WHY BOTHER (WITH ANIMUS)?

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Thank you, Bonnie. It's a real honor to be here today. I would like to thank the Law Review, Professor Paul Horwitz, and all the students, faculty, and staff at UA who helped put on this wonderful and important event.

This event is important because the topic is important. If animus is worth studying, then it is absolutely worth the effort to consider when the animus tainting a given decision can be said to have been cleansed from it.

My talk this afternoon engages the assumption encoded in that prior sentence. This talk is entitled "Why Bother (With Animus)?" I absolutely do not intend for that title to be snarky or cynical.

Instead, I want to discuss a serious question: Why should we even bother with animus doctrine? Animus doctrine raises all kinds of difficult questions—including the question this symposium addresses.[1] Given those difficulties, is it worth even trying to construct a coherent theory of animus? As the title of this talk asks, is it worth the bother?

A preliminary answer to that question emerges from the current status of animus doctrine. With Justice Kennedy's 2018 retirement, it was easy to imagine that the doctrine, which had become associated with him through his gay rights and religious freedom opinions,[2] would wither.[3] In one of those cases, *United States v. Windsor*,[4] his opinion spoke only for a bare majority of the Court, comprised of him and the four liberals who likely would have preferred a more broadly written opinion. In other cases, most notably *Romer v. Evans*,[5] his

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1. In addition to the contributions of the participants to this symposium, other scholars have also begun to consider the bad-intent-cleansing question more generally. *See* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1195 (2022) ("Commentators, too, have noted the potential thorny issues [of cleansing bad intent from a previously enacted law], but almost invariably in passing."); Rebecca Aviel, *Second-Bite Lawmaking*, 100 N.C. L. REV. 947, 947 (2022) (stating that her article "is the first" to "understand second-bite lawmaking as a pervasive and trans-substantive phenomenon").

2. *See* United States v. Windsor, 570 U.S. 744 (2013) (striking down Section 3 of the Defense of Marriage Act based on an animus theory); Romer v. Evans, 517 U.S. 620 (1996) (same result for Amendment 2 to the Colorado Constitution); Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (striking down a decision of a state civil rights commission because of a commissioner's "hostility to a religion or religious viewpoint"); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (same result for a city ordinance restricting ritual animal slaughter).

3. *See, e.g.*, Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal Protection Quiver*, 69 SYRACUSE L. REV. 69, 70–72 (2019) (suggesting that the Supreme Court's tendency to use the animus concept in gay rights cases is less secure after Justice Kennedy's retirement).

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

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

opinion was deeply undertheorized, thus raising questions about its ultimate meaning and lasting significance.[6] To his right, the conservatives in those cases often scorned the animus idea.[7] Only Justice Kennedy seemed to be truly enthusiastic about it. And by 2018, he was gone.

Nevertheless, in 2020, in *Department of Homeland Security v. Regents of the University of California*,[8] the case involving the Trump Administration's rescission of the DACA program, the Court appeared to resurrect animus doctrine. This was a striking result. By the time Chief Justice Roberts's opinion reached the plaintiffs' animus argument, the Court had already rejected the DACA rescission on an administrative law ground.[9] Given that the Court decided *Regents* in the summer of 2020, in the middle of a presidential campaign where the incumbent President stood a real chance of losing,[10] there was a similarly real chance that the administrative law resolution of the case would have ended the rescission effort.[11]

For these reasons, it was remarkable—literally, worthy of remark—that the Court nevertheless reached out to address the animus argument. Equally remarkable was the fact that in doing so, the Court sketched out a structure for equal-protection animus that explicitly relied on the 1977 *Arlington Heights* case[12] that provided a set of factors for uncovering not animus per se, but discriminatory intent more generally.[13] I've argued for some years now that the *Arlington Heights* factors, properly understood, provide the appropriate template for deciding animus claims.[14] I am pleased that the Court has finally explicitly seen the light, even if hints of that wisdom could have been found in cases going back half a century.[15] Indeed, in an article I'm publishing as part of this symposium, I argue that those same factors can be useful guideposts for

6. *See, e.g.*, Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 204 (stating that *Romer*, along with earlier animus opinions, are undertheorized).

