsnews.com/news/new-data-shows-us-hate-crimes-continued-to-rise-in-2017/ (explaining that hate crimes have been rising in America's largest cities).

bad. The social acceptance of same-sex marriage since *Obergefell*[32] has been remarkable.[33] Indeed, it's a measure of that acceptance that the main topic of discussion with regard to same-sex marriage is whether a baker can be legally required to sell a cake for a couple's wedding reception.[34] In facing up to the negative, we should never lose sight of the positive.

But it seems to me that the social climate cannot be measured only by public opinion polls that seek to gauge the aggregate opinions of the American people. With every advance in tolerance comes the risk of a backlash—either one that's widespread, or one that's concentrated among a small group. Whether such advances take the form of same-sex marriage, an African-American president, a female presidential nominee, or simply the growth of a particular ethnic or religious community in an area that had never hosted that community before, advancement causes a counter-reaction—even if a localized or concentrated one. And, of course, official encouragement of such a counter-reaction only legitimizes it and allows it to emerge further from the shadows.

When that happens—when backlash comes out of the shadows—it behooves those in power to call it what it is.

In *Barnette*, Justice Jackson spoke of "village tyrants."[35]

In *Lukumi*, Justice Kennedy was more circumspect. He stated that the local ordinances in that case "were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom."[36]

In *Windsor*,[37] he was somewhat more direct. Speaking of the Defense of Marriage Act, he wrote that its "principal purpose and . . . necessary effect . . . are to demean those persons who are in a lawful same-sex marriage."[38]

The point is straightforward, but nevertheless important. In a world where backlash is written into law, law must answer it by

32. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

33. *See, e.g.*, Sanders, *supra* note 20, at 46 (explaining American citizens' evolved understanding of gay marriage rights with the lack of backlash following the Court's decision in *Obergefell*).

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

35. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

36. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993).

37. United States v. Windsor, 570 U.S. 744, 774 (2013).

38. *Id.*

identifying the phenomenon for what it is. Not simply a statute that fails an ends-means test. But instead, animus.

Let me shift gears now and speak more theoretically.

It seems to me that crafting and implementing an effective animus doctrine may be useful for an additional reason. The concept of animus—that is, a bare desire to harm or exclude a group of persons, which actuates a government action—can help connect modern equal protection law to its nineteenth-century antecedents, in particular, that earlier law's concern with so-called class legislation.[39] If class legislation is properly understood as legislation that affirmatively seeks to promote a non-public-regarding interest, then one can understand animus as a modern variant on such legislation. To be sure, animus and class legislation are not perfect synonyms. For example, what today we might describe—and condemn—as rent-seeking legislation may not be properly categorized as legislation based in animus. Yet such legislation might be another subset of modern class legislation.[40]

Nevertheless, legislation that does satisfy the criteria for condemnation as based in animus could justifiably be compared to nineteenth-century legislation—that is, legislation that aimed not at the public good but instead sought to promote a private-regarding interest.[41] In the case of animus, that private interest would be the desire to harm or subordinate a group, not as an unfortunate by-product of the achievement of some legitimate public good, but as the fundamental goal of that law.[42] Again, there may be other such private interests that are equally beyond the legitimate power of government to pursue. Rent-seeking is the

39. ARAIZA, *supra* note 1, at 11–28, 176–78; *see also* William D. Araiza, *Animus and its Discontents*, FLA. L. REV. (forthcoming 2019) (Brooklyn Law School, Legal Studies Paper No. 563) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225974 (discussing the relationship between animus and class legislation).

40. *See, e.g.*, Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 986 (2013) (connecting rent-seeking legislation with the concept of class legislation).

41. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.").

42. ARAIZA, *supra* note 1, at 177.

most notable example.[43] But animus remains a viable subcategory of laws that can be properly described as class legislation.

This latter insight—that there may be different species of laws that are properly classifiable as class legislation, of which animus is but one subset—raises a broader point. The benefits of calling something by its name extend beyond animus doctrine to encompass the variety of labels that become possible for different types of inequality that are appropriately subject to meaningful judicial scrutiny. I would suggest that those various labels and the differing judicial responses they may trigger can play a valuable role in constitutional adjudication.

