

Essays

SECOND AMENDMENT ANIMUS

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ABSTRACT—The Supreme Court’s animus doctrine has proven surprisingly adaptive. The Court has employed the doctrine not just in the typical equal protection context from which it arose, but also to claims that religious conduct or beliefs are the target of legislative hostility. Animus law and scholarship are flourishing after several invocations of the doctrine in the high Court’s recent Terms. Coinciding with these developments, gun-rights advocates and other supporters have increasingly railed against the hostility with which they believe government officials are treating the Second Amendment. This Essay connects these developments, mapping three types of gun-supporter claims that sound in an animus register: claims about hostility toward guns, gun owners, and gun rights. It argues, however, that Second Amendment doctrine should not incorporate the blossoming animus rationale into its methodological framework. Typical gun laws are not likely to arise from legislative hostility toward guns, their owners, or gun rights, and the customary Second Amendment framework employing motive-blind means–end scrutiny is sufficient to weed out any anomalous laws that may arise from improper motive.

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INTRODUCTION

Government action undertaken for an impermissible purpose¹ is ordinarily unlawful.² A rich literature attempts to make sense of the doctrinal and normative significance of bad legislative intent.³ Many of those debates

¹ In this Essay, I use the terms “purpose,” “intent,” and “motive” interchangeably. Though some scholars argue the terms are distinguishable in different ways, none of those proposed distinctions are relevant to this Essay’s arguments. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 426 n.40 (1996) (using the terms interchangeably and noting that the Supreme Court often has as well).

² The Supreme Court itself has not always been clear on whether improper motive renders a challenged action per se unconstitutional or whether it merely heightens the scrutiny that a court should apply. See Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 528 (2016) (describing these differing views).

³ See, e.g., Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2149–54 (2019) (suggesting how courts might scrutinize legislative process to sniff out bad legislative intent); Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1472 (2018) (arguing that discriminatory legislative intent corrodes the legitimacy of government); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1785–90 (2008) (tracing the history of purpose-based judicially enforced restrictions on legislative power and arguing that the Supreme Court has ignored precedential limits on its own authority to scrutinize purpose); Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 195–97 (2008) (justifying judicial review of legislative motive through a philosophical lens); Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1, 3–4 (2007) (arguing that the difficulty of determining legislative purpose generally favors greater focus on the effects of legislation to determine constitutional validity); Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 846 (arguing similarly that courts considering constitutional challenges to election laws should scrutinize effects instead of purposes); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 301–02 (1997) (noting a trend in Supreme Court jurisprudence toward greater scrutiny of legislative purpose and proposing possible ways forward); Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 17–26 (exploring limits on the constitutional significance of legislative motive); J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 954 (1978) (arguing that bad legislative motive is constitutionally relevant because of its potentially unfair impact on the social contract); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*,

turn on practical and conceptual concerns: the difficulty of discerning purpose;⁴ how to distinguish purpose, motive, and intent;⁵ whether it is even coherent to speak of purpose for multimember bodies;⁶ and so on.⁷ Other debates turn on the role that the concept of intent does or should play in adjudicating constitutional cases.⁸ Yet, despite the fact that the Supreme Court sometimes clearly does assess motive in constitutional cases,⁹ far less scholarship has focused on just what motives or purposes actually are considered or ought to be considered improper or invalid.¹⁰

Part of the reason for that lacuna is no doubt the multiplicity of bad reasons available to government actors. Just as the range of permissible government objectives is broad and diffuse,¹¹ there are likewise many possible forbidden motives. And just as permissible government ends are inferred or derived from various sources—grants of legislative powers, the purposes of governmental authority, the conferral of rights themselves—the

52 N.Y.U. L. REV. 36, 39–41 (1977) (attempting to reconcile conflicting uses of bad motive and impact in Supreme Court jurisprudence); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1208 (1970) (arguing that bad motive’s relevance depends on the substantive constitutional challenge); Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 102 (criticizing Professor John Hart Ely’s article on legislative motive (citing Ely, *supra*, at 1254–61, 1281–82)).

⁴ See Ely, *supra* note 3, at 1220 (“Anyone who concludes that legislative or administrative motivation is sometimes relevant to constitutional questions will inevitably become concerned with the methodology by which such motivation is to be determined.”). *But see* Bhagwat, *supra* note 3, at 322 (arguing that it is easier for courts to determine legislative purposes than to assess governmental means).

⁵ Kagan, *supra* note 1, at 426 n.40 (noting the difficulty of distinguishing these concepts).

⁶ Robert C. Farrell, *Legislative Purpose and Equal Protection’s Rationality Review*, 37 VILL. L. REV. 1, 11 (1992) (suggesting that understanding purpose as the aggregation of individual motivations means “the very idea of legislative purpose is incoherent”).

⁷ See Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 925–26 (1978) (listing a series of eleven nonexhaustive questions about the role of motive in constitutional analysis).

⁸ Fallon, *supra* note 2, at 529 (arguing that, as a normative matter, bad intent ought to play a minor role in constitutional rights adjudication); Kagan, *supra* note 1, at 414 (arguing that, as a descriptive matter, most of First Amendment free-speech law has developed as a way to smoke out illicit motive).

⁹ Sometimes the Court assesses motives in constitutional cases despite its occasional disavowal of that notion. *Compare, e.g.,* *United States v. O’Brien*, 391 U.S. 367, 382–83 (1968) (disclaiming an interest in legislative motive when deciding constitutional cases), *with* Fallon, *supra* note 2, at 526 n.15 (citing examples of motive-like inquiry despite *O’Brien*).

¹⁰ There are some exceptions. *E.g.,* Hasen, *supra* note 3, at 846 (stating that “by ‘bad’ intent in the election law area, I mean a legislative intent to protect incumbents, a political party, or the two major political parties, from political competition”); Kagan, *supra* note 1, at 428–30 (detailing impermissible motives in the First Amendment context).

¹¹ Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 937 (1988) (finding a broad variety of sources for potential government interests, including “rights described in the constitutional text, penumbras, and means to constitutionally specified ends”).

list of bad reasons can also be wide-ranging.¹² To be sure, few would argue legislative motive is relevant to every constitutional question, or even to every constitutional provision,¹³ but when it does become relevant, the types of motives deemed impermissible will often depend on the underlying right or interest implicated.¹⁴

But that is not always the case. Some illicit motives transcend doctrinal boundaries.¹⁵ One transsubstantive type of improper motive, argues Professor Cass Sunstein, is the “naked preference,” which he defines as the distribution of benefits and burdens based on nothing more than the raw political power of favored groups.¹⁶ Professor Sunstein in fact suggests that this notion of improper purpose is close to a comprehensive constitutional theory that explains or describes the bulk of constitutional-rights protection.¹⁷ A related type of bad government motive that transcends particular contexts—and one this Essay focuses on—is government animus.¹⁸

Animus doctrine bars the government from acting out of mere dislike—a bare desire to harm—whether in dealing with zoning ordinances,¹⁹

¹² See Bhagwat, *supra* note 3, at 331.

¹³ See Fallon, *supra* note 2, at 525–27 (identifying certain constitutional domains in which the Supreme Court has searched for motive).

¹⁴ See Bhagwat, *supra* note 3, at 330–31 (identifying various values that prohibit certain government purposes, such as anticaste values in equal protection, anti-parochialism in the Dormant Commerce Clause, and anti-ignorance and antiorthodoxy in the Free Speech Clause).

¹⁵ And some illicit motives that probably ought to extend beyond doctrinal boundaries—like invidious race discrimination—occasionally do not. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that “[s]ubjective intentions,” such as law enforcement’s motivations based on race, “play no role in ordinary, probable-cause Fourth Amendment analysis”).

¹⁶ Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689–91 (1984).

¹⁷ *Id.* at 1693 (arguing that the naked-preference prohibition is “the best candidate for a unitary conception of the sorts of government action that the Constitution prohibits”).

¹⁸ Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 134 (2018) (arguing that “animus cases represent, however haltingly or incompletely, a basic principle of constitutional law, namely, that officials act illegitimately when their conduct is based on wrongful intentions”); Bhagwat, *supra* note 3, at 314 (identifying animus as one type of improper purpose courts have looked to when invalidating statutes on grounds of motive); *cf.* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 900 (2012) (“As a concept that cuts across the tiers-of-scrutiny framework, the prohibition against basing laws in animus represents the broader and more universal commitments of the Equal Protection Clause . . .”).

¹⁹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (holding that requiring a special use permit for a home for the intellectually disabled violated the Equal Protection Clause).

government benefits,²⁰ antidiscrimination law,²¹ or religious practices,²² among other government actions. Hostility, in this sense, is antithetical to the legislature’s deliberative obligations to act for public purposes to serve the public good.²³ In just the last few years, the Supreme Court has invoked animus in a variety of settings, including recent “high-stakes constitutional rights adjudication.”²⁴

In 1973, the Supreme Court first struck down a law on what would come to be understood as an animus rationale.²⁵ In *U.S. Department of Agriculture v. Moreno*, the Court held unconstitutional an amendment to the Food Stamp Act that “exclude[d] from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household.”²⁶ The amendment tragically affected many poor individuals living in nontraditional arrangements, including the plaintiffs who brought the successful challenge under the Fourteenth Amendment’s Equal Protection Clause.²⁷

In striking down the provision, the Court acknowledged that in a typical equal protection case, classifications for nonsuspect classes receive only minimal rationality review.²⁸ But here the provision could not be squared with the purposes of the Food Stamp Act itself,²⁹ and the legislative history

²⁰ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (striking down a law that excluded from food stamps those living in a household with unrelated members).

²¹ *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (striking down amendment to the Colorado constitution that prohibited lesbian, gay, or bisexual status, conduct, or activity from, among others, serving as a ground for a nondiscrimination claim).

²² *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1732 (2018) (overturning a state court adjudication against a cakeshop owner on the grounds that commissioners exhibited religious hostility toward the baker).

²³ Unsurprisingly, many of those focusing on government purposes emphasize that public purposes are the antithesis of bad ones, whether characterized as animus, naked preferences, or forbidden legislative intent generally. WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* 2 (2017); Sunstein, *supra* note 16, at 1690 (“The constitutional requirement that something other than a naked preference be shown to justify differential treatment provides a means, admittedly imperfect, of ensuring that government action results from a legitimate effort to promote the public good rather than from a factional takeover.”); Fallon, *supra* note 2, at 530 (arguing that legislators have deliberative obligations “not to pursue constitutionally forbidden aims or to take official actions based on constitutionally forbidden motives”).