7. *See generally, e.g.*, *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

8. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

9. *See id.* at 1907–15 (analyzing and rejecting the Government's decision on an administrative law ground); *id.* at 1915–16 (proceeding, after deciding the case on the administrative law ground, to consider the plaintiff's equal-protection animus claim).

10. *See id.* at 1891 (noting the date of the decision).

11. *See* William D. Araiza, Regents*: Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983, 1002 n.99 (2021) (explaining this likelihood).

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

13. *See Regents*, 140 S. Ct. at 1915.

14. *See* WILLIAM D. ARAIZA, ANIMUS: A BRIEF INTRODUCTION TO BIAS IN THE LAW 89–133 (2017) (laying out in more specificity the analogy between the *Arlington Heights* discriminatory intent factors and framework and unconstitutional animus).

15. *See id.* at 29–75 (explaining how the animus cases from *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), to *United States v. Windsor*, 575 U.S. 744 (2013), laid out the building blocks for a proper understanding of animus).

addressing the difficult question of when pre-existing animus has been cleansed.[16]

Thus, animus doctrine remains a viable doctrinal path for judges and litigants. For that reason, though, it bears taking a step back and considering whether animus *should* remain a viable doctrinal path and, if so, why.

Animus is, of course, a doctrine of bad government intent. Moreover, when *Regents* embraced *Arlington Heights*-style analysis, the Court made a nearly explicit connection between animus doctrine and the more general discriminatory intent requirement.[17] Given that connection, defending the animus idea means defending, at least in some ways and in some cases, the intent idea.

That task is a challenge. It is true that prominent scholars embraced some version of the intent idea in the years before and immediately after the Court's official adoption of that requirement in *Washington v. Davis*.[18] Still, since *Davis*, scholars have critiqued both the Court's version of the intent requirement and the requirement more generally.[19] The arguments range from claims that the intent requirement elevates the perpetrator's over the victim's perspective,[20] that it fundamentally misunderstands the motivations for human actions,[21] and that it has created an environment in which the Fourteenth Amendment's antisubordination goals are systematically frustrated.[22]

The resulting sting—and the irony—is only magnified when one realizes that scholars making the final argument noted above often observe that racial justice measures, such as explicitly race-conscious affirmative action plans, automatically trigger skeptical judicial scrutiny while, by contrast, second- and third-generation discrimination hides behind a veil of ostensible facial neutrality, thus requiring plaintiffs to satisfy the intent requirement.[23] Scholars critical of the intent requirement have further argued that even if *Davis* and

16. *See* William D. Araiza, *Cleansing Animus: The Path Through* Arlington Heights, 74 ALA. L. REV. 541 (2023).

17. *See* Araiza, *supra* note 11, at 997–98 (explaining that connection).

18. Washington v. Davis, 426 U.S. 229, 239–41 (1976); *see, e.g.*, Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95. Indeed, Justice Powell's majority opinion in *Arlington Heights* relied heavily on Professor Brest's article when constructing its discriminatory intent framework. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.12, 268 n.18 (1977) (citing Brest, *supra*, 116–18); *see also* Gary J. Simson, *Racially Neutral in Form, Racially Discriminatory in Fact: The Implications for Voting Rights of Giving Disproportionate Racial Impact the Constitutional Importance It Deserves*, 71 MERCER L. REV. 811, 837 (2020) (characterizing Professor Brest's article as "the article that the Court cited, and relied upon heavily, in fashioning its *Davis-Arlington Heights* approach").

19. Among the voluminous critical literature, see, e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

20. *See, e.g.*, Freeman, *supra* note 19, at 1052–57.

21. *See, e.g.*, Lawrence, *supra* note 19, at 336–44.

