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This Hill Ain't Big Enough for the Both of Us: How the Feud Between Skiers and Snowboarders Illustrates the Inequality that Has Become the Norm in Equal Protection Land Access Claims

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THIS HILL AIN'T BIG ENOUGH FOR THE BOTH OF US:
HOW THE FEUD BETWEEN SKIERS AND SNOWBOARDERS
ILLUSTRATES THE INEQUALITY THAT HAS BECOME THE
NORM IN EQUAL PROTECTION LAND ACCESS CLAIMS

“You’d be hard-fought to find two sports, two cultures that are more similar than skiing and snowboarding. Our equipment is made in the same factories, of the same materials. We live in the same towns, drink at the same bars, wear the same clothes, date, have sex, get married, and have little inter-glisse kids together. We chase the same storms, for the same reasons, and when they hit, we travel to the same places. That is, except three.”¹

I. INTRODUCTION

Ever since Sherman Poppen created the first snowboard in the 1960s, there has been a rift between the snowboarding and skiing communities.² From the beginning, ski resorts prohibited snowboarders from using their hills, and so snowboarders were forced to use rough trails in the backcountry.³ The sport eventually became more mainstream in 1977, when ski liability insurance began covering snowboarders.⁴ However, snowboarding did not reach relative popularity until the 1980s, when the younger generation adopted the sport as a way to express rebellious cultural attitudes.⁵ At a time when skateboarding was taking over the streets,

1. Derek Taylor, *The End to Snow-Separatism*, POWDERMAG.COM (Apr. 10, 2014), <http://www.powder.com/stories/end-snow-separatism/#YBX6WYUmH96ZTFvG.97> (commenting on similarities between snowboarders and skiers, and explaining that three ski resorts still ban snowboarding).

2. See Sam Baldwin, *Snowboarding Vs Skiing: The Dying Feud*, SNOWSPHERE.COM (Jan. 2006), <http://www.snowsphere.com/special-features/snowboarding-vs-skiing-the-dying-feud> (detailing early stages of feud between snowboarders and skiers).

3. See *id.* (explaining that there were still relatively few snowboarders in the 1960s and 1970s, and that for the most part it was only a “hardcore few” that tried to develop the sport).

4. See *id.* (citing “a man named Dimitrije” as the catalyst of this effort); see also Paul MacArthur, *Top Ten Important Moments in Snowboarding History*, SMITHSONIAN.COM (Feb. 5, 2010), <http://www.smithsonianmag.com/history/the-top-ten-important-moments-in-snowboarding-history-6851590/?no-ist> (summarizing most important moments in development of snowboarding). MacArthur explains that Dimitrije Milovich was a snowboarding pioneer who started the first modern snowboarding company called Winterstick. See *id.*

5. See Baldwin, *supra* note 2 (discussing how youth in punk era became interested in snowboarding).

snowboarding began taking over the slopes.⁶ The presence of a younger crowd collided with the established decorum at ski resorts, and set off the feud that continues to this day.⁷

The tension between the two sports arises from differences in their traditional mentalities.⁸ Skiing has always been a very serious sport, requiring a substantial investment of time, training, and money.⁹ For skiers, having fun means training intensely, not goofing around with friends.¹⁰ Resorts themselves were built around the development of skiing rather than snowboarding, and many argue that skiing is the more challenging and inherently dangerous of the two sports.¹¹

On the other hand, snowboarding tends to focus on the pure joy of riding outdoors rather than commitment to competition.¹² Evidence of this mentality is apparent in typical snowboarding attire, which is baggy and non-functional, as opposed to the tight, aerodynamic attire typically found on skiers.¹³ Summed up, the feud exists because “a skier who spent \$4,500 on the gear he strapped to the top of his Audi . . . sees a snowboarder who spent less than \$1000 rolling up in a ‘83 Civic hatchback having more fun than him.”¹⁴

6. *See id.* (explaining that kids who were interested in skateboarding also became interested in snowboarding). Skateboarders were known for using “features” such as curbs and benches when practicing. *See id.* This tended not to bother people that much on the streets, while the same action at private ski resorts caused much more backlash. *See id.*

7. *See id.* (explaining how feud was largely cultural and represented socioeconomic differences).

8. *See, e.g.,* Jack Salathe, *Skiers Vs Snowboarders: Why Can't They Get Along?*, HUBPAGES (Feb. 11, 2011), <http://jacksalathe.hubpages.com/hub/Skiers-Vs-Snowboarders-Why-Cant-They-Get-Along> (outlining basic differences between snowboarding and skiing cultures).

9. *See id.* (stating skiers' perspective on their sport). Skiers are proud of the value and expense of their equipment. *See id.*

10. *See id.* (discussing how skiers are deathly proud of their sport, seeing it more as a triumph of nature and less as a leisure activity, and consequently, they are less open to change).

11. *See id.* (commenting how some argue that snowboarding may be harder to master than skiing).

12. *See id.* (summarizing snowboarders' perspective on their sport). Unlike skiers, snowboarders are more about having fun and so are more accepting of change and innovation. *See id.*

13. *See id.* (purporting that snowboarders are more concerned about comfort and appearance than functionality).

14. *See id.* (speculating why skiers, who commit so much to their sport, do not want to see young snowboarders, who are perceived as reckless and low class, enjoy slopes without putting in same level of commitment). *See also* Christopher Solomon, *Has Snowboarding Lost Its Edge?*, N.Y. TIMES, Jan. 20, 2013, at TR1, available at <http://www.nytimes.com/2013/01/20/travel/has-snowboarding-lost-its-edge.html>

Some argue that after more than forty years the feud has all but died out, due in part to a possible decline in the popularity of snowboarding, an increase of athletes participating in both sports, or a general acceptance of the snowboarding culture as a whole.¹⁵ However, a recent legal battle in Utah illustrates that the feud is very much still alive.¹⁶ Alta Ski Resort (“Alta”) is a famous resort in Utah that does not allow snowboarders to use its facilities.¹⁷ Last year, Wasatch Equality (“Wasatch”), a non-profit group representing snowboarders, brought a constitutional claim against Alta and the United States Forest Service (“Forest Service”), the lessor of Alta’s land.¹⁸ In *Wasatch v. Alta*, Wasatch argued that Alta and the Forest Service were denying snowboarders of their Fourteenth Amendment right to equal protection and Fifth Amendment right to due process because Alta and the Forest Service were prohibiting snowboarders from patronizing Alta or making use of the public

(explaining how in recent decades snowboarding has declined in popularity in part because sport has become more serious and focused like skiing).

15. See Karen Schwartz, *Skiing and Snowboarding: Many People Do Both Now*, HUFFINGTON POST (Jan. 11, 2012, 2:21 PM), <http://www.huffingtonpost.com/huffwires/20120111/us-travel-skiers-vs-snowboarders> (discussing how as snowboarding has become more main stream, many winter athletes are participating in both sports which has led to better understanding between skiing and snowboarding communities); *The Snowboarders vs. Skiers Cold War Is Over*, ORLANDO SENTINEL (Nov. 10, 1996), http://articles.orlandosentinel.com/1996-11-10/travel/9611050801_1_snowboarders-skiers-resorts (explaining how general acceptance of snowboarding has permeated through ski resorts and general ski culture); *Skiers v. Snowboarders: A Feud in the Past*, GRAYS ON TRAYS, <http://www.graysontrays.com/blog/snow-culture/skiers-v-snowboarders-a-feud-in-the-past/> (last visited Sept. 10, 2015) (outlining how emergence of snowboarding as respected sport in mainstream winter sports culture, as demonstrated by its acceptance into Olympic games, has led to decline in feud between skiers and snowboarders).

16. See Megan Barber, *Snowboarders Sue Alta Ski Resort, the Internet Freaks Out*, CURBED SKI (Jan. 16, 2014, 12:58 PM), <http://ski.curbed.com/archives/2014/01/snowboarders-sue-alta-ski-area-the-internet-freaks-out.php>; Lindsey Whitehurst, *Skiing vs. Snowboarding: ‘Riders’ Sue Utah Ski Resort that Prohibits Their Sport*, MASSLIVE (Aug. 11, 2014, 10:55 PM), http://www.masslive.com/sports/index.ssf/2014/08/skiing_vs_snowboarding_riders.html (commenting on 2014 suit against Alta Ski Resort for not allowing snowboarders to use resort).

17. See *About Alta*, ALTA, <http://www.alta.com/the-mountain/about-alta> (last visited Feb. 4, 2016) (providing information regarding ski resort).

18. See Barber, *supra* note 16 (reporting on lawsuit); Whitehurst, *supra* note 16 (reporting on lawsuit); *Wasatch Equal. v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351, 1353 (D. Utah 2014). “Wasatch equality is a Utah based nonprofit working to end the anti-snowboarding policies that prevent friends and families from exercising their legal right to enjoy public land, regardless of how they choose to get down the hill.” *Home*, WASATCH EQUAL., <http://wasatchequality.org> (last visited Mar. 13, 2016). See also *infra* notes 44–59 (describing claim had to be brought against both Alta and Forest Service because Alta is private entity and equal protections claims require presence of state actor).