²⁴ William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 155 (2019) (identifying cases concerning lesbian and gay rights and President Trump’s travel ban as examples).

²⁵ See Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and “Bare Desire to Harm,”* 64 CASE W. RES. L. REV. 1045, 1060 (2014) (describing *Moreno* as the first in the line of “bare desire to harm cases”).

²⁶ 413 U.S. 528, 529 (1973).

²⁷ *Id.* at 538–40 (Douglas, J., concurring) (describing the dire financial and living conditions of those who brought the lawsuit).

²⁸ *Id.* at 533 (majority opinion).

²⁹ *Id.* at 533–34.

showed it was “intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”³⁰ That was the problem. If equal protection means anything, the Court said, “it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”³¹ This conception of animus—as a bare desire to harm—would come to dominate the case law and literature. Throughout the next several decades, the Court would use the animus rationale to strike down laws targeting the intellectually disabled³² and gay and lesbian individuals³³ for disfavored treatment, without elevating either group to suspect or quasi-suspect status.

Animus as a theoretical rationale for improperly motivated government conduct is migrating.³⁴ In Supreme Court opinions spanning the last several decades, the concept has leaped from equal protection doctrine³⁵ to free exercise jurisprudence³⁶ to Establishment Clause doctrine³⁷ and then back again into the equal protection context.³⁸ The concept of animus truly “is having its moment in the sun.”³⁹ Scholarship on animus theory is also flourishing.⁴⁰ Scholars have analyzed and critiqued the Court’s development

³⁰ *Id.* at 534.

³¹ *Id.* (emphasis omitted).

³² *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985).

³³ *United States v. Windsor*, 570 U.S. 744, 774 (2013); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996). Similarly, the Court in *Obergefell v. Hodges*, though not relying on traditional animus analysis of legislative intent, emphasized that bans on same-sex marriage “teach[] that gays and lesbians are unequal” and “demean[] gays and lesbians” by “lock[ing] them out of a central institution of . . . society.” 135 S. Ct. 2584, 2601–02 (2015).

³⁴ Araiza, *supra* note 24, at 163 (noting that the doctrine “has migrated into other constitutional rights areas”).

³⁵ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 532–33 (1973).

³⁶ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1732 (2018); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526, 547 (1993) (striking down a local ordinance that targeted religious meat slaughter).

³⁷ *Trump v. Hawaii*, 138 S. Ct. 2392, 2403, 2420–23 (2018) (upholding a travel ban on nationals of several countries and rejecting plaintiff’s allegation that the ban constituted religious animus).

³⁸ *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1915–16 (2020) (rejecting the claim that termination of the Deferred Action for Childhood Arrivals program was motivated by unconstitutional animus).

³⁹ Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 215 (2019).

⁴⁰ William Araiza has written more prolifically on the topic in recent years than any other commentator. See ARAIZA, *supra* note 23; Araiza, *supra* note 24; William D. Araiza, *Call It by Its Name*, 48 STETSON L. REV. 181 (2019) [hereinafter Araiza, *Call It by Its Name*]; William D. Araiza, *Response: Animus, Its Critics, and Its Potential*, 48 STETSON L. REV. 275 (2019); William D. Araiza, *Objectively Correct*, 71 FLA. L. REV. F. 68 (2020); William D. Araiza, *Regents: Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983 (2021). Many other authors have also taken renewed interest in the topic, including those interested in applying the topic in new settings. See, e.g., Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1188–89, 1218–24 (2020) (developing a

and application of the doctrine in various settings.⁴¹ Yet the animus doctrine's place in constitutional law remains hazy. It has been variously described as "undertheorized,"⁴² "confusi[ng],"⁴³ "amorphous,"⁴⁴ "descriptively misleading,"⁴⁵ and "substantively problematic."⁴⁶ Litigants have leveraged this lack of clarity to argue for animus-based invalidation of laws on quite novel theories.⁴⁷

Another development in constitutional law is occurring alongside this growth in the doctrinal and scholarly focus on animus: increasingly strident claims that government action to prevent gun violence is motivated by hostility to the Second Amendment.⁴⁸ As one example, a recent lawsuit by gun manufacturer Smith & Wesson claimed that an administrative subpoena for select business records violated the Second Amendment because it "was motivated by an intent to infringe upon Smith & Wesson's Second Amendment rights and chill its exercise of those rights."⁴⁹ The subpoena is unconstitutional, the manufacturer contended, because it arose from an "improper motive to undermine Second Amendment rights."⁵⁰

This Essay connects these developments in animus jurisprudence and Second Amendment advocacy and litigation. It questions whether courts developing Second Amendment doctrine ought to borrow from animus doctrine in fleshing out the governing constitutional framework for Second

theory of procedural animus that would invalidate laws that create undue procedural hurdles for out-groups to vindicate their legal rights).

⁴¹ See, e.g., Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 258–60 (critiquing the Court's invocation and application of the animus doctrine in *Masterpiece Cakeshop*); Kendrick & Schwartzman, *supra* note 18, at 133–36 (same); Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 677–78 (2014) (arguing against animus doctrine due to its putatively negative effects on public discourse); Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195, 195–98 (2019) (critiquing animus doctrine on similar grounds).

⁴² Araiza, *supra* note 24, at 171.

⁴³ Pollvogt, *supra* note 18, at 929.

⁴⁴ Conkle, *supra* note 41, at 199.

⁴⁵ Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1322 (2018).

⁴⁶ *Id.*

⁴⁷ See Araiza, *Call It by Its Name*, *supra* note 40, at 191–92 (describing several cases stretching the concept).

⁴⁸ See *infra* Part I.

⁴⁹ Complaint at 33–34, *Smith & Wesson Brands Inc. v. Grewal*, No. 20-19047 (D.N.J. Dec. 15, 2020); see also *id.* at 34 ("The Subpoena and related investigation are motivated by the Attorney General's desire to prevent New Jersey residents from exercising their Second Amendment rights, and to chill citizens' exercise of those rights, by harassing and intimidating Plaintiffs.").

⁵⁰ *Id.* at 31.

Amendment challenges.⁵¹ As the Smith & Wesson lawsuit makes clear, one way to understand the claims coming from gun-rights quarters is grounded in *animus*. Claims about government animus in the Second Amendment space happen at three levels: (1) as animus against guns, (2) as animus against gun owners, and (3) as animus against gun rights. Consider Ninth Circuit Judge Lawrence VanDyke's recent opinion dissenting from the denial of rehearing en banc in *Mai v. United States*, which aptly shows why these types of claims are best characterized as grounded in a concern about animus:

To the rational observer, it is apparent that our court just doesn't like the Second Amendment very much. We always uphold restrictions on the Second Amendment right to keep and bear arms. Show me a burden—any burden—on Second Amendment rights, and this court will find a way to uphold it. . . . There exists on our court a clear bias—a real prejudice—against the Second Amendment *and* those appealing to it. That's wrong. Equal justice should mean *equal* justice.⁵²

This Essay adds to the animus literature and treads new ground in two ways. First, in Part I, it identifies and assesses the types of animus claims that arise in Second Amendment litigation, advocacy, and scholarship. These claims invoke animus against guns, gun owners, and gun rights themselves. Second, in Part II the Essay explains and defends the irrelevance of improper motive to Second Amendment adjudication. It also raises questions about the coherence of speaking about animus against rights and concludes that the Second Amendment is not sensitive to the type of harms animus doctrine seeks to prevent. The nature of the government's legitimate and compelling interest in public safety means regulations often inevitably butt up against the right to keep and bear arms; there's nothing sinister or ill intentioned about that. The Essay concludes that animus should play no role in Second Amendment doctrine. The Second Amendment is not motive sensitive, and courts should reject these animus incantations.

I. ANIMUS IN THE SECOND AMENDMENT

In the context of Second Amendment rhetoric and advocacy, there are three types of animus claims to disentangle: (1) animus against guns, (2) animus against gun owners, and (3) animus against gun rights. The first type of argument claims that legislators act out of hostility for the

⁵¹ See Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333, 340 (2021) (exploring how and when constitutional borrowing is justified in the context of Second Amendment doctrine).

⁵² 974 F.3d 1082, 1104–05 (9th Cir. 2020) (VanDyke, J., dissenting from the denial of rehearing en banc) (footnotes and citations omitted) (first emphasis added).

constitutional instrumentality itself; the second sounds in the nature of traditional animus claims, of differential treatment against politically unpopular groups; and the third consists of claims about the right itself, that certain judicial or political elites denigrate and discriminate against the exercise of the right. Weaving these claims together is the premise that various governmental actors are motivated not by good faith concerns about safety and security but by some sort of bad faith—a type of hostility or animus. This Part briefly disaggregates and provides examples of each of these claims by examining animus against guns and gun owners in the first Section, and then animus against gun rights in the following Section.

A. Animus Against Guns and Their Owners

1. Hoplophobia Claims

One set of animus claims invokes hostility to guns themselves. “[T]oday there are some people who find the mere sight of a firearm objectionable or terrifying.”⁵³ These people, described as those “who have emotional fears of guns,”⁵⁴ are often referred to as “hoplophobes” in pro-gun circles.⁵⁵ As one gun store owner explained to self-described hoplophobe and journalist Philip Weiss, “[b]laming a gun for its misuse” is to irrationally imbue the instrument with agency; he called such a leap “modern witchcraft.”⁵⁶ According to this view, people who think guns are evil are just plain irrational.⁵⁷

Those who make these accusations think this antigun bias colors policymaking and leads to unreasonableness or worse. When legislators make law from a place of hostility toward lethal weaponry, the argument goes, it threatens the diminution of the right itself. As Judge James Ho said, dissenting from the denial to rehear en banc a case involving the federal ban on certain interstate handgun sales, “Law-abiding Americans should not be conflated with dangerous criminals. Constitutional rights must not give way

⁵³ David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 218 (2018).

⁵⁴ David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts*, 68 ALB. L. REV. 305, 335 (2005).

⁵⁵ *Id.* at 335 n.134 (“The precise term for such fears is ‘hoplophobia’ (fear of armed citizens.)”); see also Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 56 (2002) (quoting a critic of a gun-free policy at the University of Utah who called the university’s president a “hoplophobe”).

⁵⁶ Philip Weiss, *A Hoplophobe Among the Gunnies*, N.Y. TIMES (Sept. 11, 1994), <https://www.nytimes.com/1994/09/11/magazine/a-hoplophobe-among-the-gunnies.html> [<https://perma.cc/UK3Z-G5X3>].