22. *See, e.g.*, Siegel, *supra* note 19, at 1135–46.

23. *See, e.g.*, Siegel, *supra* note 19, at 1141–42.

Arlington Heights themselves acknowledged the circumstantial and contextual nature of discriminatory intent,[24] subsequent decisions have squeezed the life out of that nuance and converted the standard into a nearly impossible demand for bad subjective intent.[25]

To be sure, the debate over the intent requirement does not directly apply to the debate over the merits of the animus idea as a tool for constitutional analysis. Nearly by definition, animus claims are not characterized by a facially neutral law that requires a formal intent finding as a gateway to heightened judicial scrutiny.[26] Instead, animus claims normally reflect explicit discrimination on a particular ground that is alleged to reflect animus—that is, bad ultimate intent, as opposed to the intermediate, *Davis* style of intent[27] that simply triggers heightened scrutiny. Thus, because animus focuses on ultimate, not intermediate, intent, animus claims do not formally require, for example, choosing between an approach that focuses on disparate impact and one that focuses on intermediate intent.

Nevertheless, it is easy to imagine critics of the more general intent requirement launching analogous critiques of animus doctrine. Animus doctrine, by focusing on situations where government has allegedly acted with bad intent, might be seen as limiting the effective domain of equal protection law to situations where that intent can be shown and thus further centering intent in equal protection doctrine. As such, it can be criticized as deflecting attention away from the systemic or implicit bias scholars have identified as one of the most pressing modern problems of invidious discrimination.[28]

Other critics argue that segregating the animus cases into their own category robs them of their generative potential.[29] On this theory, characterizing a case such as *Cleburne*[30] as an animus case removes it from an evolving canon of rational basis review in which at least some rational basis cases trigger meaningful judicial scrutiny. As such, that rational basis canon never grows because it is never populated by cases like *Cleburne*, exactly because such cases are shunted off into their own doctrinal category. Of course, an "animus canon"

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24. *See, e.g.*, Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1808–09 (2012) (describing *Arlington Heights* as having "further formalized the contextual approach" to discriminatory intent expressed the year before in *Davis*).

25. *See, e.g.*, *id.* at 1825–47.

26. Despite this difference, there remains a close connection between the deeper structures of animus doctrine and the *Arlington Heights* discriminatory intent structure. *See supra* text accompanying notes 12–14 (explaining this connection).

27. Washington v. Davis, 426 U.S. 229, 240 (1976) (requiring plaintiffs to demonstrate discriminatory intent to trigger the applicable level of scrutiny for the type of discrimination alleged).

28. *See* Siegel, *supra* note 19, at 1113; Lawrence, *supra* note 19, at 322–23; Freeman, *supra* note 19, at 1050–52.

29. *See, e.g.*, Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 216–17 (2019). *But see* William D. Araiza, *Response: Animus, Its Critics, and Its Potential*, 48 STETSON L. REV. 275, 284–91 (2019) (explaining and responding to Professor Eyer's critique).

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

may develop.[31] But again, if those cases rest on idiosyncratically invidious government intent, then that potential canon likely becomes less useful for equality litigators seeking more powerful tools.

Other critics from other perspectives also critique the animus idea. One obvious problem with animus doctrine is the difficulty of identifying animus. This critique, related to more general criticisms of intent theories, insists that governmental intent, as a phenomenon, is simply unknowable. The problem becomes even more acute in animus doctrine because the type of intent at issue in animus cases necessarily has a subjective tinge to it.[32]

To be sure, I have argued that animus can be understood objectively.[33] Based on *Regents*, the Court seems to agree. But still, 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.[34] And again, those critics can reasonably suggest that such subjective intent is not knowable.[35] That's especially the case when the government actor is a multi-member body like a city council or a state legislature. Judge Frank Easterbrook once wrote that "the concept of 'an' intent . . . for an institution [is] hilarious."[36] I don't think it's as funny as all that. But the argument against imputing a unitary intent to a multi-member body is well-known.[37] And to repeat, that argument may be particularly strong as it relates to animus, given its seeming grounding in notions of subjective intent.

