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# Call It By Its Name

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## SYMPOSIUM INTRODUCTION

Louis J. Virelli III\*

In an increasingly polarized society, claims of animus—singling out an individual or group based on bias, disfavor, or disapproval—are becoming more frequent and intense. When these claims are directed at government actors, they implicate serious questions of constitutional law. This is reflected in two recent high-profile decisions by the United States Supreme Court. In *Trump v. Hawaii*,<sup>1</sup> the Court addressed claims of animus by the executive branch against Muslim immigrants. In *Masterpiece Cakeshop*,<sup>2</sup> the Court evaluated whether a state civil rights commission acted out of animus when it ordered a defendant to comply with state anti-discrimination laws in contravention of his religious beliefs.

Despite the increasing prominence of animus claims, courts have been slow to develop a coherent animus doctrine. In his important and timely recent book, *Animus: A Short Introduction to Bias in the Law*,<sup>3</sup> Professor Bill Araiza tackles this difficult problem by offering a novel and nuanced approach to incorporating animus into equal protection law. This symposium brings together preeminent scholars in the field to offer much-deserved attention to Professor Araiza's work. The following pages describe and develop those ideas, providing valuable insight and food for thought regarding the role of animus in constitutional law.

Quite fittingly, the first piece is from Professor Araiza himself. In *Call It By Its Name*,<sup>4</sup> Professor Araiza outlines the themes of his book and makes a compelling case for the usefulness and viability of animus doctrine. He begins by emphasizing the value of animus as an accurate descriptor of legislative motivations in certain cases. By identifying animus as its own category of discriminatory

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1. 138 S. Ct. 2392 (2018).

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

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

4. William D. Araiza, *Call It By Its Name*, 48 STETSON L. REV. 181 (2018).

treatment, we are able to properly situate it in the larger landscape of equal protection law, and to adopt standards of review for animus cases that better reflect animus's uniquely corrosive effect on our constitutional democracy. This is especially important, Professor Araiza argues, due to the "reality of our current politics [ ] that racism, xenophobia, and bias of all types ha[ve] acquired a new respectability."<sup>5</sup> To the extent government action is motivated by a desire to push back against successful social movements, Professor Araiza reminds us that, "[in] a world where backlash is written into law, law must answer it by identifying the phenomenon for what it is . . . animus."<sup>6</sup>

In addition to the benefits of identifying animus cases as such, Professor Araiza points out that animus doctrine has a historical pedigree. He ties modern animus jurisprudence—reflected primarily in four Supreme Court cases<sup>7</sup>—to nineteenth century disputes over class legislation. Although he admits they are not perfect analogues, Professor Araiza finds common ground in the criticisms of both categories of government action—the desire to “promote a private-regarding interest,” rather than “the public good.”<sup>8</sup> This connection, he argues, offers another example of how and why we should treat animus cases as a subset of equal protection law. By recognizing different forms of inequality for what they are—including animus—Professor Araiza suggests that we can tailor judicial review to better recognize “that different sorts of cases raise different type[s] of equal protection risks, and thus call for different types of judicial investigation.”<sup>9</sup> This willingness to accept various approaches to equal protection review answers critiques that animus doctrine could become an “all-purpose argument,” and instead frees animus to play its

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5. *Id.* at 186.

6. *Id.* at 187–88.

7. *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). This list of course omits the two recent cases mentioned above—*Trump v. Hawaii* and *Masterpiece Cakeshop*—both of which are recent examples of cases in which the Court referred to animus in its analysis. *Masterpiece Cakeshop* is not an equal protection case, so it is somewhat anomalous to the current discussion. *Trump v. Hawaii* is too recent to be part of the historical canon of animus cases, and implicates executive power over immigration, which makes its credentials as an animus case *per se* less clear.

8. Araiza, *supra* note 4, at 188.

9. *Id.* at 191.

