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Essay

DISGUST AND GUNS: CONDUCT, IDENTITY, AND SECOND AMENDMENT ANIMUS

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ABSTRACT—In *Second Amendment Animus*, Professor Jacob Charles examines whether the burgeoning doctrine of unconstitutional animus should play any role in adjudicating Second Amendment claims. This Essay responds to Professor Charles's important work. While it concludes that he is likely correct to reject animus as a grounding for Second Amendment claims, it points out areas where the analysis is more nuanced than he suggests. After considering Professor Charles's analysis, the Essay examines the Second Amendment animus issue through the theoretical lens provided by Professor Martha Nussbaum's work on disgust as a motivating factor for the types of exclusionary and subordinating laws properly condemned as grounded in animus. While that examination again concludes that animus is generally a poor fit for Second Amendment claims, the Essay nevertheless identifies fascinating parallels between at least some extreme gun regulations and characteristics of some laws condemned as animus based. Those parallels suggest that more work should be done to investigate the connection between animus-based laws and the disgust reactions Professor Nussbaum identifies as their source. In particular, more work is needed to examine how Professor Nussbaum's theory relates to laws that, while connected to disgust reactions, are not squarely grounded in them.

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INTRODUCTION

As Professor Jacob Charles writes in his thought-provoking essay, *Second Amendment Animus*, "The concept of animus truly 'is having its moment in the sun.'"[1] Professor Charles's contribution to the "flourishing" scholarship on animus consists of examining its applicability to three different potential targets of unconstitutional animus relevant to the Second Amendment: animus against guns themselves, against gun owners, and against gun rights. After Part I introduces the issue, Part II considers Professor Charles's analysis on its own terms. It concludes that, while fundamentally correct, his rejection of any role for animus in Second Amendment doctrine may be slightly too categorical.

In order to provide conceptual nuance glossed over by Professor Charles's categorical rejection, Part III introduces into the discussion legal philosopher Martha Nussbaum's explanation of animus and applies her theory to the Second Amendment animus question.[2] Professor Nussbaum's careful consideration of the concept of disgust, and how it feeds into discriminatory and exclusionary government decision-making, carries great potential for understanding the proper domain for claims of unconstitutional animus. Even though Second Amendment animus claims fit poorly with her focus on innate disgust reactions, a thought experiment applying her description of animus-based government action to gun restrictions raises

[1] Jacob D. Charles, *Second Amendment Animus*, 116 NW. U. L. REV. 1, 6 (2021) (quoting Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 215 (2019)).

[2] Part III primarily focuses on Professor Nussbaum's discussion in two books: MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010) [hereinafter NUSSBAUM, DISGUST], and MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004) [hereinafter NUSSBAUM, HIDING].

fascinating parallels between government actions the Supreme Court has condemned as resting on animus and the most extreme exemplars of gun regulation.[3] Those parallels may not justify importing animus into the Second Amendment; Professor Charles provides sensible reasons for rejecting that path. Nevertheless, those parallels reveal the need for more examination of the theoretical foundation for animus doctrine and, in particular, the relationship between that foundation and Professor Nussbaum's focus on disgust.

I. ANIMUS EVERYWHERE?

Professor Charles's analysis of animus doctrine's relationship to Second Amendment claims rests on both his sense that animus is "flourishing" as a legal concept and his recognition that judges and anti-gun regulation forces often rely on some version of that concept to critique gun regulations.[4] Of course, these two pillars of his analysis are related: the prominent role animus analysis has played in high-stakes constitutional litigation over the last decade makes it an attractive tool to grasp if one believes that a particular right or group suffers from majoritarian disparagement.

As to the first of these pillars, Professor Charles is surely correct to cite the growth of animus-related analysis in constitutional jurisprudence. If animus were a stock, analysts would rate it a "buy." As he notes, its domain has broadened: from its original doctrinal home in the Equal Protection Clause,[5] it spread to Free Exercise Clause and Establishment Clause jurisprudence,[6] along the way adapting to reflect those clauses' doctrinal frameworks, before reentering equal protection soil in the 2020 case

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[3] To be sure, some readers may find troubling the very idea of a parallel between animus toward guns, gun owners, and gun rights and the sexual-orientation- and disability-based discrimination that was condemned as animus based in canonical animus cases. Such readers may find the historical discrimination, subordination, and state-sponsored violence against such groups to raise a categorically different issue than any discrimination that might attend Second Amendment-related conduct or status. *See, e.g.*, Todd Brower, "*A Stranger to Its Laws:" Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy*, 38 SANTA CLARA L. REV. 65, 87 (1997) (implying a difference between sexual minorities and gun owners in terms of whether each group features "any common, collective existence or identity"). Nevertheless, judges' and advocates' invocation of animus-style reasoning in Second Amendment cases raises the issue of such reasoning's proper place in those cases and justifies considering those arguments.