That tinge of subjectivity raises yet another objection to the animus concept. Professor Steven Smith has criticized the animus cases as constituting what he calls "[t]he [j]urisprudence of [d]enigration."[38] What Professor Smith means, I think, is that judicial conclusions that a government entity acted with animus amount to conclusions that the entity acted in a mean-spirited way—essentially, that it acted out of spite. He argues in turn that such conclusions contribute to a public discourse in which opposing sides lob accusations of bad faith and subjective dislike across a legal, political, and rhetorical no-man's-land.[39]

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31. S*ee* Carpenter, *supra* note 6, at 183 (referring to a "quadrilogy" of Supreme Court animus cases).

32. *See* William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 174–75 (2019) (acknowledging this argument); *id.* at 174 n.125 (citing scholars making this argument).

33. *See* William D. Araiza, *Objectively Correct*, 71 FLA. L. REV. F. 68, 72–75 (2020). *But see* Steven D. Smith, *Objective Animus?*, 71 FLA. L. REV. F. 51, 53–55 (2020) (questioning that possibility). The first cited article in this footnote responds to Professor Smith's critique.

34. *See* Eyer, *supra* note 29, at 229 n.75; Araiza, *supra* note 29, at 288.

35. *See* Eyer, *supra* note 29, at 229 n.76; Araiza, *supra* note 29, at 288.

36. Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284, 284 (1992).

37. *See, e.g.*, Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2155–57 (2019) (canvassing scholarly opinion on both sides of this question).

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

39. *See* Araiza, *supra* note 32, at 171–74, 189–92 (describing and responding to Professor Smith's critique).

According to Professor Smith, that denigration discourse generates results that are depressingly predictable: a collapse of dialogue and the failure of any attempt to find common ground or compromise based in a recognition of the other side's underlying good faith. In other words, a jurisprudence of name-calling or denigration, as he calls it, that hardens rather than heals the opposing sides in culture-war debates.[40] Other scholars have made analogous points.[41]

These are serious critiques. They call for a serious response. In particular, they require justifications for a doctrine that is solidly and explicitly grounded in bad intent. I believe that several such justifications exist.

First, animus doctrine responds to the imperative to call things what they are.[42] Another way to express this idea is to say that animus doctrine, by bypassing the traditional fit analysis that characterizes the standard tiered scrutiny approach to equal protection, homes in on ultimate constitutional meaning.[43]

Let me explain what I mean. As I've observed before,[44] as constitutional law teachers, we've all undoubtedly experienced our students' frustration with the tiers of scrutiny. As we all know, the three formal tiers can be expanded into four, five, or even six tiers, depending on the professor's willingness to test her students' patience.[45] But a bigger problem than the elasticity of the tiered scrutiny structure is its obfuscation of the phenomena actually driving the Court in many cases that this structure ostensibly governs.[46] In other words, a set of ascending tiers of scrutiny, differentiated only by the increasing severity of their ends–means review, obscures the kind of review that courts should do—and actually do—when deciding equal protection cases.

There's great variety in the harms caused by different types of discrimination, just as there's great variety in the justifications that might warrant such harms. Ends–means review simply does not capture that richness.[47] Indeed, it's not a coincidence that the Justice who held the most

40. *See generally* Smith, *supra* note 38, at 677, 698–701.

41. *See, e.g.*, Brief of Amici Curae Steven G. Calabresi et al. in Support of Certiorari and Opposing a Ruling Based on Voters' Motivations at 9–16, Herbert v. Kitchen, 574 U.S. 874 (2014) (No. 14-124).

42. *Cf.* William D. Araiza, *Call It by Its Name*, 48 STETSON L. REV. 181, 181 (2019) (urging courts in a keynote speech not to shrink from using the term "animus" when it accurately fits the situation).