“beneficial roles” in pursuing perhaps our most important constitutional principles of justice and equality.<sup>10</sup>

Professor Katie Eyer’s response to Professor Araiza targets the potential negative consequences of encouraging courts to expand their use of animus under the Equal Protection Clause.<sup>11</sup> Professor Eyer first argues that, as a descriptive matter, equal protection victories for modern social movements have been based on claims of irrational government action (specifically, government failure of rational basis review) rather than animus. Although she admits rational basis review has been messy and incremental in its successes for non-suspect classes, she argues that the animus cases have been “only a bit player” in those successes, and thus cannot be relied on to provide better protection than rational basis review.<sup>12</sup>

Professor Eyer goes on to identify two other potential problems with using animus as a vehicle for seeking more expansive constitutional protections. First, she argues that current animus scholarship suggests that animus is a necessary component of a successful equal protection claim. Elevating animus, which Professor Eyer describes as “a serious charge indeed,” to the “central factor that allows meaningful scrutiny outside the heightened tiers” of equal protection analysis creates problems of meaning and proof that could transform animus from what its proponents see as a galvanizing and clarifying force to a “gate that will largely remain closed” for plaintiffs.<sup>13</sup> This is evidenced, she argues, in the Court’s restrictive use of animus in *Trump v. Hawaii*,<sup>14</sup> and will only be compounded in the lower courts (which decide the vast majority of equal protection cases involving non-suspect classes), as those courts are even less likely than the Supreme Court to find animus from their position “at the front end of generating constitutional change.”<sup>15</sup>

Professor Daniel Conkle approached Professor Araiza’s work from a different perspective. He concurs that animus doctrine is uncontroversial as a matter of constitutional principle. He explains that lawmaking based on “bias, dislike, or disfavor” toward the

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10. *Id.* at 193.

11. Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215 (2018).

12. *Id.* at 224.

13. *Id.* at 226, 229.

14. *Id.* at 230–33.

15. *Id.* at 229.

regulated group “violates deep-seated constitutional understandings and should be regarded as categorically impermissible.”<sup>16</sup> Professor Conkle is less sanguine about animus doctrine, however, when it is viewed through the lens of “judicial prudence,” which he defines as consisting of two distinct concepts: judicial workability and judicial statesmanship.<sup>17</sup>

Professor Conkle is concerned about the workability of the animus doctrine because he thinks animus may be difficult to define in some cases, including mixed-motive cases, where “a law is based in part on animus but in part on other, public-regarding objectives.”<sup>18</sup> Despite Professor Araiza’s suggestion that the *Arlington Heights*<sup>19</sup> framework for resolving racial discrimination claims could clarify courts’ approaches to animus claims, Professor Conkle remains concerned that the number of issues raised in mixed-motive cases—such as whether animus must be only a but-for cause of the statute or have played a more significant role in its adoption—will negatively affect animus doctrine’s workability.

Judicial statesmanship presents a different challenge for the animus doctrine. Professor Conkle argues that, by making an animus finding, courts are necessarily issuing an “*indictment* of those responsible for the law.”<sup>20</sup> This (often moral) condemnation of lawmakers puts the court in an awkward position of disparaging a coequal branch of government. What’s more, Professor Conkle acknowledges that such an indictment may be deserved in some cases, putting a court in the even more awkward position of choosing between its own integrity and publicly harming that of the legislature. In response to his concerns about judicial prudence and the animus doctrine, Professor Conkle advocates for the application of heightened scrutiny to a larger range of disadvantaged groups, with animus doctrine serving as a doctrine of last resort when more traditional options for combatting legislative bias or disfavor fail.<sup>21</sup>

Michelle Moretz offers a thorough and insightful analysis of a current issue that potentially implicates animus—discrimination

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16. Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195, 195, 199 (2018).

17. *Id.* at 197.

18. *Id.* at 202.

19. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252.