[4] Charles, *supra* note 1, at 6.

[5] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[6] *See infra* note 111 and accompanying text.

reversing the Trump Administration's DACA rescission, *Department of Homeland Security v. Regents of the University of California*.[7]

As reflected by its expansion into new doctrinal areas, animus doctrine is also resilient. It has survived both the demise of the suspect class analysis that accompanied its original introduction into equal protection law[8] and the retirement of Justice Anthony Kennedy, who wrote the equal protection and religious freedom opinions that constitute the heart of the contemporary animus canon.[9] When Justice Kennedy retired from the Court in 2018, commentators had good reason to wonder whether that doctrinal tool would be retired along with him.[10] Nevertheless, two years after his retirement, the Court in *Regents* picked up the idea.[11] To be sure, *Regents* rejected the plaintiffs' animus claim.[12] Nevertheless, as I have argued elsewhere, the fact the Court even addressed the animus claim was noteworthy, given that it had already ruled for the plaintiffs on a different ground.[13] Indeed, not only did

[7] 140 S. Ct. 1891, 1915–16 (2020) (plurality opinion). Although this part of the Chief Justice's opinion spoke only for a four-Justice plurality, Justice Sotomayor's partial concurrence and partial dissent appeared to accept the framework of the plurality's animus analysis, even if she disagreed with how the plurality applied it. Her opinion thus created a five-Justice majority for its statement of the law governing the plaintiffs' animus claim. *See id.* at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[8] The Court has not added to the list of suspect or quasi-suspect classes since at least the 1980s, and likely the 1970s. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 503 & n.88 (2004) (noting and considering this chronology); *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756–57 (2011) (noting the "antiquated air" of current attempts to argue that additional groups should be accorded suspect or quasi-suspect status). Not coincidentally, *City of Cleburne v. Cleburne Living Center*, arguably the Supreme Court's last robust performance of suspect class analysis, was decided in the plaintiffs' favor despite the Court's rejection of plaintiffs' suspect class argument because the Court decided that the government's action was infected by animus. *See* 473 U.S. 432, 450 (1985) ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the [intellectually disabled] . . . .").

[9] *See* Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731–32 (2018); United States v. Windsor, 570 U.S. 744, 769–74 (2013); Romer v. Evans, 517 U.S. 620, 631–35 (1996).

[10] *See, e.g.*, Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal Protection Quiver*, 69 SYRACUSE L. REV. 69, 71–72 (2019) (stating that "with Justice Kennedy off the Court and replaced by a social conservative more likely of a mind with Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch, [heightened rational basis review]—a powerful and lethal quill—will likely be removed from LGBT rights advocates' quiver"). To be sure, Professor Beery spoke of heightened rationality review. *See id.* at 74–76. However, elsewhere in his article he made clear his understanding that such review was often triggered by a finding of animus, and the Court has not subjected such claims sounding in animus to explicitly heightened scrutiny. *See id.* at 86–88.

[11] *See Regents*, 140 S. Ct. at 1915–16 (plurality opinion).

[12] *See id.* at 1916.

[13] *See* William D. Araiza, Regents*: Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983, 1001–07 (2021).

the four-Justice plurality address the animus claim, a five-Justice majority provided a roadmap for how plaintiffs could raise such claims in the future.[14]

Given animus doctrine's spread and resilience, good reason exists for Professor Charles to consider animus a plausible doctrinal tool in Second Amendment cases. That plausibility only grows when one recognizes that Second Amendment plaintiffs, and the judges who hear their claims, often lament the disparagement allegedly lying at the heart of gun regulations and the court opinions upholding them.[15] To use Professor Sanford Levinson's term in his groundbreaking 1989 article,[16] this rhetoric accuses judges of considering the Second Amendment an "embarrassment," acknowledging a right that the text requires be acknowledged but nevertheless providing it only grudging protection. Indeed, even the Court that embraced the individual right understanding of the amendment in 2008[17] and incorporated that right against the states in 2010[18] was later criticized for failing to grant review of a meaningful Second Amendment case until 2020[19] and then dismissing it as moot.[20] Alleged distaste for the Second Amendment extends beyond courts to include citizens and legislative bodies that, if one believes

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[14] *See supra* note 7.