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mountain that the Alta leases from the Forest Service.¹⁹ The United States District Court for the District of Utah granted the defendants' motions to dismiss the claim for (1) lack of necessary government involvement, (2) government exemption from liability, and (3) sufficient rational basis justification.²⁰

Part II of this Comment discusses the history of ski resorts refusing access to snowboarders, the typical approaches to the constitutional issues presented in the Alta case, and why the Alta case serves as a proper case study in reevaluating standard judicial approaches.²¹ Part III analyzes and critiques the Utah District Court's use of the prevailing standards of review and suggests alternative standards that are more equitable.²² Part IV concludes that the outcome of *Wasatch* reaffirms the need to employ alternate standards of review in equal protection claims that deal with land access, private parties, and rational basis review.²³

II. DISCRIMINATION AT SKI RESORTS AND THE LAND ACCESS PROBLEM

A. The Uphill Battle for Snowboarders at Ski Resorts

Ski resorts have been the battlefield for the war between skiers and snowboarders.²⁴ Ski resorts around the world banned snowboarders when the sport was introduced in the 1970s.²⁵ As a result, snowboarders had to use hills that were wild and untamed in areas known as the "backcountry."²⁶ As time passed, snowboarders

19. See *Wasatch Equal.*, 55 F. Supp. 3d at 1356 (explaining that Alta is private resort that owns facilities but leases mountain from United States government).

20. See *id.* at 1370 (explaining how both Alta and Forest Service submitted motions to dismiss, but that District Court would mainly on content of Forest Service's motion). For the purposes of this comment, the arguments of both defendants will be considered as one. See *id.* But see Ben Winslow, *The 10th Circuit Will Hear Arguments over Alta's Snowboarding Ban*, FOX 13 SALT LAKE CITY (Oct. 5, 2015, 10:11 AM), <http://fox13now.com/2015/10/05/the-10th-circuit-court-will-hear-arguments-over-altas-snowboarding-ban/> (explaining that 10th Circuit, which initially dismissed Wasatch's claim, later decided to hear claim). Unfortunately, this ruling will not be available prior to the publication of this comment, but it should be noted that the court may use the same analysis addressed in this comment. See *id.*

21. See *infra* notes 24–93 and accompanying text.

22. See *infra* notes 95–211 and accompanying text.

23. See *infra* notes 215–29 and accompanying text.

24. See Baldwin, *supra* note 2 (outlining challenges snowboarders have faced since they began trying to use resort slopes).

25. See *id.* (listing challenges that snowboarders faced during early years of sport's development).

26. See *id.* (describing backcountry as slopes not maintained by any resort, but rather naturally existing).

were gradually able to start using better-maintained hills at private resorts.²⁷ However, not all resorts followed this trend, and some resorts still rejected snowboarders at their destinations.²⁸ In addition to Alta, there are two other resorts in North America that prohibit snowboarding: Deer Valley Ski Resort in Utah and Mad River Glen Ski Resort in Vermont.²⁹

These three resorts maintain that their policies against snowboarding are a marketing angle that attracts a certain clientele and provides a unique experience.³⁰ Unlike Deer Valley and Alta, Mad River Glen is somewhat of an outlier because its exclusiveness is based more on preserving its quirky style than anything else.³¹ The sense of elitism attached to skiing is therefore not as relevant as with Deer Valley and Alta, who both cater to a more affluent crowd.³² Mad River Glen, citing its traditional ski lift design that does not accommodate snowboards, likely has the most viable justification for prohibiting snowboarders.³³ However, the other two resorts are more modern and lack unique logistical issues, making their policies especially questionable.³⁴

Snowboarders have not been silent on the issue, as demonstrated by Burton's 2008 "Sabotage Stupidity" campaign.³⁵ The

27. *See id.* (explaining that during later part of the 20th century, many resorts began accommodating snowboarders, and even providing special terrain parks geared towards snowboarders). In the beginning of the 1980s, less than 10% of resorts allowed snowboarders, but now most resorts do allow snowboarders. *See id.* Increased revenue was a major factor in this shift, not just general acceptance of the sport. *See id.*

28. *See Barber, supra* note 16 (discussing ski-only resorts); Whitehurst, *supra* note 16 (discussing small amount of ski resorts which still ban snowboarders).

29. *See id.* (noting that Alta is only of three resorts that leases public land).

30. *See Snowboarders Sue to Gain Access to Skiers-Only Resort*, NEW YORK POST (Nov. 17, 2015, 9:26 AM), <http://nypost.com/2015/11/17/snowboarders-sue-to-gain-access-to-skiers-only-resort/> (reiterating stated purpose for why resorts ban snowboarders); *see also* Christopher Del Sole, *NO Snowboards Allowed!*, ABOUT.COM, <http://snowboarding.about.com/od/snowboardresorts/i/snowboardingban.htm> (last updated Jan. 30, 2016) (identifying impetus for ski resorts that still ban snowboarding).

31. *See* Bill Pennington, *A Quirky Mountain is Keeping Its Quirks*, N.Y. TIMES (Feb. 9, 2007), <http://www.nytimes.com/2007/02/09/travel/escapes/09ski.ready.html> (discussing character of Mad River Glenn, thus distinguishing it from other ski resorts).

32. *See id.* (identifying how Mad River Glen is different from Alta and Deer Valley, who are geared toward more conservative and traditional clientele).

33. *See id.* (explaining how Mad River Glen has a single-chair ski lift system that is designed for skiers only). Allegedly snowboards would damage the lifts when exiting. *See id.*

34. *See id.* (identifying Mad River Glen as only resort with unique chair system).

35. *See Sabotage Stupidity: Burton's Power to the Poachers*, 5ONES (Jan. 16, 2008), <http://5ones.com/sabotage-stupidity-burtons-power-to-the-poachers/> (describing

snowboarding company's legendary owner and creator, Jake Burton, challenged snowboarders across the country to go to any of these three ski-only resorts, ride the hills on their snowboards, document their experiences with a camera, and submit their recordings for a chance at a \$5,000 cash prize.³⁶ However, the campaign failed to make a meaningful impact, and the three resorts continue to ban snowboarding.³⁷

B. From the Mountain to the Courtroom: Making a Case Against Alta Under an Avalanche of Obstacles

The *Wasatch* case is notable for two reasons: (1) it focuses on unique and contentious constitutional law issues, and (2) it effectively illustrates the feud between snowboarders and skiers.³⁸ Therefore, it provides a foundation for exploring the current status of constitutional claims regarding equal access to land within the context of a contemporary social battle between two distinct types of athletes.³⁹

1. *The Legal Edge*

The Alta case required the Utah District Court to apply somewhat complex, but defendant-favorable, standards for determining whether there is sufficient state action or rational basis justifications in Fourteenth Amendment claims regarding equal land access.⁴⁰ First, equal protection only applies to government actions. So for a plaintiff to bring an equal protection claim against a private party, the plaintiff must overcome the extraordinarily high burden of showing that the state is so involved that the action may be claimed as the state's own.⁴¹ Moreover, the jurisprudence on state action in

Sabotage Stupidity, social media campaign started by Jake Burton, owner of one of biggest and well-known snowboarding companies [Burton]). Burton encouraged snowboarders to trespass onto ski resorts where they were forbidden. *See id.* Burton participated in the campaign with a group of forty snowboarders who trespassed onto Mad River Glenn Resort on December 15, 2007. *See id.*

36. *See id.* (noting that this act of trespassing on ski resort where snowboarders are banned is called "poaching"). *See id.*

37. *See id.* (speculating that campaign failed either because social media use was inadequate or because snowboarders do not care enough to change policies at select resorts).

38. *See Wasatch Equal. v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351, 1357, 1367 (D. Utah 2014) (discussing how state action cases are "challenging to understand and decipher," and how animus between skiers and snowboarders is large component of plaintiff's argument).

39. *See infra* notes 40–93 and accompanying text.

40. *See Wasatch Equal.*, 55 F. Supp. 3d at 1356 (discussing nature of state action requirement for equal protection claims).

41. *See infra* notes 44–59 and accompanying text.

the context of land use provides the government, and government actors, with the additional defense that the Property Clause of the Constitution offers virtually unlimited discretion in how to operate land.⁴² Then, even if the plaintiff satisfies the state action element and the Property Clause is inapplicable, the plaintiff in most cases will have to overcome the equally difficult burden of showing that the defendant had no rational reason for discriminating against the plaintiffs.⁴³

a. State Action Requirement

In order for a plaintiff to initiate a Fourteenth Amendment equal protection claim against a private party, there must be a significant amount of state action in the discriminatory practice at issue such that the practice itself can be considered a state act.⁴⁴ When considering whether there is sufficient state action, courts look at two factors: (1) whether the alleged deprivation can be attributed to a state actor, and (2) whether the deprivation was the result of the actions of that state actor.⁴⁵

The cause of the discrimination must be a direct state actor, not someone acting under the authority of the state.⁴⁶ In *Flagg Bros., Inc. v. Brooks*, the city marshal of Mount Vernon, New York, arranged for the plaintiff, who had been evicted, to store her belongings in a warehouse owned by a private company.⁴⁷ After various disagreements over pricing between the plaintiff and the company, the plaintiff brought an equal protection claim against the company.⁴⁸ The Supreme Court of the United States held that the company did not qualify as a state actor simply because the

42. See *infra* notes 60–64 and accompanying text.

43. See *infra* notes 65–70 and accompanying text.

44. See *Wasatch Equal.*, 55 F. Supp. 3d at 1356–57 (explaining that there must be sufficient state action for court to even consider claim).