20. Conkle, *supra* note 16, at 204 (emphasis in original).

21. *See id.* at 211–12 nn. 93–94 and accompanying text (describing *Moreno* as a case where animus doctrine may be useful as a doctrine of last resort).

against LGBT employees under Title VII of the Civil Rights Act of 1964.<sup>22</sup> Although she does not engage with animus doctrine directly, Moretz examines the history and relevant theories of employment discrimination jurisprudence and concludes that discrimination against LGBT plaintiffs should be actionable under Title VII. She offers alternative approaches for those plaintiffs that she contends are consistent with the courts' view of anti-discrimination law. First, she argues that courts should defer to the views of the Equal Employment Opportunity Commission that discrimination based on sexual orientation constitutes sex discrimination under Title VII. Alternatively, Moretz argues that courts should use both the associational theory and the failure to conform to gender norms approach to employment discrimination to better focus courts on the precise problem at hand. This context-based approach to equality jurisprudence under Title VII is reminiscent of Professor Araiza's approach to constitutional animus under the Equal Protection Clause.

In the final contribution to the symposium, Professor Araiza generously responds to all three commentators.<sup>23</sup> He acknowledges the significant common ground between himself and Professor Conkle in terms of their view that animus is *de facto* prohibited within our constitutional structure, but resists the notion that judicial statesmanship should prevent courts from finding animus. To the contrary, says Professor Araiza, the "very existence of a political and social environment marked by xenophobia and deep cultural conflict . . . requires a jurisprudence that is willing to call out animus when it exists."<sup>24</sup> As for workability concerns, Professor Araiza acknowledges the challenges inherent in employing animus doctrine, but does not find them any more challenging or outside of courts' expertise than other anti-discrimination doctrines. By considering factors like the scope and context of the discrimination, Professor Araiza contends that animus doctrine allows for the types of distinctions between morality- and animus-based arguments that Professor Conkle suggests are unworkable.

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22. Michelle Moretz, Baldwin, Hively, and Christiansen, *Oh My! Navigating the Yellow Brick Road of Employment Discrimination for LGBT Plaintiffs*, 48 STETSON L. REV. 235 (2018).

23. William D. Araiza, *Response: Animus, Its Critics, and Its Potential*, 48 STETSON L. REV. 275 (2018).

24. *Id.* at 280 (emphasis omitted).

Professor Araiza also recognizes the commonality between his and Professor Eyer's aspirations for animus doctrine and for equal protection law more broadly. He disagrees, however, with Professor Eyer's contention that animus doctrine could crowd out traditional rational basis review and act as an unforgiving gatekeeper to anti-discrimination plaintiffs that are not protected by heightened tiers of scrutiny. He argues that animus doctrine, much like the class legislation jurisprudence of the nineteenth century, is designed to complement—not displace—traditional rational basis review. He further contends that, because animus is already an established concept in equal protection law, scholars should avoid resisting it and focus instead on finding productive ways to incorporate the doctrine into a broader constitutional view of equality. Finally, rather than adopt Professor Eyer's view that the Court's use of animus in *Trump v. Hawaii* was evidence of the animus doctrine's potential to overwhelm traditional rational basis review, Professor Araiza describes it as a further opportunity for scholars to develop the doctrine apart from "pure irrationality" cases.<sup>25</sup>

He ends his response by highlighting two connections between Ms. Moretz's Title VII analysis of employment discrimination on the basis of sexual orientation and animus doctrine. Doctrinally speaking, Professor Araiza points out that the associational theory of discrimination discussed by Moretz and the courts dealing with Title VII cases involving LGBT plaintiffs may offer an example of a discrimination claim—based at least implicitly on "a state of affairs in which the employer disapproves of the employee and her choices, for example, her choices of intimate partner or family relationship"—that sounds in animus doctrine.<sup>26</sup> More generally, Professor Araiza points out that the multi-dimensional analysis suggested by Moretz in the Title VII context reflects the argument in his book that "there are many paths to equality" for plaintiffs, including through claims of animus.<sup>27</sup>

Professor Araiza's book reinvigorates the animus doctrine as a powerful potential solution to a pressing national problem—increasingly bold and apparent evidence of government animus against particular groups. This symposium offers an opportunity

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25. *Id.* at 291.

26. *Id.* at 293.

27. *Id.*

to develop and build on Professor Araiza's thesis. Its contributions to our understanding of constitutional equality will no doubt benefit us all.