⁵⁷ *Id.* (“There is . . . a hidden agenda among what I call gun prohibitionists who want to disarm the American people, and they’re selling the greater number of unknowing Americans that guns all by themselves are evil . . .”).

to hoplophobia.”⁵⁸ In his view, banning such interstate gun sales could only come from antigun animus; legislators were not acting out of public regard for public safety but out of an irrational bias against guns themselves.⁵⁹

2. *Second-Class-Citizen Claims*

Next, some activists and advocates argue that gun owners are discriminated against in government action and treated as second class, usually in response to laws or regulations that affect the ease of gun use or access. Consider, for example, the statement of a gun store owner who sued (and partially prevailed) over a COVID-19-related shutdown order in Massachusetts: “We are being treated like second-class citizens because we sell guns.”⁶⁰ Speaking of the precautions imposed on gun shops after a judge otherwise ruled in their favor, the owner lamented, “we feel that [the law] is treating us differently.”⁶¹

Some commentators similarly argue that “[g]un owners have been subjected to vicious stereotypes” and are, in this sense, “no different from other groups who petition the courts for the protection of their rights.”⁶² Those “other groups” for whom the state has shown disrespect—and to whom some explicitly compare contemporary gun owners—are often historically disadvantaged and repressed groups, like Black Americans fighting for racial equality.⁶³ Often, the relationship between the Civil Rights Movement and gun owners is drawn expressly.⁶⁴

Some of these advocates clothe themselves in the traditional animus language. For instance, the Mountain States Legal Foundation, an assertive gun-rights-advocacy organization, characterized a Boulder, Colorado law raising the minimum age for firearm possession in city limits to twenty-one

⁵⁸ *Mance v. Sessions*, 896 F.3d 390, 398, 405 (5th Cir. 2018) (Ho, J., dissenting from the denial of rehearing en banc).

⁵⁹ *See id.*

⁶⁰ John Hilliard, *Mass. Gun Shops Reopen: ‘Second Amendment Should Not Be Suspended During a Health Pandemic,’* BOS. GLOBE (May 9, 2020), <https://www.bostonglobe.com/2020/05/09/metro/gun-shops-reopen-second-amendment-should-not-be-suspended-during-health-pandemic/> [https://perma.cc/EU88-BWB8].

⁶¹ *Id.*

⁶² Alice Marie Beard, *Gay Rights Strengthen Gun Rights*, 57 S. TEX. L. REV. 215, 236 (2016).

⁶³ Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223, 224 (2014) (“[J]ust as the struggle for racial equality did not end with *Brown v. Board of Education*, the effort to establish the Second Amendment as a normal part of the Bill of Rights was never going to unfurl a ‘Mission Accomplished’ banner just because the Supreme Court declared that the Second Amendment was a fundamental individual right on par with the others.” (citation omitted)).

⁶⁴ *See, e.g., Massive Gun Resistance*, WALL ST. J. (Apr. 12, 2013), <https://www.wsj.com/articles/SB10001424127887324600704578402760760473582> [https://perma.cc/YFQ4-BUMR] (arguing that the “main difference” between Southern resistance to *Brown* and purported resistance to *Heller* is that now “the media are cheering on the politicians thumbing their noses at the law of the land”).

as “a blatant act of discrimination against a political minority.”⁶⁵ Indeed, pro-gun-rights politicians have repeatedly proposed or passed various “nondiscrimination” laws to protect gun owners. For example, in 2016, Maine passed “An Act To Ensure Nondiscrimination against Gun Owners in Certain Federally Subsidized Housing,” a law that forbids landlords leasing federally subsidized housing from imposing restrictions on lawful gun possession or use in rental units.⁶⁶ And organizations have lobbied for broader protections for industry participants.⁶⁷ Consider one proposal:

The Firearms Industry Nondiscrimination (FIND) Act provides that it shall be an unlawful discriminatory practice for any person to refuse to provide any goods or services of any kind, or to terminate an existing business relationship with, or otherwise discriminate against an individual or trade association, solely because the business or individual is engaged in the lawful commerce of firearms or ammunition products.⁶⁸

These arguments assume that gun regulations are not intended for the ostensibly compelling interest in preventing gun violence, but simply as a way to harass and demean gun owners.⁶⁹ As (fictional character) Ainsley Hayes put this claim to someone in favor of gun regulation: “Your gun control position doesn’t have anything to do with public safety, and it’s certainly not about personal freedom. It’s about you don’t like people who do like guns. You don’t like the people.”⁷⁰

B. *Animus Against Gun Rights*

Like impermissible government hostility toward unpopular minorities, animus claims in the Second Amendment context also often involve purported hostility toward the exercise of the right—of “government animus

⁶⁵ *Caldara v. City of Boulder: Our Freedom Includes the Right to Self-Defense*, MOUNTAIN STATES LEGAL FOUND., <https://mslegal.org/cases/caldara-v-city-of-boulder/> [<https://perma.cc/3MSD-5KYW>].

⁶⁶ 2016 Me. Legis. Serv. S.P. 620 (West) (codified at 14 ME. REV. STAT. ANN. tit. 14, § 6030-F (West 2020)).

⁶⁷ Jonathan Shorman & Nicole Asbury, *Kansas Bill Bans Discrimination Against Firearms Industry. It Faces an Uncertain Future*, WICHITA EAGLE (Feb. 19, 2020), <https://www.kansas.com/news/politics-government/article240427586.html> [<https://perma.cc/C9ZQ-79CW>] (“The National Shooting Sports Foundation has pursued the anti-discrimination bill in legislatures across the country.”).

⁶⁸ *Firearms Industry Nondiscrimination Act (FIND Act)*, CONG. SPORTSMEN’S FOUND., <http://congressionalsportsmen.org/policies/state/firearms-industry-nondiscrimination-act-find-act> [<https://perma.cc/5GPT-8LTX>].

⁶⁹ MATTHEW J. LACOMBE, FIREPOWER: HOW THE NRA TURNED GUN OWNERS INTO A POLITICAL FORCE 53 (2021) (quoting an NRA publication as decrying gun regulation proposals in the wake of the Columbine massacre as nothing more than a “hateful and bigoted war . . . against American firearm owners”).

⁷⁰ *The West Wing: In This White House* (NBC television broadcast Oct. 25, 2000).

toward the constitutional entitlement” itself.⁷¹ These arguments that the Second Amendment has been downgraded from a fundamental constitutional guarantee to a “second-class” right are increasingly common.⁷² But this is a specific type of second-class claim. After all, courts or legislators could be treating the right as second class through ineptitude⁷³ or plain neglect.⁷⁴ But the *animus* type of the second-class claims points to improper motive as the cause of the alleged disparity.

In cataloguing various types of second-class claims in the setting of court decisions, Professor Timothy Zick describes an animus type of assertion in his classification of “ideological” claims.⁷⁵ These are arguments about “the tone, tenor, or hostility of lower court decisions,” which claim “judges have viewed and treated the Second Amendment as ‘second-class’ owing to partisan attitudes or personal biases.”⁷⁶ Although Professor Zick focuses on a framing of claims about the views of courts or judges, the same type of allegations have been leveled against policymakers as well.⁷⁷

Judges are not just the target of such claims, but also occasionally the accusers. Here’s Justice Clarence Thomas dissenting from the Court’s decision not to review a Ninth Circuit opinion upholding a waiting period before a handgun purchase: the court of appeal’s analysis “is symptomatic of the lower courts’ general failure to afford the Second Amendment the respect due an enumerated constitutional right.”⁷⁸ Even more colorfully, Fifth Circuit Judge Don Willett recently claimed the Second Amendment is

⁷¹ Joseph Blocher, *Bans*, 129 YALE L.J. 308, 370 (2019).

⁷² Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CON. L.Q. 621, 627 (2019) (creating a typology of second-class right claims); Joseph Blocher & Eric Ruben, “*Second-Class*” *Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. (forthcoming March 2022) (on file with journal) (documenting and categorizing various types of claims that the Second Amendment is being treated as a disfavored right).

⁷³ Something like this was almost part of New York City’s defense in the Supreme Court to its regulation that did not allow gun owners with a premises license to take their firearms to a second home outside the City. Transcript of Oral Argument at 59, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280) (“I think that the—the question on second homes, there, Petitioners have identified a difficult application of our former rule that wasn’t really contemplated when the rule was—was adopted.”).

⁷⁴ *Rogers v. Grewal*, 140 S. Ct. 1865, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) (contending that the Court would have reviewed similar restrictions on free-speech or abortion rights but “faced with a petition challenging just such a restriction on citizens’ Second Amendment rights, the Court simply looks the other way”).

⁷⁵ Zick, *supra* note 72, at 632–33.

⁷⁶ *Id.* at 632.

⁷⁷ Blocher & Ruben, *supra* note 72 (manuscript at 39) (“A close relative to claims about widespread judicial disrespect of the Second Amendment is the claim that policymakers (legislatures, city governments, and so on) are disrespecting the right to keep and bear arms.”).

⁷⁸ *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari).

“spurned as peripheral,” “snubbed as anachronistic,” and “scorned as fringe” by those who disagreed with his understanding of its scope.⁷⁹

Just as judges level these claims against the Second Amendment’s perceived legislative opponents, so too do some advocates, commentators, and politicians. Some, for example, argue that “the Democratic Party is increasingly hostile to the Second Amendment.”⁸⁰ Others argue that particular localities are.⁸¹ In opposing a bill that would expand background checks to private sales, the NRA intoned: “This legislation isn’t about making Americans safer; it’s about forwarding an anti-gun agenda that seeks to restrict firearm ownership in America—as much as they can, however they can, and as soon as they can.”⁸² Some scholars have connected this kind of rhetoric directly to that employed in animus cases.⁸³

A few Second Amendment cases have also revolved around animus-like challenges. In *Chicago Gun Club, LLC v. Village of Willowbrook*, the Village of Willowbrook denied a special-use permit and variance that would have enabled a luxury gun store to be built in the 8,500-person community.⁸⁴ The developers of the proposed gun store sued, claiming that the decision violated the Second Amendment; they detailed what they described as procedural irregularities in the village’s consideration of the proposal and hostile statements by residents,⁸⁵ two evidentiary indicia the Supreme Court

⁷⁹ *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J., dissenting from the denial of rehearing en banc).