43. *See* Araiza, *supra* note 29, at 290.

44. *See* Araiza, *supra* note 42, at 189.

45. *See, e.g.*, Maxwell Stearns, Obergefell*,* Fisher*, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1046 (2017) (noting the de facto expansion of the ostensible three-tiered scrutiny structure into additional tiers); James E. Fleming, *"There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2304–11 (2006) (suggesting that there might be up to six tiers of equal protection scrutiny).

46. *Compare, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689–93 (2017) (applying intermediate scrutiny in a case of sex discrimination by relying heavily on conclusions about the stereotypical assumptions behind the challenged law), *with* Clark v. Jeter, 486 U.S. 456, 461–64 (1988) (applying the same ostensible level of scrutiny as in *Morales-Santana* in a case of legitimacy discrimination but doing so via application of conventional ends–means scrutiny).

47. *See* Fleming, *supra* note 45, at 2301–04.

nuanced views about the harms and benefits of affirmative action, Justice Stevens, was also the loudest critic of the tiered scrutiny structure.[48] In other words, his recognition of the variety of harms and justifications that flow from racial classifications required a jurisprudence that does more than plug in a tier of scrutiny.[49]

Other Justices have signaled their agreement with Justice Stevens's view. Indeed, in the same opinion that actually established a particular tier—*Craig v. Boren*, which established intermediate scrutiny for sex classifications—Justice Brennan wrote that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."[50] Concededly, examining statistical correlations is not the only way to do tiered scrutiny. But performing "fit" analysis *is* a common way and has a clear connection with the statistical analysis Justice Brennan criticized in *Craig*.[51] It is telling that Justice Brennan intuited that such analysis is inconsistent with equal protection's deepest commitments.

These examples stand for a straightforward proposition. As I have argued before, "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."[52]

The connection between this claim and my defense of animus doctrine should be clear. Professor Smith notwithstanding,[53] calling animus what it is—fundamentally bad intent—captures the reality of those situations. It captures the sheer dislike suggested by the admittedly sparse legislative history in *U.S. Department of Agriculture v. Moreno*.[54] It also captures the fear and dread felt by some residents of Cleburne, Texas when they heard that a group home for intellectually disabled persons was planned for their neighborhood.[55] And it captures the starkly homophobic attitudes that marked at least some of the

48. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 452 (1985) (Stevens, J., concurring) ("I am inclined to believe that what has become known as the tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." (alteration in original) (quoting Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring))).

49. *See, e.g.*, Andrew M. Siegel, *Equal Protection Unmodified: Justice Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2350, 2358–59 (2006); William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules*, 44 LOY. L.A. L. REV. 889, 916–25 (2011).

50. Craig v. Boren, 429 U.S. 190, 204 (1976).

51. *See, e.g.*, Angelo N. Ancheta, *Science and Constitutional Fact Finding in Equal Protection Analysis*, 60 OHIO ST. L.J. 1115, 1133 (2008) (discussing the Supreme Court's use of statistical analysis in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

52. Araiza, *supra* note 42, at 190.

53. *See* Smith, *supra* note 38 (critiquing animus doctrine as a "jurisprudence of denigration").

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

55. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985).

campaign material urging enactment of Amendment 2, the law struck down in *Romer v. Evans*.[56]

A focus on what is *really* going on in a given case may generate surprising results. For example, it might suggest the appropriateness of an approach to equal protection that focuses on the subordinating impact of a given law.[57] A focus on antisubordination is, in many ways, the polar opposite of the classification focus that dominates today's equal protection law.[58] For those who feel like that current focus simply misses the point about modern equality, calling things what they are has much to commend it. For example, if the problem with racial discrimination is that it stigmatizes or subordinates, then saying that out loud may naturally arise from a commitment to calling things what they are. Indeed, it's what Justice Brennan did in *Regents of the University of California v. Bakke* when, justifying his vote to uphold UC Davis's affirmative action program, he argued that the university did not stigmatize Allen Bakke when it prohibited him from competing for any of the sixteen seats set aside for racial minorities in its medical school's entering class.[59] Similarly frank is the Court's conclusion in *Romer* that in Amendment 2, Colorado sought to make the class of LGB persons "a stranger to its laws."[60]