As constitutional law teachers, we've all undoubtedly experienced our students' frustration with the tiers of scrutiny. As we all know, the three ostensible tiers[44] can be expanded into four, five, six, or even more tiers,[45] depending on the creativity of the instructor and the patience of the students. The futility of trying to cram a variety of styles of judicial review into these tiers is frustrating enough in itself. But what makes matters worse is the realization that those tiers—three, four, or however many you want to identify—obscure different *styles* and *concerns* that courts reveal in their opinions. In other words, a set of ascending tiers of scrutiny, differentiated only by the increasing severity of their scrutiny, fails to do justice to the kind of review that courts are actually doing when they conduct an equal protection review.[46] Review of a statute suspected to be grounded in animus can properly take one form, while a law challenged as pure rent-seeking can be subjected to a different type of review.[47]

Similarly, review of the most canonical types of discrimination—for example, discrimination based on race and

43. Calabresi & Leibowitz, *supra* note 40, at 1048.

44. *See, e.g.*, R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The Base Plus Six Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 225–26 (2002) (identifying the three traditional basic standards of review as minimum rationality review, intermediate review, and strict scrutiny).

45. *See id.* at 226 (proposing seven identifiable standards of review).

46. *Compare, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 (2017) (scrutinizing a sex classification by considering whether the challenged classification reflected gender stereotypes), *with* Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198, 2222 (2016) (scrutinizing a race classification by considering the degree of fit between the classification and the government's asserted interest in student body diversity).

47. *Cf.* WILLIAM D. ARAIZA, CONSTITUTIONAL LAW: CASES, APPROACHES, AND APPLICATIONS ch. 15 (2016) (presenting animus as a separate equal protection category).

sex—can also generate different styles,[48] as can, at least potentially, different types of race or sex discrimination—for example, a Jim Crow law versus an affirmative action university admissions policy.[49] Indeed, for those of us who believe that a Jim Crow law is fundamentally different from a university's good faith use of race in admissions, tiered scrutiny raises a barrier to a court's ability to see what is really going on in each of these laws. That's not to say that a tiered scrutiny approach condemns us to a strict anti-classification approach to equal protection. But the additional conceptual hurdle of explaining why *some* racial classifications are different from *other* racial classifications for purposes of tiered scrutiny review imposes another barrier to a court's frank engagement with the real import of the law it is forced to consider. As we think about this, it might be helpful to realize that the modern Justice who had the most nuanced views about affirmative action—Justice Stevens—was also the most outspoken critic of tiered scrutiny.[50]

Again, the applications are varied, but the underlying point is straightforward. Calling things *what they are* opens the door for recognizing things *as they are*. This increased candor in judicial review can only redound to the good. It can lead to judicial review that responds explicitly to the underlying concerns posed by a given law. It reduces the likelihood that judges will cite inapposite precedent simply because the precedential case applies the same level of scrutiny as the judge is doing in the case before her. (For example, consider a judge facing a question of legitimacy discrimination and applying the Court's analysis in *United States v. Virginia*,[51] just because, as a formal matter, they both involve intermediate scrutiny.) Or, perhaps more relevantly, consider a judge analyzing a case of sexual orientation discrimination by

48. *See, e.g.*, *Morales-Santana*, 137 S. Ct. at 1693; *Fisher*, 136 S. Ct. at 2222 (discussing how policies are reviewed based on the specific stereotypical discrimination).

49. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 242–45 (1995) (Stevens, J., with Ginsburg, J., dissenting) (arguing that giving the same review to a Jim Crow law and an affirmative action law would be akin to "disregard[ing] the difference between a 'No Trespassing' sign and a welcome mat").

50. *E.g.*, Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2340 (2006) (explaining Justice Stevens's views about tiered scrutiny and equal protection more generally).

51. 518 U.S. 515, 559 (1996) (Rehnquist, C.J., concurring) (explaining that sex classifications reviewed under intermediate scrutiny must be supported by "an exceedingly persuasive justification") (citations omitted).

relying on the type of scrutiny Justice Douglas applied in *Railway Express*.[52]

More generally, a recognition that different types of equality cases are in fact different for purposes of constitutional analysis mitigates what seems sometimes to be the relentless pressure to reduce equal protection cases to questions about fit. Fit—that is, the degree of fit that should be required in a given case—is still important. But, at the very least, concerns about fit need to be supplemented by both a recognition of the sort of case the court is dealing with and a recognition that different cases raise different types of equal protection risks, thus calling for different types of judicial investigation. As Justice O'Connor recognized in *Grutter v. Bollinger*,[53] context matters in constitutional adjudication. To the extent that context is submerged beneath an abstract tiered scrutiny formula requiring a challenged law to exhibit a certain degree of fit with a governmental interest of a particular level of importance, such a formula harms, rather than helps, the project of meaningful judicial review.