⁸⁰ Jacob Sullum, *Democrats Reveal Their Hostility to the Second Amendment*, REASON (June 26, 2019, 12:01 AM), <https://reason.com/2019/06/26/democrats-reveal-their-hostility-to-the-second-amendment/> [<https://perma.cc/FYW2-MZ88>].

⁸¹ Brian McCombie, *There Are Many Second Amendment Supporters in California*, NAT’L RIFLE ASS’N (Feb. 13, 2020), <https://www.americas1stfreedom.org/articles/2020/2/13/there-are-many-second-amendment-supporters-in-california> [<https://perma.cc/9T3S-3P96>] (“The current political leadership in California has a well-earned reputation for outright hostility to the Second Amendment and to those Golden State citizens who wish to exercise their right to keep and bear arms.”); *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1139 n.25 (S.D. Cal. 2019) (arguing that California’s “firearm laws are so complex as to obfuscate the Second Amendment rights of a citizen who intends to abide by the law”), *aff’d*, 970 F.3d 1133 (9th Cir. 2020), *reh’g en banc granted and opinion vacated*, 988 F.3d 1209 (9th Cir. 2021); Walter Williams, *Virginia Gun Owners in a Second Amendment Battle*, TRIB LIVE (Dec. 27, 2019, 7:00 PM), <https://triblive.com/opinion/walter-williams-virginia-gun-owners-in-a-second-amendment-battle/> [<https://perma.cc/Z9RT-KGAB>] (“I am proud of my fellow Virginians’ response to the attack on their Second Amendment rights.”).

⁸² *Senate to Take Up Anti-Gun Legislation Soon!*, NAT’L RIFLE ASS’N (Apr. 5, 2013), <https://www.nraila.org/articles/20130405/senate-to-take-up-anti-gun-legislation-soon> [<https://perma.cc/QHJ7-5YPJ>].

⁸³ Blocher, *supra* note 71, at 371 (“The NRA, in effect, has the same position as the challengers in *Trump v. Hawaii*. The argument is that laws targeting guns (and not targeting, or not targeting enough, other sources of crime and mayhem) are evidence of government bias against guns.”).

⁸⁴ No. 17-6057, 2018 WL 2718045, at *1 (N.D. Ill. June 6, 2018).

⁸⁵ *Id.* at *2–3.

has considered in canonical animus cases.⁸⁶ At heart, the developers' complaint was that the village denied the permits because residents did not like the Second Amendment: "The refusal . . . was based purely on an unconstitutional motive: a perceived anti-gun, anti-Second Amendment bias of certain residents of the Village of Willowbrook and the surrounding communities."⁸⁷ The *Chicago Gun Club* court was unsympathetic to this argument because it did not confront "some flagrant zoning law resolved to violate the Second Amendment" but instead "merely an isolated zoning decision to maintain the status quo."⁸⁸ It swiftly rejected the challenge.⁸⁹ Regardless of whether one agrees with the court's decision, the case stands as an example of litigation that seems to invoke an animus-type rationale. The next Part returns to some similar cases in discussing the utility of animus doctrine in Second Amendment challenges.

This Part has surveyed three types of animus claims. The next Part explores the different types of animus claims in the course of advancing the argument that government motive is irrelevant in Second Amendment cases.

II. SIDELINING SECOND AMENDMENT ANIMUS

This Part argues that Second Amendment doctrine ought to be fairly insensitive to charges of bad motive. It begins by briefly addressing the irrelevance of motives in the hoplophobia claims below. Then, it proceeds to a more in-depth discussion of animus against gun owners and turns to the concerns with an animus toward the right itself.

A. Hoplophobia Claims

Start with the hoplophobia claims. Should we take seriously a concern that legislation is motivated by irrational antigun bias? I don't think so. After all, it is hard to see why we should care about a legislature's attitudes toward guns as inanimate objects apart from its views about gun owners or gun rights. There are not many constitutionally protected *items* identified in the Bill of Rights—the arms of the Second Amendment, the papers and effects of the Fourth Amendment, the amorphous "property" of the Fifth

⁸⁶ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (discussing city council resolutions expressing resident concerns as part of the evidence that an ordinance targeted a religious practice); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (stating that the government's action appeared to "rest on an irrational prejudice" against the intellectually disabled).

⁸⁷ *Chi. Gun Club*, 2018 WL 2718045, at *10 (quoting Complaint at 12, *Chi. Gun Club, LLC v. Village of Willowbrook*, No. 17-6057 (N.D. Ill. Aug. 18, 2017)).

⁸⁸ *Id.* at *5.

⁸⁹ *Id.* at *11.

Amendment, and perhaps the printing presses of the First Amendment.⁹⁰ But if motive is relevant at all, it is to protect *people* or their *use* of these items, not any concern over the items themselves (except as property protected without regard to motive). As two Second Amendment scholars put it:

[I]t seems likely that most gun control supporters [and, by extension, gun regulations] are concerned not with guns themselves but instead with the negative consequences of their misuse. In that sense, even direct gun control is akin not to content or viewpoint discrimination—which can trigger First Amendment scrutiny even when targeting otherwise-unprotected activities—but rather to regulations targeting secondary effects. Reducing the lethality of confrontations and making negligent actors compensate those whom they injure are content-neutral in this sense. They are focused on harms, not on guns.⁹¹

Relatedly, there does not seem anything constitutionally objectionable with legislative disdain for guns. So long as regulations respect substantive barriers protecting people and rights, even an admitted, collective antigun bias would not seem to offend the Constitution. One could suggest that gun buybacks, for example, could sometimes be motivated by a desire to decrease gun stockpiles out of hostility toward lethal weaponry. But because the buybacks are typically voluntary,⁹² I have never seen any colorable constitutional claim made against the use of government resources to fund them. If animus matters at all in the context of guns, it must be animus against gun owners or gun rights. The next Sections take up these concerns.

B. Animus Against Gun Owners

Existing animus doctrine helps to assess claims that gun owners are being treated as “second-class citizens”—that they are objects of the legislature’s bare desire to harm. Traditional equal protection doctrine focuses on just these sorts of claims, that legislators are singling out a particular group for unfair treatment. To be sure, gun owners are not a suspect or quasi-suspect class, and there are no good reasons to consider treating them as one. Yet neither were the “hippies” in *Moreno*, the intellectually disabled in *Cleburne*, or the gay, lesbian, and bisexual

⁹⁰ U.S. CONST. amends. II, IV–V; see also *id.* amend. I (discussing freedom of the press).

⁹¹ Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 346 (2016) (citations omitted).

⁹² Champe Barton, *How Would an Assault Weapons Buyback Actually Work?*, TRACE (Sep. 12, 2019), <https://www.thetrace.org/2019/09/assault-weapon-buyback-policy-cost-estimates> [<https://perma.cc/A4NZ-DBRM>] (“While several states and cities have run their own voluntary buyback programs, only two nations, Australia and New Zealand, have undertaken a mandatory gun buyback.”).

individuals in *Romer* and *Windsor*.⁹³ Animus doctrine is one way in which nonsuspect classes have been able to seek protection from targeted legislation that treats them unfairly.⁹⁴ The rationale for the constitutional significance of animus is that group-based harm infliction is never a legitimate government purpose.

A typical animus inquiry is often highly context dependent, probing the justification for a discrete government action in light of the ends asserted.⁹⁵ For that reason, this Section cannot, of course, rule out that some specific government action might in fact be grounded in animus against gun owners. Instead, this Section hopes to make three points that together suggest that we have no good reason to suspect gun-owner animus would occur in anything more than anomalous cases: (1) public safety ends motivate nearly all gun laws, (2) gun laws do not target gun owners as such, and (3) gun owners as a group have not historically been marginalized—and even laws burdening this group carry no negative symbolic effect or stigma.

Professor William Araiza observes that animus concerns have long roots. They are grounded in the Founders' concerns with faction and the Supreme Court's later focus on impermissible "class legislation" that serves private and not public interests.⁹⁶ These twin ideas, and the heart of animus doctrine, help explain why gun owners are unlikely to be the subject of unconstitutional legislative animus when the government enacts gun laws. There are two related ideas animating animus doctrine: a proscription against identity-based harm infliction and a prescription that government act for public purposes.

One key reason not to credit the claims of the gun-rights advocates invoking animus is that gun laws are almost always motivated by the *quintessential* public interest. As Justice Stephen Breyer observed in *Heller*: "[A]lmost every gun-control regulation will seek to advance (as the one here does) a 'primary concern of every government—a concern for the safety and

⁹³ U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (striking down a law that excluded from food stamps those living in a household with unrelated members); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (holding that requiring a special use permit for a home for the intellectually disabled violated the Equal Protection Clause); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (striking down amendment to the Colorado Constitution that prohibited lesbian, gay, or bisexual status, conduct, or activity from, among others, serving as a ground for a nondiscrimination claim); *United States v. Windsor*, 570 U.S. 744, 749–52 (2013).

⁹⁴ *But see Eyer*, *supra* note 45, at 1356–59 (arguing that ordinary rational basis review and not animus should be the conceptual lens with which to view the means the Court used to vindicate the interests of these groups).

⁹⁵ *See ARAIZA*, *supra* note 23, at 134–35 (describing the contextual factors that influence the animus framework).

⁹⁶ *Id.* at 3, 14–16, 28 (stating that principles underlying the bar against class legislation can be found in animus doctrine).

indeed the lives of its citizens.”⁹⁷ This interest in public safety goes far beyond merely whether someone is killed or physically injured. Government has significant and compelling interests in making the public square safe for its residents.⁹⁸ As *Heller* demonstrates, this does not mean every gun law is constitutional. Yet it does mean that typical gun laws are not likely to be improperly motivated. Regulating the use of lethal weaponry is something a functioning government must do. Whether, for example, one agrees that bump stocks should be tightly regulated or that government has the power to ban semiautomatic assault weapons, such measures do not seem to seek the vindication of private or factional interests. Indeed, whether one thinks the laws are *effective* at promoting public safety ends, there is little reason to doubt that legislators, regulators, and the researchers they rely on *believe* the laws are. In other words, government actors are seeking legitimate ends, even if the laws are unconstitutional for other reasons—poor fit between the means and the end, for example, or simply too onerous a burden on protected Second Amendment rights. Recall that in *Heller*, the Supreme Court never doubted the D.C. Council’s motive for banning handguns; the law was unconstitutional because the Court considered a ban to be *per se* impermissible, even if it would serve the goals of decreasing gun violence.⁹⁹

One way to understand this distinction is to compare the canonical animus cases to a typical Second Amendment case. In cases like *Moreno*, *Cleburne*, *Romer*, and others, the Court found itself searching in vain for a justification adequate to support the government’s action. Whether it was fraud prevention,¹⁰⁰ flood-plain protection,¹⁰¹ or enforcement-resource preservation,¹⁰² the purported rationales all appeared pretextual, as post hoc justifications for legislation adopted for decidedly different reasons. Poor fit was evidence of an ulterior motive. Not so in mine-run Second Amendment challenges. As all the justices, even the dissenting ones, recognized in a recent case concerning Wisconsin’s ban on felon firearm possession, the

⁹⁷ *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

⁹⁸ Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139, 160–63 (2021) (conceptualizing the government interests in public safety).