Of course, this does not mean that an antisubordination or disparate impact approach—or, for that matter, an approach grounded in animus—is therefore necessarily always the right approach to equal protection. Calling things what they are requires that we recognize when a given approach does *not* reflect the actual problem a given case poses. Writing nearly fifty years ago, in the immediate aftermath of *Davis* and *Arlington Heights*, Kenneth Karst observed that the outcome of the intent/impact debate should turn on the realities of the type of discrimination at issue.[61] He wrote the following:

> If we were talking about some new form of discrimination—say, discrimination against persons with red hair, or discrimination against whites—then the "purpose" doctrine would make eminent sense . . . . But in America today, where the problem of racism is the problem of eliminating a

56. *See* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 101 (2004) (citing materials that urged enactment of the constitutional amendment struck down in *Romer* that claimed that gay men ate blood and feces).

57. *See generally, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (arguing that antisubordination should be understood as the Equal Protection Clause's motivating principle).

58. *See, e.g.*, Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 692–93 (briefly explaining the distinction between these two approaches).

59. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 373–75 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

60. Romer v. Evans, 517 U.S. 620, 635 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.").

61. Kenneth L. Karst, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 51 (1977).

> long-established stigma of inferiority . . . it is as plain as a cattle prod that we are talking about something quite different.[62]

In the first type of case Professor Karst is talking about—cases involving new types of discrimination, perhaps against new or emerging identity groups[63]—it may be quite appropriate to think about whether the government intended to harm the burdened group in question. In such cases, the use of intent more generally, and animus in particular, may be useful—again, not as an all-purpose tool for any equal protection case. But as a tool that, when confined to its proper domain, can play an important and useful role—the role of explicitly naming the real problem with a particular government action when the animus label in fact well describes that problem.[64]

There's a second reason animus may be worth bothering with. I'd like to make, yet again,[65] a brief pitch for considering animus doctrine as a modern incarnation of a much older constitutional tradition: namely, the tradition disfavoring so-called class legislation. This idea, largely unknown today, constituted one of the fundamental organizing principles of American constitutionalism through much of the nineteenth century and into the twentieth.[66]

The class legislation idea rested on the larger idea that constitutional limitations on government action should not be understood as focusing on whether government action encounters some freestanding right—for example, the right to free speech.[67] Instead, it focused on the appropriate scope of government power.[68] Perhaps to oversimplify, if the action in question exceeded the government's legitimate authority to act—its so-called police power—then a court would hold that the government had encroached on the residual liberty that remained when that legitimate government power ran out.[69] In turn, a government action that exceeded its legitimate police power likely meant that the law was intended to promote a private or class interest.[70] Hence, such a law would be condemned as class legislation.

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62. *Id.*

63. *Cf.* William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451 (2010) (discussing this issue in the context of Congress's power to enforce the Equal Protection Clause).

64. *See generally* Araiza, *supra* note 42 at 185.

65. *See* Araiza, *supra* note 32, at 199–210; Araiza, *supra* note 29, at 287; Araiza, *supra* note 42, at 189; Araiza, *supra* note 14, at 176–78 (all making similar arguments).

66. *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993).

67. *See, e.g.*, Victoria F. Nourse, *A Tale of Two* Lochner*s: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 761–62 (2009).

68. *See id.*

69. *See id* ("The professional lawyer of the [late nineteenth century] believed that almost everything in constitutional law depended upon power—the 'police power,' that is.").

70. *Cf. id.* at 762 n.56.