[15] *See, e.g.*, Charles, *supra* note 1, at 8 (quoting a judge complaining that "[t]o the rational observer, it is apparent that our court just doesn't like the Second Amendment very much" (quoting Mai v. United States, 974 F.3d 1082, 1104–05 (9th Cir. 2020) (VanDyke, J., dissenting from the denial of rehearing en banc))); Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari) ("If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But . . . the Second Amendment is a disfavored right in this Court."); Petition for Writ of Certiorari at 25, Silvester v. Becerra, 138 S. Ct. 945 (2017) (No. 17-342) (describing "the Ninth Circuit and many other courts" as "openly hostile to the Second Amendment").

[16] *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989) ("I want to suggest that the [Second] Amendment may be profoundly embarrassing to many who both support [gun] regulation and view themselves as committed to zealous adherence to the Bill of Rights . . . .").

[17] District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

[18] McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

[19] *See, e.g.*, Corey A. Ciocchetti, *The Next Big Gun Case: The Resurrection of the Second Amendment at the New Roberts Court*, 102 MARQ. L. REV. 309, 341 (2018) ("The Court's courage to hear tough cases need not recede because the interpretive exercise is difficult, controversial, intimidating, or unpopular. Yet, issue avoidance has become the Court's status quo when it comes to the Second Amendment."); *see also* Philip Casey Grove, *Common Use Under Fire:* Kolbe v. Hogan *and the Urgent Need for Clarity in the Mass-Shooting Era*, 59 ARIZ. L. REV. 773, 802–03 (2017) ("*Kolbe* illuminates the lower courts' continuing struggles with *Heller*'s common-use test and counsels heavily in favor of Supreme Court review. . . . By any definition, therefore, the issue of the proper analytical approach to the common-use test for resolving Second Amendment challenges has remained unsolved—despite nearly nine years of the lower courts' best efforts—and should be answered by the Supreme Court.").

[20] *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020) (per curiam); *id.* at 1527 (Alito, J., dissenting) (critiquing that conclusion). However, the Court soon granted certiorari in another Second Amendment case raising a similar issue. N.Y. State Rifle & Pistol Ass'n v. Corlett, 818 Fed. App'x 99 (2d Cir. 2020), *cert. granted*, 141 S. Ct. 2566 (2021) (No. 20-843).

the rhetoric, do everything they can to drive guns out of their communities.[21] Given such data points, it is hardly surprising that gun-rights plaintiffs reach for the animus cudgel.

II. WHAT TYPE OF ANIMUS?

But animus against what? Professor Charles explores three possibilities. First, he considers whether one can coherently allege that gun regulations rest on unconstitutional animus against guns themselves. Second, he examines the possibility that such laws are motivated by animus against gun owners. Finally, he considers whether they reflect animus against the Second Amendment right itself. This Part reviews Professor Charles's analysis and advocates for more careful and nuanced consideration before dismissing Second Amendment animus claims altogether. Part III then reconsiders these claims in light of Professor Nussbaum's analysis of animus doctrine's roots in disgust.

A. Animus Against Guns

Professor Charles makes short work of the first claim, dismissing the possibility of animus against guns in two crisp paragraphs.[22] Yet, while he is on strong ground in rejecting the plausibility of anti-gun animus, his argument is still somewhat incomplete. Focusing on the Constitution's protections for only a few physical things (most notably, the "papers[] and effects" protected by the Fourth Amendment[23]), Professor Charles writes that "if motive is relevant at all, it is to protect *people* or their *use* of these items, not any concern over the items themselves."[24] After an intervening quotation, he then writes, "Relatedly, there does not seem anything constitutionally objectionable with legislative disdain for guns."[25]

While Professor Charles rejects the plausibility of animus against guns themselves, he at least entertains the possibility of "hoplophobia," the asserted condition of the fear of guns.[26] More generally, there is interesting ground to be covered on the general question of animus against things.