⁹⁹ *Heller*, 554 U.S. at 636 (stating that, although the Court “take[s] seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution” to the problems of gun violence, the Second Amendment simply does not allow “the absolute prohibition of handguns held and used for self-defense in the home”).

¹⁰⁰ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 535–38 (1973).

¹⁰¹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449 (1985).

¹⁰² *Romer v. Evans*, 517 U.S. 620, 635 (1996) (“Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.”).

state's asserted interest in public safety was undeniably compelling.¹⁰³ One dissenting justice noted that “[t]his interest is also well-illustrated in the history of the Second Amendment.”¹⁰⁴ Even where judges find a lack of fit, they do not typically question the government's motive or the need for government regulation in this context. Regulations to protect public safety have always coexisted with gun rights,¹⁰⁵ further undermining claims that these laws are targeted at gun owners out of a bare desire to harm.¹⁰⁶

Second, the gun laws typically targeted with animus claims also differ in *form* from the laws struck down in the canonical animus line of cases. Such gun laws do things like mandate background checks before certain types of firearm transfers,¹⁰⁷ impose waiting periods on gun purchases, or require training and good reason for carrying guns in public. None apply to gun owners, *as such*.¹⁰⁸ Even though some gun owners may hold views that ground their own identities or conceptions of self in their gun ownership, the laws do not do so.¹⁰⁹ This lack of *targeting* is significant to undermining the gun-owner animus claims.¹¹⁰

Professor Akhil Amar's connection between the Court's invalidation of laws like those in *Romer* and the Constitution's Attainder Clause helps

¹⁰³ *State v. Roundtree*, 952 N.W.2d 765, 773 (Wis. 2021) (“As other courts in this state and elsewhere have done, we recognize public safety generally, and preventing gun violence specifically, as important governmental objectives.”); *id.* at 782 (Bradley, J., dissenting) (acknowledging “the unquestionably compelling state interest in public safety”); *id.* at 803 (Hagedorn, J., dissenting) (“It is indisputable that public safety is a compelling governmental interest.”).

¹⁰⁴ *Id.* at 803 (Hagedorn, J., dissenting).

¹⁰⁵ See JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT* 10, 13–14 (2018) (describing how gun laws go back to the nation's Founding).

¹⁰⁶ One could object that these are conclusions a court reaches *after* assessing an animus claim and not *ex ante* reasons to reject employing the animus framework. My argument is more general, however. *Because* typical gun regulations are broadly recognized as serving important public safety interests, we have little reason to suspect they are really motivated by sinister antigun bias. And since we have little reason to think them immediately suspect, gun regulations ought not to raise the same types of concerns as those that distinguish citizens based on sex, race, or other protected statuses.

¹⁰⁷ *Mance v. Sessions*, 896 F.3d 390, 398, 403 (5th Cir. 2018) (Ho, J., dissenting from the denial of rehearing en banc).

¹⁰⁸ See Blocher, *supra* note 71, at 343 (“[E]ven if antigun bias were constitutionally salient, it is hard to show that gun rights or gun owners face the same kind or degree of animus or political-process failure as the kinds of claims for which constitutional law has traditionally shown special solicitude.”).

¹⁰⁹ See Michael B. Siegel & Claire C. Boine, *The Meaning of Guns to Gun Owners in the U.S.: The 2019 National Lawful Use of Guns Survey*, 59 AM. J. PREV. MED. 678, 682 (2020) (reporting that sixty-three percent of gun owners strongly agreed with the statement that guns are essential to their sense of freedom).

¹¹⁰ *Cf.* N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (concluding that an election law was motivated by intentional race discrimination and stating that the “provisions target African Americans with almost surgical precision” and that the State's “asserted justifications cannot and do not conceal the State's true motivation”).

further make this clear.¹¹¹ *Romer* struck down an amendment to the Colorado constitution that barred nondiscrimination ordinances protecting gay, lesbian, and bisexual individuals.¹¹² The provision specifically provided that “homosexual, lesbian or bisexual orientation, conduct, practices or relationships” could not constitute the basis of any claim for protected status or to nondiscrimination policies.¹¹³ Although *Romer* never cited or mentioned the Attainder Clause in its opinion, Professor Amar finds that provision’s premises support the majority’s reasoning because both emphasize invidious singling out.¹¹⁴ And, in making this connection, Professor Amar further illustrates the difference between gun laws and animus-motivated laws like that at issue in *Romer*.¹¹⁵ “[M]ost laws,” writes Professor Amar, “identify conduct rather than traits: if you do *A*, consequence *B* ensues. Laws based on traits—blood type or blood lines, left-handedness or a sweet tooth, sexual orientation and so on—are different.”¹¹⁶ Laws based on trait or identity are suspect. But gun laws are conduct laws; they do not confer identity- or trait-based disadvantages.

Put simply, run-of-the-mill gun laws are not based on discriminatory animus against gun owners. That conclusion should not be surprising given gun owners’ longstanding political power in the United States. Gun owners are and have long been a politically powerful force in American politics.¹¹⁷ Even with the NRA’s recent financial and political troubles, the interests of gun owners have been protected, expanded, and catered to in the overwhelming majority of jurisdictions, especially over the past half century.¹¹⁸ Over this time period, legislatures have, at the behest of gun owners, expanded public-carry rights, limited or eliminated local authority to regulate firearms, and loosened the authorization for the use of deadly force outside the home through stand-your-ground laws.¹¹⁹ And even in

¹¹¹ See Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 208–21 (1996).

¹¹² *Romer v. Evans*, 517 U.S. 620, 623–24 (1996) (describing the amendment).

¹¹³ *Id.* (quoting COLO. CONST. art II, § 30b).

¹¹⁴ See Amar, *supra* note 111, at 225–26.

¹¹⁵ *Romer* considered the animus behind Colorado’s Amendment 2, a 1992 ballot initiative which, once passed by voters, prohibited the state’s legislature from enacting laws to protect gay, lesbian, and bisexual people from discrimination.

¹¹⁶ Amar, *supra* note 111, at 226 (citing *Romer*, 517 U.S. at 633).

¹¹⁷ See, e.g., Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PENN. L. REV. (forthcoming 2022) (manuscript at 9), <https://papers.ssrn.com/a=3685910> (detailing how the NRA was successful in defeating legislation in the 1930s).

¹¹⁸ Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. (forthcoming 2022) (manuscript at 11–35), <https://papers.ssrn.com/a=3789216> (describing this trajectory).

¹¹⁹ *Id.*

places where politicians might want to impose stricter regulations, gun-rights enthusiasts have successfully lobbied for preemption laws that remove local authority and for federal protections that limit the possibilities for more active regulation.¹²⁰

This leads to the final reason to suspect that animus does not undergird gun laws. Unlike legislation aimed at “hippies,” the intellectually disabled, or the LGBTQ community, which raise concerns about animus both because of the history confronting these groups and because of the expressive harms that legislative hostility brings about, neither such history nor such harms exist for gun owners. There is no comparable history of government disfavoring gun owners; in fact, there is almost the exact opposite. Nor are there concerning expressive effects that might attend such a history of mistreatment. No stigmatizing stamp of disapproval accompanies legislation imposing background checks on private sales or banning certain types of semiautomatic weapons.¹²¹

In short, despite the claims of gun-rights advocates, there are no good reasons to suspect that gun laws are motivated by animus against gun owners—and many reasons to reject that allegation. Gun laws aim to protect public safety, do not target gun owners *qua* gun owners, and do not convey any moral or symbolic disapproval for gun owners, a group that has successfully held its own in legislatures for centuries.

Animus concerns, after all, are concerns about process. In Professor John Hart Ely’s classic formulation, courts should step in to fix a “malfunction” in the political process that occurs either when incumbent-protection measures “chok[e] off the channels of political change” or when political leaders are captured by a majoritarian group and legislate to “systematically disadvantage[e] some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest.”¹²² There is no legislative-process failure with gun laws, at least not one that disadvantages gun owners. Gun laws do not arise from any “simple hostility” toward gun

¹²⁰ *Id.*

¹²¹ See Young, *supra* note 3, at 246 (arguing that expressive harms occur when “a group is sufficiently identifiable, cohesive, and discriminated against such that its members are likely to understand that they have been discriminated against in a way bearing no legitimate relationship to their public-spirited action, but based solely on membership in that group”). *But see* Doe No. 1 v. Putnam County, No. 16-08191, 2020 WL 7027596, at *3–4 (S.D.N.Y. Nov. 30, 2020) (alleging, in a challenge to a New York law mandating public disclosure of handgun permit holders’ names and addresses, that “if he were granted a firearms license and his name and address were made a matter of public record that he and his family would be ‘ostracized’ by the community, and that they would be excluded from participating in social groups or ‘groups of people’”).

¹²² JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980); *see, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2420–21 (2018) (rejecting the claim that President Trump’s so-called travel ban was predicated on animus or religious hostility).

owners or a bare desire to harm them. They stem from a legislative desire to decrease gun violence. Even if one thinks the means of accomplishing that aim are flawed, there's no question that such public-safety-directed ends are legitimate.

C. *Animus Against Gun Rights*

Finally, what can we make of the next level of claims—that of animus against *gun rights themselves*? Unlike the claims about gun-owner animus, one might question whether these types of claims are properly considered under the umbrella of animus. Indeed, one might argue that it is not conceptually coherent to speak about bad motive toward conduct.¹²³ It is true that these claims do not fit neatly into the Court's equal protection animus doctrine, which focuses on *people* and not primarily on rights, interests, or things. But two developments seem to justify this framing: (1) the Supreme Court's extension of the animus concept in other contexts, such as to claims that government officials harbored animus toward a person's religious beliefs or practices and (2) the rhetoric around the Second Amendment. Recall Judge VanDyke's dissent from the denial of rehearing en banc in *Mai*, in which he charged that members of the Ninth Circuit exhibit a “clear bias—a real prejudice—against the Second Amendment.”¹²⁴ Or the NRA's cry that a proposed background-check bill was not really grounded in public safety concerns but was instead designed to “forward[] an anti-gun agenda that seeks to restrict firearm ownership in America.”¹²⁵ These seem best described as claims of animosity toward the right.