45. See *generally* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (identifying general standard of review when assessing degree of state action in equal protection claims against private entities).

46. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164–66 (1978) (ruling that state approval for private entity to operate does not alone satisfy state action requirement for discriminatory practices).

47. See *id.* at 153 (recounting how the plaintiff's eviction was the result of failed payments on property). The city directed her to a storage company to hold her things while she searched for a new residence. See *id.*

48. See *id.* (reporting that the plaintiff brought action because warehouse threatened to sell her belongings after she refused to pay asking price).

company was working in unison with the city, so there was not a sufficient connection to establish a valid equal protection claim.⁴⁹

The action must also be the direct result of the state actor's action, not simply exist as a result of the state authorizing an actor to operate in an otherwise legal manner.⁵⁰ In *Moose Lodge No. 107 v. Irvis*, the Supreme Court of the United States ruled that the plaintiffs did not have standing to bring a claim against the Pennsylvania Liquor Control Board based on the racially discriminatory policies of a club that the Board had licensed to serve alcohol.⁵¹ The court explained that even though the Board approved the club's liquor license, that it did not constitute Board involvement in the non-alcohol related practices of the club.⁵² In other words, the state action had no meaningful connection to the discriminatory practices, and neither supported nor denied the practice, so the contact was insufficient to hold the government responsible.⁵³

*Gallagher v. Neil Young Freedom Concert*⁵⁴ provides further guidance, not only by introducing four tests available for state action claims, but also by applying those tests to a state action claim regarding land access, which is the focus of *Wasatch*.⁵⁵ In *Gallagher*, the United States Court of Appeals for the Tenth Circuit found that an equal protection claim regarding private security workers employed for a concert at a public university failed because there was insufficient state action.⁵⁶ The tests the court offered were (1) the nexus test, (2) the symbiotic relation test, (3) the joint action test, and (4) the public function test.⁵⁷ The court relied primarily on

49. *See id.* at 164–66 (reasoning that even though company was getting business from government, it was still operating as private entity).

50. *See* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175–76 (1972) (finding that licensing by state actor to private entity does not constitute sufficient state action).

51. *See id.* (explaining that lodge refused to serve African-Americans).

52. *See id.* (noting that liquor board only licensed lodge to sell alcohol, and had nothing to do with manner in which lodge ran its business otherwise).

53. *See id.* (pointing out that liquor board had no direct impact on policy).

54. 49 F.3d 1442 (10th Cir. 1995).

55. *See id.* at 1445–47 (outlining claim brought against state of Utah for incident happening at concert held at University of Utah, and identifying four tests established by state action case law).

56. *See id.* at 1448–57 (evaluating claim under four identified tests).

57. *See id.* (listing tests that can be employed in such cases). The Tenth Circuit court described the four tests as follows:

[1. Nexus Test:] Under the nexus test, a plaintiff must demonstrate that “there is a sufficiently close nexus” between the government and the challenged conduct such that the conduct “may be fairly treated as that of the State itself.”

...

the symbiotic relationship test in determining whether the fact that a state institution hosted the event was sufficient state action to hold the state liable for equal protection claims against security workers.⁵⁸ The court found the claim failed this test because “[t]he fact that certain conduct occurs on public property does not establish state action.”⁵⁹

b. The Property Clause Defense

Courts have found that additional protection for defendants exists in the Property Clause of the Constitution, which states that the government controls the rules and regulations for operating property that the government owns.⁶⁰ This defense is unique to cases like *Alta* because it only applies when the claimed discrimination deals with the right to access government land.⁶¹ The jurisprudence regarding this defense is summed up in *Light v. United States*,⁶² where the Supreme Court of the United States held that under the Property Clause, the government has the right to control its property as any other proprietor would: thus the government can allow the property to be used in only certain ways or by certain persons.⁶³ Therefore, the federal government has broad discretion as long as it is acting as a proprietor.⁶⁴

[2. Symbiotic Relationship Test:] State action is also present if the state “has so far insinuated itself into a position of interdependence” with a private party that “it must be recognized as a joint participant in the challenged activity.” . . .

[3. Joint Action Test:] State action is also present if a private party is a “willful participant in joint action with the State or its agents.” . . .

[4. Public Function Test:] If the state delegates to a private party a function “traditionally exclusively reserved to the State,” then the private party is necessarily a state actor.

Id. (second alteration in original) (citation omitted).

58. *See id.* at 1451–53 (evaluating whether state was acting in unison with private entity to constitute interdependence).

59. *Id.* at 1452 (explaining that there must be more direct connection between private and public entities than simply one operating on land of another).

60. *See* U.S. CONST. art. IV, § 3, cl. 2 (stating breadth of Property Clause). The Property Clause states that “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.” *Id.*

61. *See id.* (identifying power of government to control its own land).

62. 220 U.S. 523 (1911).

63. *See id.* at 536–37 (1911) (holding that defendant could not bring cattle onto land owned by government and then seek judicial recourse concerning government’s ability to choose said land).

64. *See id.* (holding that government has broad discretion when acting as proprietor of land).

c. Equal Protection Claims Under Rational Basis Scrutiny

Barring a Property Clause or state action defense, a court will apply the appropriate level of scrutiny to the practice at issue.⁶⁵ Rational basis is the lowest and most common form of scrutiny applied to equal protection claims.⁶⁶ It is the default standard applied unless there is discrimination against a class based on race, national origin, alienage, or gender.⁶⁷ When a court determines that rational basis is the proper level of scrutiny, the burden is placed on the claimant to prove that the policy or law at issue fails to meet the rational basis standard.⁶⁸ The claimant must show the government did not have a rational purpose for imposing the contested policy, and that the policy was not reasonably related to that purpose.⁶⁹ The claimant will win if they successfully argue either of these points, though courts generally give deference to the government.⁷⁰ However, a showing of animus alters a court's analysis.⁷¹ Animus is hatred towards a particular class, and when it is the sole

65. See *Wasatch Equal. v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351, 1365 (D. Utah 2014) (offering analysis of snowboarder's claim under rational basis scrutiny had there been sufficient state action).

66. See *id.* at 1360 (stating specifically that “[a]ll other rights and classifications that are subject to the Equal Protection Clause are reviewed pursuant to a ‘rational-basis’ standard, which is the least exacting level of review”).

67. See *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (explaining that strict scrutiny is reserved for classifications based on race, nationality, or alienage). See also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725–26 (1982) (describing intermediate scrutiny test that should be applied to cases involving classifications based on gender).

68. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (declaring that practice is acceptable unless plaintiff can show that there is no rational reason for practice or policy); *Heller v. Doe*, 509 U.S. 312, 320 (1993) (holding that government does not have to give further justification for its policy other than rational purpose).

69. See *Heller*, 509 U.S. at 320 (detailing how claimant must show that government had absolutely no legitimate interest in enacting policy).

70. See, e.g., *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949) (holding that seemingly arbitrary regulation on advertising was nonetheless constitutional under rational basis because conceivable reason existed). The Supreme Court specifically stated:

[The Court does] not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. [The Court] would be trespassing on one of the most intensely local and specialized of all municipal problems if [it] held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

Id. (citation omitted).

71. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (holding that a policy aimed at disadvantaging politically unpopular class of “hippies” was based on animus and thus overcomes rational basis scrutiny).

impetus for a policy or law, courts will rule for the plaintiff even in rational basis cases.⁷²

d. Alta as a Case Study

Alta requires an in-depth consideration of the above-referenced constitutional law issues, and thus serves as an appropriate example for reviewing the typical theories applied to equal protection land access cases.⁷³ The case law in this area has generally resulted in favorable outcomes for defendants because courts give deference to defendants when analyzing the above issues.⁷⁴ The *Alta* case is therefore a modern example of how these constitutional issues are analyzed, providing ample opportunity to reconsider the standard approaches.⁷⁵

Alta is a private resort near Salt Lake City, Utah, that is permitted, by the United States Forest Service, to operate on public land in exchange for an annual fee.⁷⁶ *Alta's* agreement with the Forest Service stipulates that the resort is authorized to ban those who use ski equipment that creates an "immediate risk, causes undue damage to the quality of the snow, and is not consistent with [*Alta's*] business management decisions."⁷⁷ *Alta* allows "various types of skis", but strictly prohibits snowboarding, a policy that is neither explicitly encouraged nor prohibited by the Forest Service.⁷⁸

Wasatch sought an injunction on *Alta's* snowboard ban, claiming that snowboarders have a constitutional right to snowboard at *Alta*.⁷⁹ The complaint was twofold because while *Alta* is a private

72. *See id.* (noting that finding of animus indicates that law or policy is unrelated to asserted interest).

73. *See infra* notes 76–85 and accompanying text.

74. *See supra* notes 44–70 and accompanying text (providing examples of cases dealing with state action requirement, Property Clause defense, and rational basis scrutiny, all of which resulted in favorable outcomes for defendants).

75. *See Wasatch Equal. v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351, 1356–69 (D. Utah 2014) (providing analysis of state action requirement, Property Clause defense, rational basis scrutiny, and applicability of animus).