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[21] *See, e.g.*, Teixeira v. County of Alameda, 822 F.3d 1047, 1051 (9th Cir. 2016) (quoting a group of homeowners opposing a permit for a gun store as being "opposed to guns and their ready availability and therefore believ[ing] that gun shops should not be located within their community"), *aff'd*, 873 F.3d 670 (9th Cir. 2017) (en banc).

[22] *See* Charles, *supra* note 1, at 14–15.

[23] U.S. CONST. amend. IV.

[24] Charles, *supra* note 1, at 15.

[25] *Id.*

[26] *See id.* at 14–15 (considering "hoplophobia" claims); *id.* at 9 (linking use of this word to "pro-gun circles"). Hereafter, this Essay uses this term without quotation marks, despite its potentially ideologically skewed nature.

Professor Nussbaum has written of the feelings of disgust persons feel toward other persons or conduct of which they disapprove.[27] She notes that persons who feel disgust toward those other persons or conduct report feelings akin to those of the revulsion persons often feel toward bodily waste and fluids, insects, or other such items from which our hard wiring prompts us to recoil.[28]

The connection Professor Nussbaum draws between disgust for certain items and disgust toward people who are associated with them—the latter of which she identifies as "animus"[29]—raises important questions about the constitutional implications of hoplophobia. Her recognition of humans' disgust reactions toward certain items[30] suggests at least a limited realm in which disgust toward objects exists, and potentially opens the way to animus, whether against those objects or persons associated with them.[31] This Essay engages those questions in Part III, after presenting Professor Nussbaum's analysis in more detail.

B. Animus Against Gun Owners

Professor Charles next considers the possibility of animus against gun owners. His discussion of this claim unfolds against a diametrically opposite conceptual landscape from his discussion of animus against guns themselves. That earlier discussion raises questions about whether animus against things even states a coherent proposition. By contrast, his discussion of animus against gun owners rests on familiar conceptual ground. The canonical equal protection animus cases struck down government action because it was based on animus against particular groups: "hippies" and "hippie communes" in *U.S. Department of Agriculture v. Moreno*,[32] intellectually disabled persons in *City of Cleburne v. Cleburne Living Center, Inc.*,[33] and LGB people in *Romer v. Evans* and *United States v. Windsor*.[34]

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[27] *See* NUSSBAUM, DISGUST, *supra* note 2, at 12–13.

[28] *See id.* at 15–17.

[29] *See id.* at 141.

[30] *See infra* text accompanying notes 91–93.

[31] *See infra* text accompanying notes 93–96.

[32] *See* 413 U.S. 528, 534 (1973) (noting legislative history hostile to "hippies" and "hippie communes").

[33] *See* 473 U.S. 432, 450 (1985) ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the [intellectually disabled] . . . .").

[34] *See* Romer v. Evans, 517 U.S. 620, 635 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."); United States v. Windsor, 570 U.S. 744, 770 (2013). In addition, Justice O'Connor's concurrence in *Lawrence v. Texas* rested on an equal protection analysis sounding in animus theory. *See* 539 U.S. 558, 579, 582 (2003) (O'Connor, J., concurring in the judgment). The "T" and "Q" in the common identifier "LGBTQ"

Thus, when Professor Charles considers the possibility of animus against gun owners, his analysis begins with a strong presumption in favor of its conceptual plausibility.

That conceptual plausibility in turn raises the empirical question whether gun owners are likely to be victims of animus. Professor Charles believes they are not. He identifies

> 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.[35]

Unfortunately, these arguments prove less than Professor Charles might like them to.

1. Motive and Means–End Analysis

Professor Charles's first argument—that "public safety ends motivate nearly all gun laws"[36]—fails by largely (although not completely) assuming its conclusion. He writes: "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."[37] He then explains: "[T]his does not mean every gun law is constitutional. Yet it does mean that typical gun laws are not likely to be improperly motivated."[38]

By citing gun-regulatory laws' assertedly legitimate motivations as evidence of their likely constitutionality, Professor Charles shortcuts the difficult work of uncovering the illicit motives that lie at the heart of any animus-based law. To be sure, quite possibly every single gun regulation in the United States cites public safety justifications. Moreover, legislators who favor gun regulation likely believe that, indeed, fewer guns mean safer communities. Professor Charles contrasts those justifications and beliefs with the corresponding justifications for laws struck down in the equal protection animus cases. He describes those cases as ones in which "the Court found itself searching in vain for a justification adequate to support the government's action."[39]

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are omitted because transgender and queer identity were not at issue in *Romer*, since Amendment 2 itself focused on sexual orientation and not sexual minority status more generally. *See Romer*, 517 U.S. at 624.