Ultimately, however, the label is less significant than the description of an improper governmental motive in enacting gun laws. The prior Section aimed to show how the government's interests in gun regulations were not improper attempts to merely harm gun owners, and this Section focuses on claims that the government intentionally aims to undermine gun rights. (One

¹²³ One could argue, for example, that government may permissibly dislike any conduct, even constitutionally protected kinds, and that there is therefore no such thing as bad motive with respect to any type of conduct. Why would it be wrong for government officials to dislike abortion or certain types of harmful speech or criminal defendants' invocation of their constitutional rights? It is only the actions state actors take that matter. I am sympathetic to this style of argument. But I do think governmental intent to infringe on a constitutionally protected right—even if subtly or psychologically different than “animus”—is a type of hostility that might be thought to be off-limits in some contexts. In any event, this Section argues that, assuming the concept of animus against rights is conceptually coherent (and the claims from gun-rights activists certainly seem to imply it is), Second Amendment doctrine should not incorporate that understanding into its methodological framework. If it turns out the concept collapses on itself, that's just one more reason to reject motive tests in the Second Amendment context.

¹²⁴ *Mai v. United States*, 974 F.3d 1082, 1105 (9th Cir. 2020) (VanDyke, J., dissenting from the denial of rehearing en banc).

¹²⁵ *Senate to Take Up Anti-Gun Legislation Soon!*, *supra* note 82.

could try to distinguish between an intent to interfere with the right and *animus* against the right, but that distinction is irrelevant for my purposes; the aim here is to assess whether bad intent should matter for adjudicating gun cases.) This Part argues that (1) there are no good normative justifications for attending to motive in Second Amendment cases, and (2) that the established doctrinal framework in Second Amendment cases, which requires no direct inquiry into government motive, is sufficient to condemn any laws that happen to be badly motivated.

1. Lack of Normative Reasons to Focus on Motive

Since *animus* is a type of improper government motive, it makes sense to step back and consider why courts engage in this motive-seeking enterprise at all. Although assessing motive is demonstrably important in protecting some constitutional rights, that “does not mean that it is relevant or should be an admissible consideration in all cases.”¹²⁶ Rather, “[t]he extent to which a judicial determination of motivation is relevant to the outcome of a case depends on the substantive doctrine in the particular area of law involved.”¹²⁷ That’s not just an accurate descriptive statement of Supreme Court doctrine; it also reflects the fact that the underlying values for constitutional guarantees ought to drive the questions of why and when motive matters. In trying to unpack what effect *animus* against a right should have, we should first consider why we care about purpose scrutiny in constitutional law at all.

There are, of course, those who critique such scrutiny on conceptual or theoretical grounds, as foolishly searching for a fictional institutional intent or trying to gain insight into others’ minds that we often do not even have about our own.¹²⁸ But there are also others who argue that, regardless of these concerns, courts should not—as a normative matter—focus on bad intent in individual rights cases. Professor Richard Fallon, for example, has recently argued that substantive doctrines should play the key role, focusing on a law’s “language and effects.”¹²⁹ Professor Calvin Massey has similarly argued that government motive should play a more circumscribed role in constitutional adjudication “[b]ecause it is the real world effects of government action that harm or help people,” and therefore “the default criterion for assessing constitutional validity should be the effects of the

¹²⁶ Tribe, *supra* note 3, at 18.

¹²⁷ Brest, *supra* note 3, at 102 n.46.

¹²⁸ See Fallon, *supra* note 2, at 538 (describing a way to understand collective intent).

¹²⁹ *Id.* at 529.

challenged government action.”¹³⁰ And, in the election context, Professor Richard Hasen has argued that bad intent should be neither sufficient nor necessary to invalidate legislation.¹³¹ Indeed, this emphasis on a law’s real-world effect might be more consistent with the historical practice of judicial review in constitutional rights adjudication.¹³²

Whatever its merits in broader constitutional doctrine, in Second Amendment cases, there are no good normative reasons to focus on government motive—and plenty to ignore it. When courts and scholars invoke motive, there are two primary types of reasons justifying that focus: intrinsic and instrumental ones.¹³³ First, intrinsic rationales point to the expressive meaning of bad intent. Laws that, by their very existence, express vile views are rightfully condemned.¹³⁴ Rights that have equality dimensions may thus justify concern with motive.¹³⁵ So, too, of course, may rights that can be infringed through symbolism or expressive government action itself,¹³⁶ such as an explicit establishment of religion¹³⁷ or laws expressing racial inferiority.¹³⁸ The improper motive is itself harmful and also produces negative consequences for those groups demeaned or impugned.¹³⁹ For this reason, constitutional doctrine often points to the relevance of government

¹³⁰ Massey, *supra* note 3, at 3; *see also* Nelson, *supra* note 3, at 1856 (observing that “[e]ven under modern doctrine . . . it is possible that most of the Constitution’s purpose-based restrictions on legislative power come into play only when a statute produces certain kinds of real-world effects”).

¹³¹ Hasen, *supra* note 3, at 846.

¹³² *See* Nelson, *supra* note 3, at 1786–87.

¹³³ *See* Kagan, *supra* note 1, at 506 n.256, 506–11 (describing consequentialist and deontological views about motive analysis). Without trying to be overly technical, I am using consequentialist and instrumental as synonyms to mean reasoning that relies on the outcome or result of some action; similarly, I am using deontological or intrinsic to mean reasoning that focuses on the rightness or wrongness of the action itself, without basing one’s judgment on the action’s outcome or result.

¹³⁴ *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”).

¹³⁵ *See* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 931 (1994) (arguing that the equality dimension is why even minimal burdens on the right to vote are unconstitutional).

¹³⁶ *See* Tribe, *supra* note 3, at 17 (recognizing that “government’s motives, or the messages conveyed by its actions, may at times matter even *more* than those of a private individual”).

¹³⁷ *See* *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); Fallon, *supra* note 2, at 549–50 (noting the Court’s concern with expressive meaning in the Establishment Clause context).

¹³⁸ *Loving*, 388 U.S. at 11.

¹³⁹ Young, *supra* note 3, at 253 (describing how improper motive in these settings causes “psychic pain”).

motive “under constitutional provisions that consist of broad language invoking fairness and equality.”¹⁴⁰

Second, on top of intrinsic concerns, some argue that whether we appeal to motive should be guided by consequentialist concerns.¹⁴¹ These instrumental reasons for assessing motive suggest that the inquiry is important because bad motive portends bad effects.¹⁴² Professor Gordon Young, for example, argues that “a finding of a bad motivation animating a statute is a reasonably good, though not a perfect, proxy for the likelihood of unacceptable future consequences.”¹⁴³ But if intent is only instrumentally valuable to help gauge effects, why do we care about it at all? As Professor Hasen says, “[I]t seems odd to argue for an intent test over an effects test when the primary means of proving bad intent is bad effect.”¹⁴⁴ True, there may be other, more direct ways to assess motive, but if the goal is searching for bad effects, it seems preferable to take that route directly.¹⁴⁵

It follows that motive ought to play a smaller role for rights that do not implicate expressive interests or for which a direct assessment of burdens and consequences is easier than a search for governmental motive. Those are two benchmarks for when we ought to care about motive.

Professor Laurence Tribe provides another way to consider when we should care about motive, focused not as much on the underlying values of the right itself as on the nature of the government’s action, such as whether the state is distributing benefits and burdens or creating general rules of conduct. To build that argument, he first distinguishes between two different kinds of constitutional principles: input and output principles.¹⁴⁶ Input principles limit what factors can go into government decision-making for

¹⁴⁰ *Id.* at 193–94; see also Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 728 (1994) (using race discrimination as an example and arguing that “[t]wo state actions are not the same—ethically, expressively, and sometimes legally—if they are taken for different reasons”).

¹⁴¹ See Fallon, *supra* note 2, at 567 (“[T]he question of how constitutional law should respond to constitutionally forbidden legislative intentions should depend largely on calculations of likely costs and benefits.”).

¹⁴² See Young, *supra* note 3, at 198 (arguing that “people who aim at bad states of affairs are likely to bring them into existence”).

¹⁴³ *Id.* at 260.

¹⁴⁴ Hasen, *supra* note 3, at 870.

¹⁴⁵ The most plausible justification for an instrumental reason to focus on bad motive might be when the concrete burdens a law imposes or the consequences it brings about are hard to measure. That could be true when thinking about, for example, complicated macroeconomic consequences, which may be one reason the Court has considered motive relevant to the Dormant Commerce Clause inquiry. See Young, *supra* note 3, at 214–15 (“The Court in the Dormant Commerce Clause cases can be taken at least to suggest that protectionist motives are among other features invalidating or tending to invalidate state laws.”).

¹⁴⁶ Tribe, *supra* note 3, at 19.

otherwise valid action, such as considerations about race or a person's religious views; output principles limit what outcomes can come from government regulation, such as the rules protecting private intimacy or the right to counsel.¹⁴⁷ According to Professor Tribe, output principles are unconcerned with government motive: "If the output of the government's conduct is to deny a defendant a speedy trial, what motivated or led to this denial . . . is altogether irrelevant to the threshold question of a constitutional violation."¹⁴⁸ When the government is distributing benefits and burdens among groups, input principles, such as concerns about motive, can be relevant.¹⁴⁹ But when the government creates general rules of conduct for all of society, only output principles ought to matter.¹⁵⁰

Applying the above concepts to the Second Amendment context, neither intrinsic nor instrumental reasons support importing a motive analysis into Second Amendment doctrine. Moreover, the fact that most gun laws create general rules of conduct provides further reason to focus only on outputs. First, nothing in the text, history, tradition, or doctrine of the Second Amendment suggests that the right safeguards any expressive interests. The interests it protects are substantive and concrete.¹⁵¹ The "core," "central component" of the right to keep and bear arms, according to the Supreme Court, is individual self-defense.¹⁵² As *McDonald* explained, "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the central component' of the Second Amendment right."¹⁵³ Even broader readings of the Amendment, concerned with tyrannical state power, emphasize the

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 35.