76. *See id.* at 1355–56 (stating that the permit fee is calculated by formula designed by Congress). *Alta's* fee accounts for less than 1% of the Forest Service's annual budget. *See id.* There are 119 other ski resorts that possess the same permit as *Alta*. *See id.* The Forest Service is not cited as an enforcer of any of *Alta's* policies. *See id.*

77. *See id.* at 1355 (internal quotation marks omitted) (describing nature of arrangement between *Alta* and Forest Service).

78. *See id.* (noting that *Alta* is also able to restrict sledding, tubing, and snowshoeing).

79. *See id.* at 1356 (articulating *Alta's* general reason for bringing claim). *See also Wasatchequality.org*, *supra* note 18 (stating background and purpose of Wasatch Equality).

resort, the slopes are situated on public land owned by the United States Forest Service.⁸⁰ Therefore, Wasatch contended that Alta's snowboarding ban was an equal protection violation under the Fourteenth Amendment, as well as a due process violation under the Fifth, due to the federal government's involvement through the Forest Service.⁸¹

Alta and the Forest Service filed motions to dismiss the complaint, claiming Wasatch had no grounds to bring a constitutional claim.⁸² Alta and the Forest Service first argued that there was a lack of subject matter jurisdiction because Wasatch failed to show sufficient state involvement by the Forest Service to warrant a constitutional claim against the government.⁸³ Second, they argued that Wasatch was not seeking a right protected by the Constitution, so there were no further grounds for a constitutional claim.⁸⁴ And finally, even with a valid constitutional claim, there was a clear rational basis for the policy banning snowboarders.⁸⁵

2. *The Social Edge*

After more than forty years since the creation of snowboards, *Alta* is the first time the snowboarding ban at ski resorts has entered the legal realm.⁸⁶ The key legal issue was whether a particular class, snowboarders, should have equal access to public land, yet many arguments on both sides were based on the social tensions between snowboarders and skiers.⁸⁷ Thus, *Alta* embodies the feud between the two cultures and brings the issue to a public forum where both sides can finally be heard.⁸⁸

80. *See id.* at 1355 (explaining how Wasatch's claim was necessarily against both Alta and Forest Service).

81. *See id.* at 1356 (outlining how Wasatch's claim was made in light of state action requirement).

82. *See id.* (demonstrating that both defendants filed separate motions to dismiss, but essentially argued the same points).

83. *See id.* at 1357 (reiterating defendants' argument that just because Alta used public land did not mean government was involved in the policy against snowboarding).

84. *See id.* at 1361 (summarizing defendants' argument that the right to use land for a recreational activity was not sufficient to trigger equal protection).

85. *See id.* at 1367 (listing Alta's justifications such as snowboards' detrimental effects on the terrain of hills, differences in motions between snowboarders and skiers, and safety concerns caused by snowboarders' "blind spot").

86. *See Barber, supra* note 16 (arguing that *Alta* is a new mark in feud between snowboarders and skiers).

87. *See id.* (discussing how lawsuit is fueled by snowboarders' feeling discriminated against at ski-only resorts).

88. *See id.* (explaining how *Alta* provides official forum for feud to be settled).

Wasatch's claim was indeed based largely on the presence of animus.⁸⁹ The Utah District Court summarized Wasatch's position that "Alta's decision was based on Alta's belief that snowboarders are undesirable people with obnoxious habits and characteristics and that this attitude on the part of Alta was the primary, if not the sole, reason for the snowboard ban."⁹⁰ The strength of Wasatch's arguments therefore rests largely on the social undertones of the case and whether such concerns were enough to constitute an unconstitutional act of discrimination.⁹¹

Though Wasatch admitted to a lack of legal precedent for its claim, it nonetheless maintained that Alta's policy was a clear example of discrimination against a specific class of people.⁹² Not surprisingly, the claim sparked significant backlash from the skiing community in support of Alta's policy against snowboarding.⁹³ Therefore, the Utah District Court was tasked with evaluating the challenging constitutional issues stemming from the historic feud between two classes of people that is just now reaching the courts.⁹⁴

III. CUTTING INTO THE COURT'S DECISION IN FAVOR OF ALTA AND CARVING NEW STANDARDS FOR REVIEW

Though the constitutional issues in this case arose within the unique context of land access, the District Court's opinion accurately demonstrates the typical approach in equal protection cases, ultimately ruling against Wasatch on every major point, including the state action, Property Clause, and rational basis issues.⁹⁵ The reality is that plaintiffs face an extremely high burden at every turn, so courts can, and do, strike down a claim on any one of the numer-

89. See *Wasatch Equal.*, 55 F. Supp. 3d at 1367 (describing that Wasatch's primary policy motivation was hatred).

90. See *id.* (outlining Wasatch's stance on presence of animus in case).

91. See *id.* (declaring that animus claim is intertwined with social tensions existing between skiers and snowboarders).

92. See Whitehurst, *supra* note 16. Attorney for the plaintiffs argued, "This case is not about equipment, it's not about skiing and snowboarding. It's about deciding you don't like a group of people, you don't want to associate with that group of people, and you're excluding them." *Id.*

93. See Barber, *supra* note 16 (explaining how comment sections in many articles reporting on Alta case have included emotional arguments between skiers and snowboarders).

94. See *Wasatch Equal.*, 55 F. Supp. 3d at 1357, 1367 (noting that state action cases are "challenging to understand and decipher," and how animus between skiers and snowboarders is large component of plaintiff's argument). See Barber, *supra* note 16.

95. See *Wasatch Equal.*, 55 F. Supp. 3d at 1369-70 (summarizing holding in favor of Alta and Forest Service).

ous grounds discussed in the *Alta* case.⁹⁶ However, there is considerable evidence and authority that opposes much of the Court's reasoning, which again, reflects the norm.⁹⁷ This evidence and authority suggests a more equitable and plaintiff-friendly approach in equal protection cases, warranting reconsideration of the jurisprudence in this area of law.⁹⁸ This analysis will therefore provide a recommendation on how to analyze the specific constitutional law issues brought up in *Alta* with the backdrop of a historic rivalry that continues to incite conflict in the winter sports world.⁹⁹

A. State Action

Although state action jurisprudence on equal protection claims generally favors defendants, there is reason to doubt the reasoning behind the District Court's quick dismissal of Wasatch's argument.¹⁰⁰ The court's opinion first stated that the Forest Service had not been meaningfully involved in *Alta*'s policy and was therefore not sufficiently close to satisfy the state action element.¹⁰¹ It based its reasoning primarily on *Gallagher*, holding that the simple fact that *Alta*, as a private entity, was operating on public land, was not enough on its own to warrant a finding of sufficient state action.¹⁰² The court also cited *Vincent v. Trend Western Technical Corp.*,¹⁰³ where the United States Court of Appeals for the Ninth Circuit ruled that state action might exist when a private entity's financial obligations to the state actor are an "indispensable element in the [state actor's] financial success."¹⁰⁴ Here, the District Court explained, *Alta*'s permit fee constituted a mere 0.1% of the Forest Service's budget, making it insufficient to reach the level of

96. *See id.* (demonstrating how courts will approach and decide cases with issues similar to *Alta*).

97. *See id.* at 1356–69 (noting opposition to court's reasoning). *See also infra* notes 100–211 and accompanying text.

98. *See infra* notes 100–211 and accompanying text (suggesting more lenient standards for plaintiffs in equal protection cases similar to *Alta*).

99. *See infra* notes 100–211 and accompanying text.

100. *See supra* notes 44–59 and accompanying text (demonstrating defendant favorability); *see also infra* notes 101–20 and accompanying text (showing quick dismissal).

101. *See Wasatch Equal.*, 55 F. Supp. 3d at 1357–58 (holding that Forest Service was not involved in actual policy banning snowboards).

102. *See id.* (reasoning that relationship existing between two parties was not sufficient to warrant sufficient state action).

103. 828 F.2d 563 (9th Cir. 1987).

104. *See Wasatch Equal.*, 55 F. Supp. 3d at 1358 (citing *Vincent*, 828 F.2d at 569) (describing alternative means for finding state action).

indispensability described in *Vincent*, and so the claim fails on this additional basis as well.¹⁰⁵

However, other authority justifies a more lenient approach to evaluating state action, which would (1) more generously consider the role of private parties in the overall business of the state actor, and (2) refuse to accept ignorance as an excuse from state liability.¹⁰⁶ In *Burton v. Wilmington Parking Auth.*, an equal protection claim was brought against a restaurant in Wilmington, Delaware that refused to serve a patron because the patron was African American.¹⁰⁷ The restaurant was privately operated but located in a building owned by the Wilmington Parking Authority, who was found to be a state actor on behalf of Delaware.¹⁰⁸ The Supreme Court of the United States ruled that there was sufficient state action in light of the specific circumstances of the case.¹⁰⁹ Similar to *Alta*, the restaurant's only obligation to its government lessor was the payment of fees.¹¹⁰ Though the payments in *Burton* were relatively more significant to the state, the \$1.7 million paid by Alta to the Forest Service between 2009 and 2012 dwarfs the \$28,700 annual fees collected in *Burton*.¹¹¹

Moreover, although there was no evidence that the Wilmington Parking Authority directly supported the restaurant's policy, the state actor was still liable.¹¹² Justice Clark stated that the state may not avoid liability just because it ignores the discriminatory

105. *See id.* at 1358 (reasoning that annual fee's impact was too small to be significant).

106. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 729 (1961) (holding actions of restaurant located in public parking garage were attributable to state actor because of integral relation); *see also* Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1100 (1960) (providing overarching discussion on meaning and applications of state action doctrine).

107. *See Burton*, 365 U.S. at 716 (explaining that restaurant only served whites).

108. *See id.* (noting that Parking Authority was operating on behalf of state, and that restaurant was located within garage owned and operated by Parking Authority).

109. *See id.* at 722–29 (holding that more than impact on discriminatory policy should be considered).

110. *See id.* at 722–23 (reporting that restaurant leased space from Parking Authority).

111. *See id.* (discussing financial aspect of Alta's lease). *See also* Brooke Adams, *Forest Service Says Alta Has Rational Reasons for Snowboard Ban*, THE SALT LAKE TRIBUNE (Mar. 31, 2014, 8:31 PM), <http://www.sltrib.com/sltrib/news/57755544-78/alta-forest-service-snowboarders.html.csp> (discussing revenue resulting from lease). Note that in addition to differences due to inflation, Alta's payment is a three-year cumulative amount, while the restaurant's is a yearly amount. *See id.*

112. *See Burton*, 365 U.S. at 725–29 (reasoning that Parking Authority's direct impact on policy was not only worthy consideration).

practices at issue.¹¹³ He added that “[b]y its inaction, the [Parking] Authority, and through it the State, ha[d] not only made itself a party to the refusal of service, but ha[d] elected to place its power, property and prestige behind the admitted discrimination.”¹¹⁴ Applying this reasoning to *Alta*, the Forest Service should not be exempt from an equal protection claim simply because it did not overtly support Alta’s snowboarding ban, contrary to the opinion of the Utah District Court.¹¹⁵

Further support for this argument is found in Thomas P. Lewis’ *The Meaning of State Action*, where Lewis says that a lessor of government property should be found liable for the actions and policies of the lessee if the land is used to fulfill a public need or desire.¹¹⁶ He cites examples such as golf courses, swimming pools, and parks, which may be leased and operated by a private entity but run for the purpose of public enjoyment.¹¹⁷ According to Lewis, the key issue is that the state actor is not selling the land, instead leasing it to a private party for public benefit, thus integrating the state with the purpose and policies of the land.¹¹⁸ As a ski resort, Alta is a recreational site run by a private organization, but it leases public land and operates to fulfill a public desire to engage in winter sports.¹¹⁹ Therefore, under Lewis’ analysis, the Forest Service would be sufficiently involved in Alta’s snowboarding ban because it is a government lessor providing land for a private entity to fulfill a public desire.¹²⁰

113. *See id.* at 725 (determining that ignorance does not preclude liability).

114. *See id.* (explaining that allowing policy to exist was equivalent to endorsing it).

115. *See id.* (summarizing holding on ignorance); *see also* *Wasatch Equal. v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351, 1358 (D. Utah 2014) (holding that since Forest Service did not directly support policy against snowboarding, it was exempt from liability).

116. *See* Lewis, *supra* note 106, at 1100 (arguing that if land is leased for public purpose, there is state action).

117. *See id.* at 1101 (providing examples of recreational uses for land that fulfill public purpose).

118. *See id.* at 1102 (stipulating that state is sufficiently involved if it only leases land as opposed to selling it).

119. *See Wasatch Equal.*, 55 F. Supp. 3d at 1355–56 (discussing facts of case, including Alta’s purpose and relation to the Forest Service).

120. *See* Lewis, *supra* note 106, at 1102 (implying that since nature of relationship between Alta and the Forest Service fits criteria set forth by Lewis, then there should be sufficient state action).

B. Standing

Before proceeding to rational basis analysis, the District Court first addressed two challenges raised by Alta and the Forest Service regarding standing: (1) that the right to snowboard is not a right protected under the Fourteenth Amendment, and (2) that Article IV (the “Property Clause”) of the Constitution precludes this type of claim from judicial review.¹²¹ The first defense was one of the only aspects of the case where the court agreed with Wasatch, and so the existing standard requires little attention for the purposes of this comment.¹²² However, the second defense was approached with complete deference to Alta and the Forest Service, so exploring a new standard is warranted.¹²³

1. *Zone of Interests Defense*

Though Alta argued that in addition to the state action issue, Wasatch’s claim should also be precluded because it failed to assert a right protected by the Fourteenth Amendment, the District Court, in a rare moment, sided with Wasatch.¹²⁴ Alta based its argument on *Alexander v. First Wind Energy, LLC*,¹²⁵ in which the United States District Court for the District of Maine ruled that a claim against the engineers behind a wind-energy project was invalid because the claimed injury, a decline in scenic quality, was not protected by the Fourteenth Amendment.¹²⁶ Alta attempted to link the interest in aesthetic integrity in *Alexander* with the interest in recreational activity in its own case, but the court declined to adopt the proposed line of reasoning.¹²⁷ Instead, it sided with Wasatch, holding that,

121. See *Wasatch Equal.*, 55 F. Supp. 3d at 1361–62 (outlining arguments related to standing brought by both defendants in effort to avoid rational basis review).

122. See *id.* (ruling that Wasatch had standing to bring claim as class of one constituting certain type of athlete).

123. See *id.* at 1362–65 (reasoning that Property Clause precluded claim from being brought against Forest Service, thus voiding entire claim).

124. See *id.* at 1361–62 (holding that recreational activities like snowboarding can be protected by Constitution in context of equal protection).

125. 2012 WL 681838, at *1 (D. Me. Feb. 28, 2012)

126. See *Wasatch Equal.* 55 F. Supp. 3d at 1361 (summarizing *Alexander*); see also *Alexander v. First Wind Energy, LLC*, 2012 WL 681838, at *1 (D. Me. Feb. 28, 2012) (stating specifically that claimant alleged that turbines would obstruct her view of mountains).

127. See *Wasatch Equal.*, 55 F. Supp. 3d at 1361. (demonstrating how Court favored Wasatch’s argument that it was simply seeking equal protection under a policy that directly affected snowboarders in a way that Wasatch claimed was unfair).

it is clear that the Equal Protection Clause has been interpreted to require that any action that can be properly attributed to the government must be applied equally to all persons, subject to the various levels of scrutiny explained above. The focus is on the way the state action treats people, not on the relative seriousness of the activities subject to the action.¹²⁸

Therefore, Wasatch had a legally sound claim that Alta's policy fundamentally and thus unconstitutionally treated snowboarders differently than skiers.¹²⁹

2. Property Clause Defense

Despite this finding, the District Court denied Wasatch's argument for standing because the Property Clause of the Constitution precluded the court from hearing equal protection claims against the Forest Service; yet the sources cited by the court suggest a different outcome under a standard that goes a step further and considers whether the action at issue was arbitrary.¹³⁰ The Forest Service's relevant argument relied mostly on *Engquist v. Oregon Dep't of Agriculture*, where the Supreme Court of the United States held that a disgruntled former government employee could not bring an equal protection claim for being terminated for allegedly arbitrary reasons.¹³¹ The Court said that when a state actor is functioning as a proprietor, as opposed to a regulator, it has significant discretion in carrying out its duties.¹³² Therefore, because relations between

128. See *id.* at 1362 (explaining why Wasatch had standing to bring equal protection claim based on type of class and interest at hand).

129. See *id.* (explaining further the Court's reasoning that direct connection to injury was key distinguishing factor between *Alexander* and current case).

They only seek to prove that Alta's decision to ban snowboarders was a decision attributable to the government that treats them differently than other people and that it has no rational basis. Plaintiffs' connection to the rule is direct (i.e., they are banned from using their snowboards at Alta), placing them in a significantly different position than the plaintiff in Maine whose complaint was based only on an alteration of the view she had of the western hills.

Id.

130. See *id.* at 1362–65. See also *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008) (ruling that discretionary power of state actors should apply in context of government employment); see *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (holding that because there was different standard for licensing applied to claimant, state actor's action was subject to review by courts).

131. See *Engquist*, 553 U.S. at 595 (stipulating that government decisions can generally be made with broad discretion).

132. See *id.* at 598 (adding caveat that government decision must be made in context of proprietorship, which warrants broader discretion than as regulator).

employers and employees in the context of hiring and firing are inherently subjective, the discretionary powers of the state actor may not be questioned when there is a simple difference between treatment of individuals.¹³³

In the current case, the court favored the Forest Service's argument that the ruling in *Engquist* should be extended to cover acts involving the government as a lessor of land.¹³⁴ First, the court said that because the Forest Service was acting as a proprietor is should be given broad discretion.¹³⁵ Further, as stated in *Light*, the Property Clause grants the executive branch unlimited power over government property, and so there would be a clear violation of the separation of powers doctrine if the court were to hear a claim regarding executive discretion regarding use of property.¹³⁶

However, after looking more closely at the basis of the Supreme Court's ruling in *Engquist*, the District Court's extension of the *Engquist* ruling to the current case seems misguided.¹³⁷ The reasoning in *Engquist* was based largely on *Olech*, where the Supreme Court found that when a state actor is executing its authority arbitrarily, the state actor's action should be subject to judicial review.¹³⁸ The District Court addressed the state action issue earlier in its decision, citing statistics regarding ski resorts that lease land from the Forest Service.¹³⁹ One of those statistics revealed that Alta was only one of 119 ski resorts that lease public land, and that its impact on the Forest Service budget was therefore insignificant.¹⁴⁰ Yet, Alta is the only one of those 119 resorts that prohibits snowboarding.¹⁴¹ Regardless of whether there are legitimate reasons for the ban, the sheer fact that Alta's policy is a statistical

133. *See id.* at 603 (holding that government discretion, when acting as proprietor, may result in better treatment to some classes over others).