[35] Charles, *supra* note 1, at 16.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 17.

[39] *Id.*

The problem is that, in those cases, the government *did* cite legitimate justifications for the challenged laws. Of course, and as Professor Charles observes, the Court found those justifications to be pretextual and identified animus as the true justification, whether based on courts' direct fact-finding about the government's motivation,[40] evidence derived from the legislative record,[41] or as an inference from the lack of any other government interest supporting the law.[42] Nevertheless, those conclusions all required at least a passing judicial examination of the justifications the government offered,[43] and sometimes a relatively fulsome examination.[44] But even if brief, the important point is that in the animus cases the Court undertook that means–end examination—and sometimes did so in some detail.

It matters that the Court undertook those examinations because an animus conclusion doesn't—or at least shouldn't—spring forth from a quick and easy observation that a law fails to promote a legitimate government interest with the requisite rationality. To the contrary: an animus conclusion should require careful consideration of the government's proffered justifications, including careful consideration of the degree of fit between any legitimate justification and the law's actual effect.[45] To be sure, as I have discussed in other writing, that means–end analysis does not require a perfect fit. Unlike, for example, race classifications, government discrimination attacked as grounded in animus simply requires a fit confirming that the asserted legitimate government interest is in fact the real one motivating the government.[46] This is not the case with regard to race: for better or for worse, the Court's race jurisprudence considers any governmental use of race so problematic that government must show that its use of race is narrowly

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[40] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (citing the trial court's finding that the ordinance was based in part on "the [City] Council['s] . . . concern[] with the negative attitude of the majority of property owners").

[41] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (noting the legislative history's reference to a desire to deny food stamps to "hippies" and "hippie communes"); United States v. Windsor, 570 U.S. 744, 770–71 (2013) (noting the legislative history and the title of the legislation).

[42] *See* Romer v. Evans, 517 U.S. 620, 634–35 (1996) (reaching its animus conclusion as "an inevitable inference" from the lack of other plausible justifications for the legislation).

[43] *See, e.g.*, *Windsor*, 570 U.S. at 775 (stating, in the penultimate substantive sentence of the opinion, that "[t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity").

[44] *See, e.g.*, *Cleburne*, 473 U.S. at 448–50 (considering several city council justifications and finding that the city's reasons "rest[ed] on an irrational prejudice against the [intellectually disabled]").

[45] *See supra* note 40 (noting that the Court in *Cleburne*, one of the Court's canonical animus cases, did in fact give the careful consideration identified in the text accompanying this note).

[46] *See* WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 139–43 (2017).

tailored to achieve its asserted interest—indeed, an interest that must be compelling, not merely legitimate.[47]

The animus inquiry is different. As the goal of that latter inquiry is simply to ensure that government is motivated by a public-regarding interest, as opposed to "a bare . . . desire to harm a . . . group,"[48] the focus of the means–end review in animus cases is not to ensure a perfect fit with a compelling government interest. Rather, all that is required is a reasonable fit with a legitimate government interest—as long as that interest is the real one motivating the law.[49]

Thus, animus claims still require judicial inquiry into the fit between the challenged action and the government's interest, even if that inquiry is differently focused and softer than the analogous inquiry in race[50] (or sex[51]) cases. Because of this need for fit, Professor Charles cannot simply assert gun laws' likely public safety justifications and conclude that those justifications by themselves rebut an animus claim. Of course, public safety is a legitimate government interest. Moreover, one might intuitively conclude that the fewer the guns in a community, the safer that community is—although gun advocates would dispute that proposition.[52] Analogously, so too might one intuit that persons not fully able to care for themselves present unique safety concerns in the event of a flood or other emergency evacuation event.[53] One might even intuitively credit a claim that households comprised of unrelated persons raise more suspicion about public-benefits fraud.[54] Thus, the animus claims in *Cleburne* and *Moreno* required the Court

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[47] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny. This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." (citation and internal quotation marks omitted)); *see also* William N. Eskridge, Jr., *The California Proposition 8 Case: What Is a Constitution For?*, 98 CALIF. L. REV. 1235, 1236 (2010) ("Strict scrutiny requires that the discrimination be the only way the state can accomplish a compelling public goal.").