¹⁵⁰ *Id.*

¹⁵¹ See *Moore v. Madigan*, 702 F.3d 933, 935–36 (7th Cir. 2012) (finding a constitutional right to carry a gun in public); *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017) ("[T]he individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections.").

¹⁵² *District of Columbia v. Heller*, 554 U.S. 570, 599, 630 (2008); see also Blocher, *supra* note 71, at 343 ("[T]here are good reasons to doubt that the Second Amendment, as interpreted in *Heller*, has the same animus sensitivity. The Court was clear that the 'core' and 'central component' of the Second Amendment is self-defense, not combatting antigun bias." (citing *Heller*, 554 U.S. at 630) (footnote omitted)).

¹⁵³ *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (emphasis omitted) (footnote omitted).

substantive constraints this vision imposes, not expressive or symbolic ones.¹⁵⁴

Second, there are no compelling instrumental reasons to focus on government motive in Second Amendment cases. Though it is true that “evidence of [gun-law] effects is almost always deeply contested,”¹⁵⁵ assessing Second Amendment burdens and applying default standards of proof and burden-shifting devices is much simpler than trying to tease apart governmental motive for gun laws. There are also just fewer reasons to think gun regulations are immediately suspect. Unlike laws that target, for example, religious conduct,¹⁵⁶ laws targeting guns are quite often necessary and in the ordinary case unremarkable.¹⁵⁷ Some ardent gun-rights absolutists may dispute the notion, but the Supreme Court, legal scholars, and a broad swath of the American public recognize that laws targeting guns are not immediately suspect.¹⁵⁸ There are some guns that civilians should not have,¹⁵⁹ some people that should not have guns,¹⁶⁰ and some places in which ordinary people should not carry guns.¹⁶¹ In short, just as gun laws do not typically target gun owners *as such*, they also do not typically target gun rights *as such*.¹⁶² “If the basic lodestar of the Second Amendment is the core interest of armed self-defense, then one would need to show that gun regulations are

¹⁵⁴ See Skylar Pettit, Note, *Tyranny Prevention: A “Core” Purpose of The Second Amendment*, 44 S. ILL. U. L.J. 455, 515 (2020) (“No matter what method of interpretation is used, tyranny prevention is a core purpose of the Second Amendment, and this purpose necessitates the protection of military weaponry to that end.”).

¹⁵⁵ *Wrenn*, 864 F.3d at 655.

¹⁵⁶ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

¹⁵⁷ See Brownstein, *supra* note 135, at 936 (“Regulating the right to marry, the right to vote, or the right to have an abortion raises different inferences because these activities each have particular characteristics that may legitimately require specific regulatory attention.”).

¹⁵⁸ See Joseph Blocher & Luke Morgan, *Doctrinal Dynamism, Borrowing, and the Relationship Between Rules and Rights*, 28 WM. & MARY BILL RTS. J. 319, 332 (2019) (suggesting that “perhaps the well-documented (and in some quarters, much-maligned) reluctance of courts to exercise strict scrutiny in Second Amendment cases is because those courts believe that the government motive in enforcing gun regulations truly is public safety, rather than anti-gun bias” (footnotes omitted)); cf. David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1122 (2010) (“One of the reasons that strict scrutiny has been applied to racial classifications is the significant possibility that they may have ‘invidious[] motives.’ Certainly, there is a similar risk for many extant anti[-]gun laws.” (footnote omitted)).

¹⁵⁹ See 18 U.S.C. § 922(o) (outlawing most private machine-gun possession).

¹⁶⁰ See 18 U.S.C. § 922(g) (listing classes of persons barred from firearm possession).

¹⁶¹ See 40 U.S.C. § 5104(e) (barring firearms on the grounds of the U.S. Capitol).

¹⁶² James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. REV. 849, 871 (2014) (arguing against any animus- or prejudice-based rationale for reviewing gun regulations and noting that in this context “[w]e are not suspicious of the government’s proposed end to protect the security of all and to prevent harm (despite the slippery slope fear that government seeks to disarm its citizens)” and “only a paranoid person would think that gun control measures reflect animus against or a bare desire to harm gun owners”).

motivated by a desire to prevent armed self-defense as such—rather than, for example, that they do so incidentally as a means of furthering public safety.”¹⁶³ Gun-rights supporters have not attempted to carry that burden.

Lastly, typical gun regulations proscribe general conduct of the kind that Professor Tribe argues should lead to a focus on outputs; they do not directly distribute benefits and burdens, making legislative motivational inputs less relevant. In sum, there are no good normative reasons to support a focus on government motives in Second Amendment cases. The next Section further argues that an emphasis on government motive has no place in the Second Amendment doctrine because courts employing means–end scrutiny that does not involve examining underlying motives can sufficiently weed out even those rare laws that might be improperly motivated.

2. Means–End Scrutiny and Effects Tests Independent of Motives

The preceding Section argued that we have no good reason to import a focus on bad government motive into Second Amendment doctrine. Still, the government cannot vindicate its concededly compelling interests by singling out or targeting constitutionally protected conduct.¹⁶⁴ Just as group-based animus doctrines proscribe a bare desire to harm (people or their faith systems), so too the Constitution proscribes something like a *bare desire to infringe*.¹⁶⁵ To echo Judge Richard Posner’s comments in reviewing an abortion regulation, “if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue.”¹⁶⁶ A legislative desire to simply undermine gun rights would not be legitimate.¹⁶⁷

But even in this limited context, forbidding a certain governmental motive does not require a doctrine focusing on it. In the free-speech context, laws that are grounded in what Justice Elena Kagan called “ideological

¹⁶³ Blocher, *supra* note 71, at 374.

¹⁶⁴ Tribe, *supra* note 3, at 7–8; *see also* Young, *supra* note 3, at 216 (noting that “the core of the right recognized in *Roe* and *Casey* is not to be deprived of an abortion for the sole reason that officials believe abortions generally immoral in early stage pregnancies” (emphasis omitted)).

¹⁶⁵ *See* Young, *supra* note 3, at 261 (arguing that motive analysis is relevant for actions “‘designed to strike’ at a fundamental right out of disagreement with its foundational premises—for example, that people should be entitled to abortions in early pregnancy” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (opinion of O’Connor, Kennedy & Souter, JJ.))).

¹⁶⁶ *Hope Clinic v. Ryan*, 195 F.3d 857, 876, 881 (7th Cir. 1999) (Posner, J., dissenting), *cert. granted, vacated sub nom. Planned Parenthood of Wis. v. Doyle*, 530 U.S. 1271 (2000).

¹⁶⁷ *See* Young, *supra* note 3, at 216 (“[T]he Court is likely to protect all fundamental rights—for example, to birth control or to certain family living situations—from at least those motives that simply would deprive one of a Court-defined right because of the official actor’s disagreement with the Court’s premises in recognizing the right. So action motivated by the view that the exercise of such a right is immoral or even simply not worth protecting would be at least presumptively unconstitutional.” (footnote omitted)).

hostility” toward certain ideas run afoul of the First Amendment.¹⁶⁸ Indeed, she describes the very project of free-speech law as implicitly organized around the goal of flushing out improper government motive using various doctrinal proxies that do not formally focus there.¹⁶⁹ “Whenever hostility toward ideas as such . . . has played some part in effecting a restriction on speech, the restriction is irretrievably tainted; what has entered into the action commands its invalidation.”¹⁷⁰ In other words, a bare desire to suppress speech because of disagreement with ideas can never operate as a legitimate government end, and its presence in government decision-making taints the entire process. This conception sounds like what courts are doing when they try to smoke out animus and carries the same fatal consequences as an animus finding. But, for the most part, express concern with motive is not part of the free-speech doctrinal framework. Badly motivated laws are dealt with through methodological frameworks that do not focus express attention on that motive. As in other areas, if bad intent is driving state action, government will naturally “have a hard time justifying” the decision, and it will then “be struck down by the court even under relatively deferential scrutiny.”¹⁷¹

The Second Amendment might work similarly. Indeed, one context in which we might detect a proxy concern with motive is in the gun-storing context, a setting in which local decision-makers may be more attuned to hostile constituent attitudes and concerns about public safety may be more attenuated. The Seventh Circuit’s decisions in a series of cases reviewing changes to Chicago’s gun laws after the Supreme Court’s holding in *McDonald* are instructive here.¹⁷² They read as similar to some of the Supreme Court’s animus cases, with the court assessing possible government interests that could validate the laws and finding them wanting. Except that here, unlike in the animus context, the Second Amendment’s doctrinal framework has no formal role for a concern with motive.

On the day after the Court decided *McDonald*, a Chicago city council committee met to decide what powers the city had to regulate guns.¹⁷³ One alderman asked the city’s lawyers what could be done, including whether it was possible to regulate shooting ranges.¹⁷⁴ After several hearings, the city

¹⁶⁸ Kagan, *supra* note 1, at 431.

¹⁶⁹ *Id.* at 414 (“First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.”).

¹⁷⁰ *Id.* at 431.

¹⁷¹ Hasen, *supra* note 3, at 881.

¹⁷² See *Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684, 690 (7th Cir. 2011); *Ezell v. City of Chicago (Ezell II)*, 846 F.3d 888, 890 (7th Cir. 2017).

¹⁷³ *Ezell I*, 651 F.3d at 690.

¹⁷⁴ *Id.*

council adopted a comprehensive new ordinance regulating guns only four days after *McDonald* came down.¹⁷⁵ One aspect of the ordinance was a permit requirement for gun possession contingent on completing a firearm-safety course with range training.¹⁷⁶ But the ordinance simultaneously prohibited gun ranges in Chicago city limits.¹⁷⁷ Challengers argued that the law infringed their Second Amendment right to keep and bear arms, and the court of appeals sustained the challenge.¹⁷⁸

The city could not justify its ban on the grounds that residents could seek training at the many ranges outside city limits, as those were constitutionally irrelevant.¹⁷⁹ Because the court held firearm training to be a protected component of the Second Amendment right,¹⁸⁰ the ordinance could only be upheld if the city showed a strong connection between the law and a substantial public interest.¹⁸¹ The city asserted interests in avoiding accidents and limiting attractive locations for thieves, but the city provided no evidence to show the link between those interests and the ordinance.¹⁸² One other interest the city asserted—a risk of lead remaining on gun users’ hands—could not, the court said, “be taken seriously as a justification for banishing all firing ranges from the city.”¹⁸³ For the Seventh Circuit panel, Chicago’s concern about lead remnants rang about as true as the City of Cleburne’s concern for the flood plain.¹⁸⁴ “To raise it at all,” the court said, “suggests pretext.”¹⁸⁵

Noting the “obvious contradiction” between the requirement that one obtain range training to get a permit and the ban on all ranges in the city,¹⁸⁶ the court’s opinion might be read as a way of flushing out the true motives of the city council. Much as traditional animus cases like *Moreno*, *Cleburne*, and *Windsor* assess and reject other possible purposes served by the challenged government action, so too the Seventh Circuit marched through

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 691.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 695, 711.