Let me now conclude with a few final thoughts about the concept of animus.

Nothing I've said today should be taken as a statement that calling animus what it is comes without risk or cost. Professor Smith is, I believe, right about the risks of name-calling.[54] An additional related risk is that, as Justice Cardozo long ago pointed out, a judicial principle demands the full application of its logic.[55] If judges and scholars manage to create an animus doctrine that is capable of judicial application, the result will be that that doctrine will beckon litigants and judges to use it. There's nothing wrong with that. But unless that doctrine has been carefully cabined, the general nature of the idea of animus threatens to make animus doctrine an all-purpose litigation tool to support any type of equality claim. We have already witnessed both a case in which snowboarders alleged that their exclusion from a ski area was based on animus against them[56] and a case in which Wal-Mart

52. Ry. Express Agency v. N.Y., 336 U.S. 106, 109 (1949) (applying very deferential scrutiny to a municipal traffic safety law).

53. 539 U.S. 306, 327 (2003).

54. Smith, *supra* note 14, at 678.

55. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS lecture II (1921).

56. Wasatch Equal. v. Alta Ski Lifts Co., 55 F. Supp. 3d 1351, 1356 (D. Utah 2014), *aff'd*, 820 F.3d 381 (10th Cir. 2016).

alleged that a city ordinance regulating large retail enterprises was based on animus against the retailer.[57] This is not to suggest that these cases are necessarily frivolous; indeed, the court in the Wal-Mart case held that the claim was not.[58] But it is to suggest that animus should likely not be the proper doctrinal home for such claims—at least not if we want animus doctrine to become something other than the usual last resort of constitutional arguments.[59]

Paradoxically, this widespread employment of animus doctrine would constitute a problem. Victoria Nourse and Sarah Maguire have argued that in the early twentieth-century the standard police power approach to Fourteenth Amendment argumentation, in which courts sought to determine whether the legislature had acted reasonably in pursuit of a legitimate police power goal, gradually morphed into a reasonableness standard that eventually became the rational basis standard we know today.[60] This sort of doctrinal slippage is not unusual. Indeed, in Administrative Law, another class I teach, an analogous evolution occurred with the concept of so-called *hard look* review. It evolved from an approach that asked if *the agency* had taken a hard look at the particular regulatory issue, to one judges understood as requiring courts *themselves* take a hard look at that issue.[61] If animus claims begin to become a standard part of any equal protection plaintiff's lawsuit, then query whether the same sort of slippage Nourse and Maguire chart[62] would lead to such claims being rejected and ultimately becoming disfavored, even when they should prevail. This would be unfortunate.

But if we are willing to adopt a variety of approaches to equal protection review, then it seems to me we can avoid the problem of

57. Wal-Mart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 1023, 1026 (E.D. Cal. 2007).

58. *Id.* at 1039.

59. *See* Buck v. Bell, 274 U.S. 200, 208 (1927) (describing arguments about unequal application of a legislative policy as "the usual last resort of constitutional arguments"). *But see* Stephen A. Siegel, *Justice Holmes,* Buck v. Bell*, and the History of Equal Protection*, 90 MINN. L. REV. 106, 108–09 (2005) (taking issue with Justice Holmes' dismissive characterization of equal protection arguments during the *Lochner* era).

60. *See* V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 982 (2009) ("As . . . [equality claims in the early twentieth century] became increasingly repetitive and easily resolved by the police power, they began to sound almost modern—equating equality to classification simpliciter. Repeatedly, courts invoked the state's 'large discretion to classify.'") (citations omitted).

61. CHARLES H. KOCH, JR. ET. AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 634 (7th ed. 2015) (explaining this slippage).

62. Nourse & Maguire, *supra* note 60, at 982.

animus becoming an all-purpose argument—and thus a frequent loser—a fate that would hasten its fall into obscurity. Thus, creating an animus doctrine that is both *fit for* and *limited to* its appropriate tasks will help ensure the doctrine's vitality. It will accomplish that goal *exactly because* that doctrine will be limited enough to apply only when, in fact, it *should* apply. As a limited part of a constellation of equal protection doctrines, animus can thus play its beneficial roles: first, accounting for a set of cases which can justifiably be described as cases about the phenomenon that animus names; and second, connecting modern equal protection doctrine to its nineteenth-century antecedents. Especially today, when equal protection law appears largely unmoored from either any overall doctrinal theory or those historical antecedents, if animus doctrine could play these roles it would constitute a significant advance for how we think about the Fourteenth Amendment in the twenty-first century.

Thank you.