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

[49] *See* ARAIZA, *supra* note 46, at 141.

[50] *See supra* note 47.

[51] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531–33 (1996) (employing stringent means–end review in a sex discrimination case).

[52] *See, e.g.*, Robert Leider, *The State's Monopoly of Force and the Right to Bear Arms*, 116 NW. U. L. REV. 35, 56–63 (2021) (citing the underenforcement of law in many communities as a justification for protecting an individual firearm-possession right).

[53] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 449 (1985) (citing this justification offered by the city for its permit denial but rejecting it as poorly fitting the ordinance's limited sweep).

[54] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 535–37 (1973) (citing this justification offered by the government for limiting the eligibility of such households under the Food Stamp Act of 1964, but rejecting it given the limitation's poor fit with the Act's existing restrictions and antifraud provisions).

to interrogate those government justifications—as the Court did, and found them wanting in both cases.[55] As with those cases, simply asserting a public safety justification may not immunize a gun-regulation law from an animus challenge.

2. Targeting "Gun Owners as Such"

Professor Charles's second observation about animus against gun owners—that "gun laws do not target gun owners as such"[56]—is similarly inadequate to refute categorically a claim of anti-gun-owner animus. Contra Professor Charles's suggestion, the fact that gun regulations do things such as "mandate background checks" or "require training and good reason for carrying guns in public" does not necessarily distinguish them "in form"[57] from some of the laws struck down in the canonical animus cases. His reliance on Professor Akhil Amar's analysis of the anti-LGB law in *Romer v. Evans* as a bill of attainder[58] suggests that Professor Charles is making an argument that when gun laws, for example, "mandate background checks," they do not target gun owners' identities, in a way that the laws did in animus cases such as *Romer*.[59]

Yet this easy distinction based on whether a restriction targets identity may not be so easy. The difficulty arises from the often blurry relationship between status and conduct. As the final Part of this Essay argues, that distinction raises difficult problems concerning when conduct merges into status or identity, such that bans on gun-related conduct are appropriately understood as attacks on gun-related identity. Different gun-related conduct laws may have different relationships to gun owners' identities.[60] For that

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[55] *See supra* notes 53–54. Professor Charles describes the animus cases as involving "purported rationales [that] all appeared pretextual." Charles, *supra* note 1, at 17. But as suggested by the Court's examination of those rationales in the animus cases, pretext does not appear on its own accord in many cases; rather, it must be fleshed out by a careful analysis of either subjective government intent or the plausibility of legitimate justifications, leaving animus as essentially the only justification left standing. *See* ARAIZA, *supra* note 46, at 139–43 (making this point). Indeed, the conclusion of Professor Charles's descriptions of these cases concedes the point. *See* Charles, *supra* note 1, at 17 ("Poor fit was evidence of an ulterior motive [in the animus cases]."). The point is that "poor fit" must be identified via a means–end analysis.

[56] Charles, *supra* note 1, at 16.

[57] *Id.* at 18 (emphasis in third quotation omitted).

[58] *See id.* at 18–19 (discussing Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203 (1996)).

[59] *Id.* at 18.

[60] The parallel to Professor Amar's identity-grounded indictment of Amendment 2 in *Romer* is clear, at least conceptually, even if different people may disagree (indeed, disagree heatedly) about whether the identity category of "gun owner" is truly comparable, for constitutional purposes, to the analogous category of, say, "LGBTQ+ person" or "disabled person." *See, e.g.*, Brower, *supra* note 3, at 87 ("If

reason, Professor Amar's critique of Amendment 2 as a legal burden imposed on a particular status or identity[61] may have different degrees of relevance for different types of gun laws. Bans on owning a weapon might fall at one extreme end of the spectrum: to the extent a law makes it literally illegal to own a gun, it similarly outlaws the status of being a gun owner.[62] At the other extreme, requirements such as mandatory safety training before being allowed to own a weapon might be understood as imposing significantly less of an identity-based burden. A fascinating intermediate category of restrictions might include restrictions on carrying weapons in public. Such restrictions might be seen as relatively innocuous burdens on gun owners' identities, perhaps akin to time, place, and manner restrictions in free-speech doctrine.[63] Alternatively, they could potentially be characterized, at least by gun owners themselves, as stripping away their identity where it matters most—in the public sphere.