¹⁷⁹ *Id.* at 697.

¹⁸⁰ *Id.* at 704.

¹⁸¹ *Id.* at 708–09.

¹⁸² *Id.* at 709.

¹⁸³ *Id.* at 710. The city only pressed this justification in the trial court, not on appeal. *See id.*

¹⁸⁴ *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449 (1985) (“This concern with the possibility of a flood, however, can hardly be based on a distinction between the . . . home [for people with intellectual disabilities] and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the . . . site without obtaining a special use permit.”).

¹⁸⁵ *Ezell I*, 651 F.3d at 710.

¹⁸⁶ *Id.* at 705.

and rejected the city's purported justifications. Judge Ilana Rovner put the point bluntly in her concurrence:

The ordinance admittedly was designed to make gun ownership as difficult as possible. The City has legitimate, indeed overwhelming, concerns about the prevalence of gun violence within City limits. But the Supreme Court has now spoken in *Heller* and *McDonald* on the Second Amendment right to possess a gun in the home for self-defense and the City must come to terms with that reality. Any regulation on firearms ownership must respect that right.¹⁸⁷

To paraphrase Judge Rovner, although the city can regulate based on gun harms, it cannot enact laws grounded in animus against the Supreme Court's interpretation of the right to keep and bear arms.¹⁸⁸ Several years later, the Seventh Circuit struck down the city's revision of its zoning laws in response to *Ezell I*.¹⁸⁹ In place of banning gun ranges, the city created "an elaborate scheme of regulations governing" where they could be located.¹⁹⁰ Yet again, the court found the purported justifications for these restrictions wanting.¹⁹¹ And, like before, Judge Rovner was direct: "It is no secret that the City of Chicago would prefer to reduce the number of guns in Chicago."¹⁹² But the traditional tools of heightened scrutiny allowed the majority to dispense with any inquiry into what motivated the city council's action or doctrinal conclusion that turned on such a finding, even though these cases paralleled some of the animus cases in the search for adequate justification.

Consider also *Teixeira v. County of Alameda*.¹⁹³ There, gun-shop developers sought to build a gun store and complied with all county zoning requirements except one: the building they selected was just shy of the 500 feet from a residentially zoned district that the county code required for gun stores.¹⁹⁴ The zoning board of adjustment voted to grant a variance, but the county board of supervisors overruled the variance after a challenge from residents who "are opposed to guns and their ready availability and therefore believe that gun shops should not be located within [their] community."¹⁹⁵

¹⁸⁷ *Id.* at 715 (Rovner, J., concurring in the judgment).

¹⁸⁸ *See id.* at 712 (describing Chicago's contradictory regulations as "a thumbing of the municipal nose at the Supreme Court").

¹⁸⁹ *Ezell II*, 846 F.3d 888, 889–90 (7th Cir. 2017).

¹⁹⁰ *Id.* at 890.

¹⁹¹ *Id.* at 895 ("We certainly accept the general proposition that preventing crime, protecting the environment, and preventing fire are important public concerns. But the City continues to assume, as it did in *Ezell I*, that it can invoke these interests as a general matter and call it a day.').

¹⁹² *Id.* at 898 (Rovner, J., concurring in part and dissenting in part).

¹⁹³ 873 F.3d 670 (9th Cir. 2017) (en banc), *on reh 'g*, 822 F.3d 1047 (9th Cir. 2016).

¹⁹⁴ 822 F.3d 1047, 1051 (9th Cir. 2016), *vacated*, 873 F.3d 670 (9th Cir. 2017) (en banc).

¹⁹⁵ *Id.* (alteration in original).

The initial appellate panel found that the lower court should have subjected the claims to heightened scrutiny because the county’s decision burdened the right to engage in firearms commerce. The majority described its concern over the county’s “attempt to restrict the ability of law-abiding Americans to participate in activity protected by the Second Amendment.”¹⁹⁶ Here, too, the standard methodological framework of heightened scrutiny proved sufficient for upholding Second Amendment rights, rendering any search for anti-gun-rights animus unnecessary.¹⁹⁷

The right to keep and bear arms does not undermine or negate the legitimacy of the government’s compelling interest in public safety. Rather, some means of vindicating that interest are limited, and some burdens the government imposes are too great.¹⁹⁸ This will, of course, turn on definitional questions about the scope of the right, as *Teixeira* demonstrates.¹⁹⁹ There is, in short, no escaping the fact that “rights are conceptually interconnected with . . . governmental powers.”²⁰⁰ Calls to focus on burdens and effects, then, properly shift the focus to questions about what constitutes infringement and what methods the state uses to reach its compelling goals.

The standard two-part framework adopted among courts of appeals incorporates this focus on burden and effects.²⁰¹ In that framework, courts first assess whether a particular law burdens Second Amendment rights. If it does, courts impose some type of heightened scrutiny. In most cases, the

¹⁹⁶ *Id.* at 1063; *see id.* at 1061 n.7 (“Following *Heller* and *McDonald*, it is doubtful that an ordinance whose true purpose and effect was to eliminate access to firearms for law-abiding citizens could survive scrutiny.” (citation and internal quotation marks omitted)). The en banc court later vacated the decision and concluded that the gun shop developer did not plausibly allege any violation of a customer’s right to purchase firearms and could not raise his own Second Amendment claim. *See Teixeira*, 873 F.3d at 679–80.

¹⁹⁷ *See* Kopel & Cramer, *supra* note 158, at 1124 (“To recognize that some gun control laws have invidious purposes is not to say that all or even most of them do. Heightened scrutiny is the right tool for identifying the ones that are invidious.”).

¹⁹⁸ *Cf.* Bhagwat, *supra* note 3, at 336 (noting that, with respect to abortion restrictions, the government interest in protecting fetal life is legitimate but cannot involve preventing a woman from choosing to have an abortion); Brownstein, *supra* note 135, at 883 (describing the rule from *Casey* as establishing that “the state cannot attempt to further that goal [(i.e., protecting fetal life)] by substituting its choice favoring birth over abortion for the choice of the woman by deliberately hindering her ability to effectuate a contrary decision and obtain an abortion”).

¹⁹⁹ *See* Richard H. Fallon, Jr., *Individual Rights and Governmental Powers*, 27 GA. L. REV. 343, 363 (1993) (arguing that “within our constitutional practice, rights depend pervasively on judicial assessment of the appropriate scope of government power”); Bhagwat, *supra* note 3, at 366 (“With abortion rights, the Court’s leading decisions in *Roe v. Wade* and *Planned Parenthood v. Casey* present together a classic example of the way in which the definition of a constitutional right is inextricably tied to the identification of permissible and impermissible governmental purposes.”).

²⁰⁰ Fallon, *supra* note 199, at 344.

²⁰¹ For a discussion of the two-part framework and its application, *see Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016).

rigorousness of the review turns on the nature of the burden. If the burdens are great, the government must show a closer fit between the law and its compelling interest in public safety. If the burdens are slight, courts become more deferential.²⁰²

Although talk about government interests often sounds like talk about purposes, in truth the normal tiers of scrutiny have hardly any independent inquiry into motives.²⁰³ Means–end scrutiny²⁰⁴ or the focus on the fit between the government action and the ends sought are not at all “dependent on underlying motives.”²⁰⁵ When motive matters to constitutional law, notes Professor Young, it imposes a separate and independent hurdle to the means–end framework characterized by the tiers of scrutiny.²⁰⁶ Courts do not need such a test to assess Second Amendment challenges.

To be clear, this Essay does not argue that no gun laws have ever been badly motivated, or even that gun owners have never been targeted by some government action. But the doctrine ought to be built for the paradigm cases of rights violation,²⁰⁷ and the paradigm case of Second Amendment violations—like in *Heller*—exists when the government burdens the right more than is necessary to vindicate its exceptionally strong interests in public safety. Besides, even if a law does arise from a bad motive, the doctrine’s typical tools are sufficient to condemn that legislation without a resort to direct inquiry into the legislature’s motivation.

²⁰² See Brownstein, *supra* note 135, at 894 (noting that “[t]he most basic framework for identifying infringements focuses solely on the effect of state action”). Professor Alan Brownstein identified this effects-only scheme with a bifurcated standard of review that applied either strict scrutiny or minimum rationality review depending on whether the burden is substantial. But he recognized that an effects-based test can have three tiers and indeed presaged the two-part framework used in Second Amendment cases:

In theory, the Court could elect to utilize a three-tier model of this kind while continuing to focus exclusively on the effects of state action. Laws imposing de minimis burdens would receive minimum rationality review, regulations resulting in a more substantial impact would be reviewed under an ad hoc balancing test, and strict scrutiny would be reserved for egregious restrictions such as total prohibitions on the exercise of a right.

Id. at 909.

²⁰³ See Young, *supra* note 3, at 210–11.

²⁰⁴ Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–21 (1972) (discussing and defending an approach to equal protection that focuses on the fit between means and ends).

²⁰⁵ Young, *supra* note 3, at 211.

²⁰⁶ *Id.* at 213.

²⁰⁷ See Jamal Greene, *Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 114 (2018) (arguing that “how a constitutional community adjudicates rights should follow not from any mysticism about the particular rights at stake or about rights in general but rather from the paradigmatic forms of mischief the community wishes to confront”).

CONCLUSION

Animus doctrine provides a useful way to enforce the constitutional bar against state action motivated by hostility toward out-groups. But it also has been employed in other contexts; this Essay suggests that many claims in the Second Amendment space sound in animus. At the same time, the Essay has argued that none of the types of animus-related claims made about guns, gun owners, or gun rights ought to translate into a role for motive analysis in Second Amendment cases. The standard framework is working to weed out outlier laws that substantially burden protected self-defense interests.