Let's map this idea onto animus. Animus cases ask a very simple but fraught question: is there any legitimate reason for government to have imposed the burden it imposed? Recall the canonical statement from *U.S. Department of Agriculture v. Moreno*: "[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[71] Such a desire seems almost the prototypical example of a goal government has no business pursuing: the purely private interest of a group—even a majority—that simply desires to render another group unequal.[72]

So understood, the animus idea hearkens back to the class legislation concept. Indeed, I think it's fair to describe animus doctrine as one of the modern descendants of the class legislation idea. It may not be the only descendant: economic rent-seeking legislation might also count as a descendant of class legislation.[73] But animus-based laws constitute part of that (disreputable) family.

To be sure, the class legislation idea died out once courts realized in the 1930s that they simply lacked the capacity to distinguish a legitimate public interest from a desire simply to favor a particular private interest.[74] In its place, the Court eventually substituted the *Carolene Products* insight that government can do whatever it wishes as long as the burdened group has fair access to the political process that makes those decisions.[75] As we all know, that insight ultimately led to the tiered scrutiny/suspect class structure that I've spent a part of this speech critiquing. And, indeed, perhaps coincidentally or perhaps not, when the Court effectively abandoned the search for new suspect classes in *Cleburne*, it resurrected the animus idea from *Moreno*, decided a dozen years earlier.[76]

If my critique of tiered scrutiny persuades you, even in part, then animus doctrine can play a role in at least supplementing that structure. In doing so, it might help reconnect equal protection doctrine to its roots—not its roots in the

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

72. *Cf.* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 228–29 (2011) ("Rational-basis scrutiny, as traditionally understood, flows from a presupposition of American constitutionalism so basic and pervasive that it is easy to overlook: in its dealings with persons, the American government is under a constitutional obligation to act rationally. Rationality in turn requires both that public actions make sense and that they make good sense, that they have some legitimate purpose." (emphasis omitted)); *see also* Romer v. Evans, 517 U.S. 620, 635 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.").

73. *See, e.g.*, Jeffrey Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 HARV. J.L. & PUB. POL'Y 181, 191 (1977) (noting this similarity).

74. *See, e.g.*, Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RSCH. Q. 623, 624–25 (1994).

75. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

76. *Compare* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–47 (1985) (rejecting heightened scrutiny for the intellectually disabled), *with id.* at 447–50 (finding the discrimination against the intellectually disabled in that particular case to rest on animus), *and id.* at 450 (finding that discrimination to rest on "irrational prejudice" against that group).

specific original meaning of the Fourteenth Amendment but, instead, its deeper roots in the constitutional soil in which that Amendment was conceived, drafted, enacted, and ratified.[77]

I'd like to conclude by returning to my first point about how animus doctrine enjoys the advantage of being frank. As I said in another keynote speech, animus doctrine calls it by its name.[78] Of course, the "it" is the discriminatory phenomenon we are talking about. In my view, a real benefit of animus doctrine is its frank description of the phenomenon it names. Not a government action that merely lacks a rational basis. Not even a discriminatory government action that fails ends–means scrutiny performed at a higher level of stringency. Instead, the term "animus" names a phenomenon in which government has acted for the simple purpose of making the burdened group unequal. Consider how Justice Kennedy ended his opinion in *Romer*: "We must conclude that Amendment 2 classifies homosexuals *not to further a proper legislative end but to make them unequal to everyone else*. This Colorado cannot do."[79] This conclusion communicates far more than a statement that Amendment 2 failed the rational basis test.