134. *See Wasatch Equal.*, 55 F. Supp. 3d at 1364–65 (ruling that when government is leasing land, it is acting as proprietor, and therefore has broad discretion).

135. *See id.* at 1363 (stating that broad discretion applied in *Alta*).

136. *See id.* (discussing federalism issues); *see also* *Light v. United States*, 220 U.S. 523, 536 (1911) (holding that claims may not be brought against government regarding government's use of its own land); *see also* U.S. CONST. art. IV, § 3, cl. 2 (describing power of government over its own property).

137. *See Engquist*, 553 U.S. at 602–04 (relying on *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)).

138. *See Olech*, 528 U.S. at 564–65 (ruling that discretion may be subject to review when court demonstrates unreasonable level of arbitrariness).

139. *See Wasatch Equal.*, 55 F. Supp. 3d at 1358 (explaining that many other resorts lease land from Forest Service under similar terms as *Alta*).

140. *See id.* (finding that 1% contribution of *Alta* fees was minute).

141. *See Barber*, *supra* note 16 (identifying Mad River Glen, Deer Valley, and Alta as only ski resorts that prohibit snowboarding); Whitehurst, *supra* note 16 (identifying Mad River Glen, Deer Valley, and Alta as only ski resorts that prohibit

anomaly seems enough to indicate some degree of arbitrariness.¹⁴² Therefore, this finding should have been sufficient to allow the analysis to proceed rather than finding additional grounds to dismiss the claim.¹⁴³

Further support for reconsidering the general applicability of the Property Clause can be found in *Congressional Discretion under the Property Clause* where Eugene Gaetke discusses the federal government's ability to manage its land.¹⁴⁴ Gaetke argues that giving the federal government unlimited discretion when regulating its own land is entirely justifiable because the federal government is authorized to act as a proprietor of its own land under the Property Clause.¹⁴⁵ However, the two scenarios described by Gaetke, in which the federal government may exercise its unlimited discretion, do not appear to cover policies like Alta's snowboarding ban.¹⁴⁶ The first scenario occurs when the government is protecting certain land by designating it as the government's own.¹⁴⁷ Here, the Alta mountain is clearly not in need of protection because it is used for private recreational purposes.¹⁴⁸ The second scenario occurs when the government is regulating the type of activity that can occur on federal land, in order to ensure that the land is not used improperly.¹⁴⁹ At Alta, the mountain is used for recreational winter sports, and so there is no reason to protect the land from snowboarding when skiers are already able to use mountain for the same recreational purpose.¹⁵⁰ Thus, enabling the federal

snowboarding). Since Alta is the only one of the three that leases public property, it follows that it is the only one of the 119 lessees that has such a policy. *See id.*

142. *See Wasatch Equal.*, 55 F. Supp. 3d at 1358 (stating that Alta is only ski resort leasing public land that has anti-snowboarding policy, thus implying that its decision seems inherently arbitrary).

143. *See id.* (implying that had District Court applied alternate standard, it would have considered more than financial impact of Alta's fee).

144. *See Eugene R. Gaetke, Congressional Discretion under the Property Clause*, 33 HASTINGS L.J. 381, 384 (1981) (arguing that federal government should have unlimited discretion only when dealing with federal land rather than land owned by states).

145. *See id.* at 391–93 (arguing that Property Clause only applies to government's ability to regulate federal land).

146. *See id.* (identifying reasons for exercising discretion such as protecting wildlife or prohibiting hunting).

147. *See id.* (stating that federal government has power to protect land that has endangered wildlife or landscape).

148. *See About Alta*, *supra* note 17 (describing nature of Alta Ski Resort).

149. *See Gaetke*, *supra* note 144 (arguing that federal government can prohibit or regulate practices which exist on federal land to ensure that land is not harmed).

150. *See About Alta*, *supra* note 17 (stating Alta's purpose). *See also Taylor*, *supra* note 1 (describing similarity between snowboarding and skiing). Since ski-

government to use its unlimited discretion seems inappropriate in this case.¹⁵¹

C. Rational Basis Scrutiny

Had the case proceeded, the District Court would correctly have applied rational basis scrutiny to Alta's policy, but its analysis was overly deferential towards Alta and the Forest Service.¹⁵² Rational basis was the appropriate analytical framework in this case because even if Wasatch attempted to argue for a higher level of scrutiny, it would have had no legitimate basis for classifying snowboarders as a "protected class" seeking a "fundamental right."¹⁵³ Wasatch appropriately sought rational basis scrutiny for snowboarders as a "class of one" who were simply alleging unequal treatment.¹⁵⁴ The District Court then correctly applied this standard, which, as mentioned before, places the burden on the plaintiff to demonstrate that the defendants had no legitimate interest and that the policy promoting the interest was not reasonably related to the stated interest.¹⁵⁵

However, the District Court accepted Alta's numerous arguments for why its policy passed rational basis scrutiny with little opposition.¹⁵⁶ Alta argued that its policy responded to a demand for an exclusive environment for skiers, and so letting snowboarders intrude would completely undermine the culture and climate offered by the resort.¹⁵⁷ The court noted that Wasatch echoed these arguments in its own complaint, and so the rational basis burden

ing and snowboarding are very similar sports, there is no reason to believe that prohibiting one sport, while allowing the other, protects federal land. *See id.*

151. *See* Gaetke, *supra* note 144 (implying that since snowboarding ban does not appear to be protected by Gaetke's conception of Congressional discretion under Property Clause, ban seems to be an overextension of Congressional power).

152. *See* Wasatch Equal. v. Alta Ski Lifts Co., 55 F. Supp. 3d 1351, 1361–67 (D. Utah 2014) (exemplifying the District Court giving significant deference to Alta's justifications for banning snowboarding).

153. *See id.* at 1361. (analyzing snowboarders' classification). Snowboarders do not qualify under the protected classes associated with intermediate or strict scrutiny analysis. *See supra* notes 67–70 and accompanying text (outlining rational basis test).

154. *See Wasatch Equal.*, 55 F. Supp. 3d at 1361 (explaining that class-of-one claims are those where no protected class is being harmed, such as snowboarders who are simply a group of athletes).

155. *See supra* notes 6971 and accompanying text.

156. *See Wasatch Equal.*, F. Supp. 3d at 1363–67 (demonstrating how District Court did not question any of Alta's asserted interests).

157. *See id.* at 1367 (outlining Alta's claim that its policy was based on certain business model).

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was already met.¹⁵⁸ Though Wasatch focused primarily on the presence of animus in its argument, Alta's supposedly legitimate purposes are questionable themselves.¹⁵⁹ The anti-snowboard policy may be reasonably related to the asserted interests, but there is enough evidence to question the legitimacy of the asserted interests to indicate that the court unfairly favored Alta.¹⁶⁰

A more equitable standard here would have been for the court to consider whether the asserted interests were rational given the circumstances of the specific case, as opposed to generally.¹⁶¹ For example, the court found Alta's claim regarding terrain issues to be legitimate, despite the lack of justification.¹⁶² Alta claimed that because certain terrains on its hills were inaccessible to snowboarders specifically, it had a legitimate reason to prevent snowboarders from using the resort altogether.¹⁶³ However, as Wasatch points out in its complaint, if Alta's terrain argument is accurate then logically Alta would also prohibit skiers who are unable to access the certain terrain from using the resort too, yet there is no such policy.¹⁶⁴ Furthermore, though Alta is unique because it tends to get more snowfall than any other resort in the area, there is nothing to indicate that the quality of snow at Alta is itself unique or less accessible to snowboarders than in comparable resorts that do allow snowboarders.¹⁶⁵

Next Alta claims that snowboarders cause abnormal dangers to skiers because snowboarders have a different line of sight and move down the hill differently.¹⁶⁶ However, there is clear evidence refut-

158. *See id.* (explaining that Wasatch described Alta's various claimed interests in Wasatch's complaint, hoping to demonstrate why interests were not valid).

159. *See infra* notes 161–69 and accompanying text.

160. *See supra* notes 156–58 (critiquing District Court's acceptance of Alta's questionable claims).

161. *See Wasatch Equal.*, 55 F. Supp. 3d at 1365–67 (illustrating how District Court accepted Alta's justifications on their face, rather than evaluating whether or not claims were tenable).

162. *See id.* at 1367 (showing how District Court accepted Alta's argument that terrain of Alta made some land more accessible to skiers than snowboarders without further analyzing whether this concern was legitimate).

163. *See* Complaint at 74, *Wasatch Equal. v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351 (D. Utah 2014) (No. 2:14CV00026) (articulating Alta's claims that snowboarders are unable to access all slopes on mountain).

164. *See id.* (arguing that Alta's reasoning is one-sided and unreasonable).