Part III considers these nuanced and socially contingent questions once we have the benefit of Professor Nussbaum's exploration of the disgust reactions that she argues form the basis for animus conclusions.[64] For now, the preliminary point is that Professor Charles's easy dismissal of any claim that gun-regulatory laws target gun owners qua gun owners may be premature.

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lesbians and gay men have no identity apart from sex, they are indeed similar to . . . drug addicts, smokers, gun owners, or motorcyclists[,] . . . a collection of miscellaneous individuals united only by a common activity without any common, collective existence or identity.").

[61] For further information about Professor Amar's analysis of identity versus conduct regulation, see Amar, *supra* note 58, at 225–26.

[62] Obviously, *Heller* and *McDonald* make it clear that government may not enact a flat-out ban on gun possession, at least of the types of guns *Heller* described as "those in common use at the [founding]." District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (internal quotations omitted); *see* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010). Whether permissible bans on possessing other weapons would similarly impact the identities of the would-be owners of such guns is a question that implicates an intricate analysis of the identities of gun owners. For purposes of this Essay, the more important point is the basic concept of gun ownership's relationship to a meaningful concept of identity—the identity of being a gun owner. *See supra* note 60 (discussing the idea of identity centered on gun ownership).

[63] In First Amendment doctrine, content-neutral restrictions on the time, place, or manner by which speech is made are subject to relatively deferential judicial review. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." (internal quotation marks omitted)); *see also id.* at 797 (observing that an analysis requiring the government to use the least speech-restrictive means possible "has never been a part of the inquiry into the validity of a time, place, and manner regulation").

[64] *See infra* Section III.C (discussing the relationship of restrictions on gun-related conduct to perceived disapproval of the status of being a gun owner).

3. Marginalization and Stigmatization

Professor Charles's final argument about animus against gun owners maintains that "gun owners as a group have not historically been marginalized—and even laws burdening this group carry no negative symbolic effect or stigma."[65] At a doctrinal level, the first of these observations implicates a problem that has bedeviled equal protection law at least since the erection of the Court's suspect class structure in the early 1970s: how can a court reliably determine whether a group has in fact been marginalized? Supreme Court decisions since the dawn of its experiment with suspect class analysis have struggled to apply a principled approach to the political powerlessness question.[66] In an example of lower courts echoing that confusion, two panels of the same circuit court, within just two years of each other, reached diametrically opposing conclusions about whether LGB persons lacked political power.[67]

Viewing Professor Charles's point more broadly—as one about social marginalization rather than "simple" political powerlessness—makes the analysis even more challenging. Determining whether gun owners are socially marginalized turns on judgments about social reality that are highly contested, factually contingent, and quite arguably beyond courts' competence.[68] As with his other arguments about animus against gun owners, his conclusions about the lack of marginalization gun owners experience would benefit from more nuanced discussion of types of contested marginalization and their applicability to gun owners.

The second half of Professor Charles's assertion, that gun laws inflict no "negative symbolic effect or stigma," raises the even more difficult question of identifying stigmatic harm. Again speaking at a doctrinal level, scholars have similarly noted the difficulty courts have encountered in the Establishment Clause context when asking whether a law endorses a

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[65] Charles, *supra* note 1, at 16.

[66] *Compare, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686–88 (1973) (plurality opinion) (explaining that the enactment of legislation benefiting women and outlawing sex discrimination, rather than reflecting women's political power, illustrated the existence of a problem Congress was justified in addressing), *with* United States v. Virginia, 518 U.S. 515, 575–76 (1996) (Scalia, J., dissenting) (suggesting that the enactment of that legislation illustrates that sex discrimination should be demoted from evaluation under strict scrutiny to rational basis review because such legislation indicates that women can successfully wield political power).

[67] *Compare* High Tech Gays v. Def. Indus. Sec. Clearance Off., 895 F.2d 563, 574 (9th Cir. 1990) (finding that LGB persons have political power), *with* Watkins v. U.S. Army, 837 F.2d 1428, 1447–48 (9th Cir. 1988) (finding they do not).