Some listeners may consider this frankness point a trivial one. I think that's deeply unfortunate. Perhaps such a view traces to the proliferation of tests and standards emanating from the Court over the last generation.[80] One might call this process "doctrinalizing" constitutional law—that is, converting foundational insights about the Constitution into mechanically applicable decision rules. There may be good reasons for such doctrinalization—after all, the Supreme Court can't review every lower court decision, even every lower court decision interpreting the Constitution. Thus, three-part tests, scrutiny levels, and other constitutional heuristics have their place in guiding lower courts.[81]

Nevertheless, that approach to deciding constitutional cases ignores constitutional law's expressive power. Justice Jackson recognized that element and the concomitant virtue of frankness—most notably in his masterful

77. *See, e.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 7 (2011) ("Under [a] Jacksonian reading of the Fourteenth Amendment, the Black Codes [enacted by southern states immediately after the Civil War] would fall because they were examples of the slave power trying to perpetuate itself by giving its supporters monopoly power over the lives of the freed African-Americans. If there was one thing all Jacksonians hated, it was government-conferred monopolies or special privileges or class legislation.").

78. *See* Araiza, *supra* note 42.

79. Romer v. Evans, 517 U.S. 620, 635 (1996) (emphasis added).

80. *See, e.g.*, Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

81. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1094–95 (1987) (arguing that the Court's limited docket resources "contribute to a manner of [judicial] speaking that emphasizes the enunciation of doctrine over the resolution of disputes . . . . hoping to put that part of the law's house in order").

opinion in *West Virginia Board of Education v. Barnette*.[82] Justice Jackson's opinion in *Barnette* was frank in many ways. It explicitly noted the tendency of local officials to oppress local minorities.[83] It recognized the challenge of transplanting what he called "the majestic generalities" of the Fourteenth Amendment from what he explicitly identified as the *laissez-faire* soil of the eighteenth and nineteenth centuries to the heavily regulated New Deal economy and society of 1943.[84] Perhaps most notably for current purposes, his opinion also explicitly connected the education board's attempt to compel ideological conformity to totalitarian attempts of both the past and also Jackson's contemporary world of 1943, when he explicitly referred to "the fast failing efforts of our present totalitarian enemies"[85]—efforts he helped hold to legal account three years later at Nuremberg.[86]

In other words, Justice Jackson called things what they were. So too, today, in a world that every day looks more and more like 1943, we should call things what they are, at least when we can. In particular, we should call by their name attempts to oppress groups simply because a majority disfavors them. When we must, we perhaps have to cloak such conclusions in the clinical language of ends–means scrutiny. But when we can, we should speak such conclusions out loud.

And we should do this today, more than ever. In our world of war, xenophobia, and deep cultural conflict, the imperative of calling things what they are is greater than ever. Three years ago, in another keynote speech I gave at another conference on animus, I observed that "racism, xenophobia, and other hatreds," when combined with "the risk of a backlash" that follows "every advance in tolerance," "behooves those in power to call [that phenomenon] what it is."[87] Developments since then have only increased the urgency of my call.

Animus is by no means the proper label for everything the Equal Protection Clause condemns. It should not become what Justice Holmes, referring to equal protection more generally, called "the usual last resort of constitutional arguments."[88] But when it fits, we should use it.

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82. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Nevertheless, *Barnette* was not the only occasion in which Justice Jackson expressed concern for ensuring that the legal doctrine employed by the Court to decide a case matched the facts presented to it. *See, e.g.*, Edwards v. California, 314 U.S. 160, 182 (1941) (Jackson, J., concurring) (agreeing that a state's ban on assisting the migration of indigent persons into that state violated the dormant Commerce Clause but nevertheless expressing concern that the Court's use of the Commerce Clause to decide the case "is likely to result eventually either in distorting the commercial law or in denaturing human rights").

83. *Barnette*, 319 U.S. at 637–38.

84. *See id.* at 639–40.

85. *Id.* at 641.

86. *See generally* John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH. U. GLOB. STUD. L. REV. 511 (2007).

87. *See* Araiza, *supra* note 42, at 186, 187.

88. Buck v. Bell, 274 U.S. 200, 208 (1927).

For these reasons, even though questions like today's—when animus can be said to have been cleansed—may be difficult, they are worth the effort. And yes, worth the bother.

Thank you.