165. *See id.* at 45–46 (providing further proof that Alta's claim that snowboarders are unable to access all of mountain is unfounded).

166. *See id.* at 73, 83–84 (explaining that snowboarders ride sideways on their boards when going down a slope, whereas skiers face forwards at all times). Snowboarders move down the slopes differently than skiers and are said to have a blind spot that skiers do not. *See id.* Alta argued that snowboarding would create more danger and stress for skiers on the slopes. *See id.*

ing this claim.¹⁶⁷ Although Wasatch failed to present any counter-argument here, since it focused on animus instead, a study conducted by the National Ski Area Association in 2012 directly contradicts Alta's argument.¹⁶⁸ According to the study, only 6.4% of all collisions on the slopes involve skiers and snowboarders, with alpine skiers being three times more likely to be involved in collisions than snowboarders.¹⁶⁹ Furthermore, according to a previous study presented in 1993 at the Ninth International Symposium on Skiing Trauma and Safety, only 2.6% of collisions involving skiers also involved snowboarders, whereas 7.7% involved only skiers.¹⁷⁰ In sum, "[s]nowboarders don't appear to be making the slopes less safe for their skiing peers"¹⁷¹

Finally, Alta claims it is simply managing a business under a certain model, which the court accepted purely on the basis of "simple common sense."¹⁷² The court stated that "[a] business, even a skiing business on Forest Service property, enjoys the right to manage its business pursuant to its preferred business model, even if others disagree with it."¹⁷³ However, the issue in this case is not a mere disagreement over the business model, but rather a complaint that the model is an equal protection violation based on the model's arbitrary exclusion of a certain class of people.¹⁷⁴ The court glosses over this issue, giving complete deference to Alta.¹⁷⁵

The need to revise rational basis review has been recognized by other commentators, who have provided alternative approaches.¹⁷⁶

167. See Troy Hawks, *Facts About Skiing/Snowboarding Safety*, NAT'L SKI AREAS ASSOC. (Oct. 1, 2012), <https://www.nsaa.org/media/68045/NSAA-Facts-About-Skiing-Snowboarding-Safety-10-1-12.pdf> (presenting evidence that skiers are more dangerous to each other than snowboarders are to skiers).

168. See *id.* (providing research that shows snowboarders are not significant danger to skiers).

169. See *id.* (demonstrating that skiers are much more likely to collide with each other than with snowboarders).

170. See *id.* (demonstrating that skiers are not in more danger with snowboarders present on slopes).

171. *Id.* (concluding that snowboarders are not uniquely dangerous).

172. See *Wasatch Equal. v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351, 1367 (D. Utah 2014) (showing how the District Court did not provide a legal standard here, but rather evaluated the argument on the basis of common sense).

173. See *id.* (demonstrating District Court's deference to Alta in case).

174. See *id.* at 1356 (showing misguided reasoning, since the issue in this case is whether an arbitrary policy violates equal protection, not whether a business model is reasonable under common sense standards).

175. See *id.* at 1367 (demonstrating again defendant-favorable standards employed in case).

176. See Aaron Belzer, Comment, *Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 340-41 (2014) (arguing rational basis review needs to be revised because courts do not require defendants to provide evidence

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One extreme approach, offered by Aaron Belzer in *Putting the “Review” Back in Rational Basis Review*, argues that the burden of proof should rest on the defendant, not the claimant.¹⁷⁷ Under this approach, the defendant would have to show that the policy in question is supported by an actual “fact-based justification” for the policy’s resulting discrimination.¹⁷⁸ Belzer points out that this would only require a “minimally [more] intrusive judicial review” than is currently required, but the difference would likely bring more equitable results by holding defendants reasonably accountable.¹⁷⁹ Had this standard been applied in *Alta*, the District Court would have required *Alta* to provide more robust factual evidence for *Alta*’s claimed goals, casting more significant doubt onto *Alta*’s arguments.¹⁸⁰

A more conservative proposal is made in Neelum Wadhvani’s *Rational Reviews, Irrational Results*, in which Wadhvani advocates for courts to require more narrowly tailored justifications for discrimination by defendants.¹⁸¹ Wadhvani argues that courts should refuse to accept broad and “lofty” goals like “public health and safety,” because accepting such goals essentially ensures that defendants will always prevail under rational basis scrutiny.¹⁸² Rather, courts should require defendants to provide more specific goals that do not infringe on valid individual interests.¹⁸³ Although *Alta*’s claims were much narrower than “public health and safety,” they

in support of justifications for discrimination, and shifting burden back to defendants would alleviate this issue). See also Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 802–03 (2006) (stating that courts accept overly broad justifications for discrimination, and so standards must be narrowed).

177. See Belzer, *supra* note 176 (explaining that government would still have ability to make laws based on classifications, just that the government would have to show that there was reasonable justification for enacting such law).

178. See *id.* (asserting that government should have to show that justification was legitimate, not just conceptually reasonable).

179. See *id.* (calling this revised standard “put-your-money-where-your-mouth-is” rational basis review because it holds the government, the party enacting the laws, more accountable).

180. See *supra* notes 152–69 and accompanying text. Since many of *Alta*’s justifications seemed to lack factual basis, such as snowboarders imposing a unique danger to skiers, the Belzer standard would likely result in *Alta*’s arguments being struck down. See *id.*

181. See Wadhvani, *supra* note 176 (claiming that acceptance of broad justifications gives government unlimited discretion).

182. See *id.* (explaining that government can convince court that any justification is valid under rational basis scrutiny when overly-broad categories are accepted).

183. See *id.* (citing *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)).

were still broad under the circumstances which, according to Wadhvani's standard, the court should reject.¹⁸⁴ For example, Alta's claimed interest in protecting skiers from snowboarders is essentially a micro-level version of "public health and safety" in that Alta's interest is for the health and safety of resort guests specifically, as opposed to the health and safety of the general public.¹⁸⁵ The District Court accepted this justification despite a lack of evidence indicating that snowboarders pose any particular legitimate threat to skiers.¹⁸⁶ Again, a more equitable standard casts serious doubt on Alta's justifications since they lacked specificity and infringed on the individual interests of snowboarders wanting access to Alta's slopes.¹⁸⁷

D. Animus

The final issue in this case is whether animus should play a role in the District Court's analysis, which is the primary argument advanced by Wasatch.¹⁸⁸ Courts regard animus individually, and so accordingly this comment will discuss it individually as well.¹⁸⁹ However, as subsequent analysis will demonstrate, animus is inextricably intertwined with rational basis scrutiny.¹⁹⁰ The court explains that animus becomes a factor when animus is based upon membership in a protected class or a fundamental right is at issue, which warrants the application of intermediate or strict scrutiny analysis.¹⁹¹ Animus did not qualify under that standard, but the court also explained that animus may be considered if it is the *sole* motiva-

184. See *supra* notes 152–69 and accompanying text. Alta's claims may have applied specifically to ski resorts, but were broad in that they cited factors such as safety, accessibility, and customer demand as justifications without providing specific backing. See Wadhvani, *supra* note 177.

185. See *supra* notes 167–65 and accompanying text. Alta's claim focused primarily on public health and safety at Alta.

186. See *supra* notes 157–65 (demonstrating through statistical research that snowboarders pose no significant or unique threat to skiers, but rather skiers are more dangerous to each other).

187. See *supra* notes 152–69 and accompanying text. As Alta's claims were general, as applied to the context of ski resorts, they would be found overbroad under the Wadhvani approach. See Wadhvani, *supra* note 177.

188. See Wadhvani, *supra* note 177 (showing that Wasatch believes that Alta's policy is based on disdain for snowboarders above all else).

189. See *Wasatch Equal. v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351, 1367 (D. Utah 2014) (analyzing animus independently from rational basis).

190. See *infra* notes 191–97 and accompanying text. For the purposes of this comment, a new standard of analyzing animus would fall under the umbrella of a new standard for analyzing rational basis.

191. See *Wasatch Equal.*, 55 F. Supp. 3d at 1367–68 (describing proper role of animus).

tion for the discrimination practice, one of the rare instances in which a plaintiff will succeed despite a court's application of the rational basis framework.¹⁹² Since the court credited the arguments for the discriminatory practice, it held that there was no reason to consider animus.¹⁹³ However, Wasatch argued that there was no rational basis for the discriminatory practice, or at least that there was enough doubt to warrant a denial of Alta and the Forest Service's motions to dismiss.¹⁹⁴

If a plaintiff overcomes the rational basis hurdle, then there is enough evidence to indicate the presence of animus, yet the court again gives complete deference to Alta.¹⁹⁵ According to Susannah Pollvogt in *Unconstitutional Animus*, one way to show that animus is a motivating factor is to demonstrate direct bias by the creators of a policy.¹⁹⁶ With this strategy in mind, there appears to be a great deal of evidence indicating bias at Alta, yet the District Court failed to address this.¹⁹⁷ First, there is a clear history of general animus towards snowboarders from the skiing community that the court chose not to consider.¹⁹⁸ More importantly, the court discredited evidence related specifically to Alta, concluding that the evidence lacked a solid foundation and was insufficient to indicate clear animus in the decision to ban snowboarders.¹⁹⁹ Yet, the evidence paints a fairly clear picture of the animus present at Alta.²⁰⁰ Rather than dismissing the evidence because it did not demonstrate that animus was the explicit or sole impetus for a policy, courts could provide more equitable results if they consider evidence holistically.²⁰¹

192. See *id.* at 1368 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)) (providing further grounds for impact of animus).

193. See *id.* at 1368 (holding that Alta has sufficient arguments to satisfy rational basis).

194. See *supra* notes 152–69 and accompanying text.

195. See *Wasatch Equal.*, 55 F. Supp. 3d at 1367–69 (ruling that Wasatch's animus argument had no standing because sources were not strong enough).

196. See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 926 (2012) (describing methods for demonstrating animus in equal protection cases). Additionally, another method is to show that animus existed indirectly based on the structure of a policy. See *id.*

197. See *infra* notes 198–211 and accompanying text.

198. See *supra* notes 1–37 and accompanying text.

199. See *Wasatch Equal.*, 55 F. Supp. 3d at 1368 (holding that quotes from second-hand sources and social media outlets insufficient to indicate animus).

200. See *infra* notes 202–11 and accompanying text.

201. See *Wasatch Equal.*, 55 F. Supp. 3d at 1367–69 (dismissing sources cited by Wasatch because they did not directly link animus to creation of snowboard ban). However, cumulatively the evidence seems to indicate a clear presence of animus. See *id.*

Alta's ownership demonstrates clear animus.²⁰² Upon deciding to officially ban snowboarders in the 1980s, the Alta General Manager stated that he would never allow snowboarders or even anyone who uses snowboarding slang to ride on Alta's hills.²⁰³ Furthermore, a current owner of Alta stated that he knew that management was simply unwilling to consider admitting snowboarders.²⁰⁴ Finally, another owner and former Alta Town Mayor thought it strange and possibly unreasonable that Alta doesn't allow snowboarding when almost every other ski resort in the continent does.²⁰⁵

In addition to the snowboarders represented by Wasatch being "verbally assaulted and heckled" at Alta, there is also an indication of animus shown by video documentation of numerous experiences at Alta.²⁰⁶ Most telling is the comments made by skiers at Alta.²⁰⁷ One skier commented that he hated snowboarders simply because they are younger and ride differently than skiers.²⁰⁸

Another reiterated that sentiment, stating that snowboarders are just "too young and stupid," to be riding at Alta.²⁰⁹ Finally, another skier said that snowboarders are simply a different kind of patron and therefore should not be allowed to "intermix," with the skiers at Alta.²¹⁰ These additional comments evince the presence of animus that may not explicitly be the impetus for the snowboard ban, but clearly is at the foundation of Alta's business model.²¹¹

Of course, even if the District Court acknowledged the arguably clear presence of animus in this case, as Pollvogt points out, courts may nonetheless find a law constitutional if rational basis jus-

202. See Complaint, *supra* note 163, at 76–85 (providing quotes from current and former administrative personnel at Alta).

203. See *id.* at 76 (exemplifying attitudes regarding snowboarders).

204. See *id.* at 78 (exemplifying further the extent of animus).

205. See *id.* at 79 (arguing that ban is result of economic and social interests).

206. See *id.* at 82–85 (providing quotes from a video regarding snowboarders).

207. See *id.* at 83 (providing quotes from skiers at Alta).

208. See *id.* (exemplifying general hatred toward snowboarders at Alta). Specifically, the skier said, "[s]nowboarders are assholes, teenage assholes, out of control; they can't stop; they hit people, and then they don't even stop to see how they are . . . I hate snowboarders. They need to get off our mountain; get their own mountain. This is a skiers' mountain." See *id.*

209. See *id.* (demonstrating desire to perpetuate snowboarding ban based on social characteristics of snowboarders). The skier stated, "[s]nowboarders are the worst. That's why I don't ski anywhere else but here . . . I don't ever want to see a snowboarder near me . . . Snowboarders are too young and stupid . . . I would hate it if there were snowboarders." See *id.*

210. See *id.* (exemplifying desire to keep policy based on tradition of exclusion).

211. See *id.* at 83–84 (demonstrating general, but clear, animus at Alta).

tifications exist.²¹² Pollvogt explains that a heightened rational basis review may take place in such instances, but that defendants may still prevail if courts are overly deferential.²¹³ However, Pollvogt cautions that courts usually discredit these other rational basis arguments when clear animus is found, and so in *Alta* the existing animus would still likely prevail.²¹⁴

IV. CONCLUSION

The Utah District Court's ruling in *Alta* exemplifies the specific analysis typically used in equal protection claims that concern state involvement, land access, and rational basis review.²¹⁵ The District Court's reasoning would have been more equitable if it adopted the standards for review presented in this comment, especially considering the unique history of the feud between skiers and snowboarders, but the Court simply maintained the status quo.²¹⁶ These standards would give slightly more deference to plaintiffs in such cases, with the potential for more equitable results.²¹⁷ Unfortunately, the *Alta* court employed the more established standards, and thus granted *Alta* and the Forest Service's motions to dismiss, holding that *Wasatch* had no grounds to bring the claim.²¹⁸

At a basic level the *Alta* court's ruling will result in the perpetuation of the feud, by ensuring that ski-only resorts will have adequate grounds for defense when snowboarders try to bring claims for equal access against them.²¹⁹ Again, the District Court gave def-

212. See Pollvogt, *supra* note 196, at 929–30 (identifying misconceptions among legal authorities when evaluating role of animus under rational basis scrutiny).

213. See *id.* (describing how courts may evaluate justification more harshly when animus is present, but explaining how this standard still does not guarantee successful outcome for claimant).

214. See *id.* (explaining that courts usually give deference to claimants when animus is present).

215. See *supra* notes 95–211 and accompanying text.

216. See *supra* notes 95–211. See also *supra* notes 24–94 and accompanying text.

217. See *supra* notes 95–211 and accompanying text. If the suggested standards were employed in the *Alta* case, *Wasatch* would have stood a better chance in making its case against *Alta*'s policy, which appears to be discriminatory, and without valid justification.

218. See *supra* notes 92–204 and accompanying text. Because the District Court employed the typical standard of review, its analysis heavily favored *Alta* and the Forest Service, rendering *Wasatch*'s chances at success slim at best. It is precisely this kind of uneven playing field that this comment seeks to address.

219. See *supra* notes 92–204 and accompanying text. Also, ski resorts that do allow snowboarding now have a solid foundation to ban it if they please, resulting in more widespread discrimination.

erence to virtually every argument put forth by Alta and the Forest Service, so there is ample room for other defendants to make similar arguments.²²⁰ Even if future plaintiffs are able to satisfy the state action element and overcome a Property Clause defense (highly unlikely given this ruling), they are unlikely to prevail on rational basis framework application given the court's deference toward Alta's seemingly weak defenses.²²¹ The real tragedy of this case is the unlikelihood of another claim, as Alta is the lone member of the three remaining ski-only resorts that leases public land allowing for an equal protection claim.²²² As a result, snowboarders likely lost their only chance at legally gaining equal access to these exclusive and discriminatory resorts.²²³

On the more general level of equal protection land access claims involving state action, this case will provide greater footing for defendants to prevail.²²⁴ Although state action claims can cause confusion, this ruling clearly demonstrates that courts generally favor the defendants.²²⁵ The court's analysis and final conclusion indicate that a claimant would essentially have to show (1) that the government is all but writing the discriminatory policy to constitute state action, (2) that the policy is extraordinarily discriminatory under rational basis scrutiny, and (3) that the policy is outside the scope of the government's seemingly infinite discretion under the Property Clause.²²⁶ This barrier seems virtually insurmountable, and so claimants in such cases should have very low expectations when assessing the likelihood of success.²²⁷ Defendants, on the other hand, should expect to prevail under almost any circum-

220. *See supra* notes 92–204 (showing that Court gave deference to Alta and Forest Service's defenses).

221. *See supra* notes 92–204 (demonstrating extremely high bar claimants face in cases like the current Alta case).

222. *See Barber, supra* note 16; Whitehurst, *supra* note 16 (both explaining that Alta is only of three resorts that leases public land, justifying an equal protection claim).

223. *See supra* note 222 and accompanying text. Since Alta is the only ski-only resort with a state connection, it is the only resort susceptible to an equal protection claim. *See id.*

224. *See id.* (suggesting virtually impossible likelihood that claimants will win in such cases under prevailing standards).

225. *See Wasatch Equal. v. Alta Ski Lifts, Co.*, 55 F. Supp. 3d 1351, 1356 (discussing nature of state action requirement for equal protection claims).

226. *See supra* notes 95–211 and accompanying text. Though this may slightly overstate the actual requirements of a claimant in such cases, it illustrates the extremely unequal playing field that claimants will face.

227. *See supra* notes 95–211 and accompanying text (demonstrating that claimants face high barrier and thus have little likelihood of getting past motions to dismiss).

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stances.²²⁸ Therefore, unless the recommended standards or others that are more favorable to plaintiffs are applied in equal protection land access claims, barring the requirement of intermediate or strict scrutiny, there can be an expectation of unequal protection.²²⁹

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228. *See supra* notes 95–211 and accompanying text (demonstrating that defendants have clear upper hand in such cases).

229. *See supra* notes 95–211 and accompanying text. If the prevailing standards continue, then claimants will usually fail, which will perpetuate instances of discrimination similar to the *Alta* case.

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