[68] *See, e.g.*, Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1571 & n.252 (2015) (noting the difficulty courts encounter when they try to determine whether a particular group is politically powerless and quoting cases suggesting judges' inability to make such determinations); *id.* at 1571 n.253 (quoting scholars expressing that same view about judges' capabilities).

particular religion or makes nonbelievers feel excluded from full membership in the political community.[69] While the analogy is not precise, any judicial inquiry into stigmatic harm requires similarly nuanced and socially contingent analysis. At the very least, though, Professor Charles's assertion about the stigma-free implications of gun laws, just like his prior assertion about the public safety justifications for gun laws, comes troublingly close to assuming a conclusion.

C. Animus Against Rights

Professor Charles's third claim addresses whether it makes conceptual sense to think about animus against rights and, if it does, whether such antirights animus infects gun regulations. Professor Charles begins his discussion by recognizing the potentially poor fit between the animus idea and conduct, that is, the exercise of rights.[70] However, he acknowledges that the Court has implicitly endorsed the conceptual possibility that animus might exist against conduct by applying something closely akin to animus principles in a series of religious freedom cases.[71] Nevertheless, he concludes that it makes little sense to embrace the idea of animus against gun rights. Professor Charles first indicates that laws regulating gun-related conduct do not "express vile views" or implicate rights, such as equality, "that can be infringed through symbolism or expressive government action"[72]—situations in which, he contends, a focus on intent (and thus animus) may make the most sense.[73] Second, he argues that "consequentialist concerns"[74] justify ignoring intent in Second Amendment cases, since he believes that Second Amendment rights can be effectively protected by means–end inquiries that focus on a challenged law's effects, rather than its motives.[75]

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[69] *See, e.g.*, Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1214–16 (2016) (explaining the difficulty courts experience in applying the endorsement test through the lens of a reasonable observer); *see also* Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions . . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."). In later cases, Justice O'Connor explained that the endorsement test should be applied by examining the perceptions of a reasonable observer. *See, e.g.*, Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 778–79 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

[70] *See* Charles, *supra* note 1, at 21.

[71] *See id.*

[72] *Id.* at 23.

[73] *See id.*

[74] *Id.* at 24.

[75] *See id.*

Professor Charles persuasively argues that the nature of some rights is such that inquiries into bad intent (such as animus) play no useful role. Sometimes, government disfavor and social disdain toward the exercise of a right may be acceptable so long as government nevertheless protects that exercise.[76] For example, we may dislike particular speech (indeed, we may "hate" it)[77] as long as we protect it. The same might be true of arming oneself despite community objections that such conduct makes it less safe, or of having an abortion despite moral objections a community might have to that practice. Despite such conduct's protected status, such majoritarian dislike may well be constitutionally acceptable, as long as regulations do not effectively infringe on the performance of the conduct.[78] He contrasts such rights to those whose unconstitutional effect flows, at least in part, from the message a challenged law sends. Thus, he argues that, for example, laws that allegedly constitute an establishment of religion or express racial inferiority are proper subjects for an intent, and thus ultimately an animus, inquiry.[79]

The problem resides in determining whether the Second Amendment right is akin to those rights for which intent inquiries play no proper role. Professor Charles considers gun rights to fall within the category of 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."[80] However, as suggested by this Essay's analysis of Professor Charles's argument about animus against gun owners,[81] it is at least plausible to suggest that some gun regulation does indeed implicate government motivations in ways that render a motive inquiry viable, even if not necessarily the preferred way of analyzing such laws. The unfortunate fact of the matter is that the gun issue in the United States has transcended

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[76] Indeed, in a footnote he states his "sympath[y]" with a position I took during a conversation with him, that it is perfectly legitimate for government to disfavor, dislike, or (if one wishes to use the critical term) harbor animus toward particular conduct, even when that conduct is otherwise constitutionally protected. *See id.* at 21 n.123; E-mail from William D. Araiza to Jacob Charles (May 24, 2021) (on file with author).

[77] *See* United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting) (calling for "freedom for the thought that we hate"). While Justice Holmes spoke of "thought," modern judges and justices have acknowledged that such protection extends to "speech that we hate." *E.g.*, Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring) ("[W]e protect speech that we hate . . . .").

[78] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850, 869 (1992) (plurality opinion) ("Our obligation is to define the liberty of all, not to mandate our own moral code.").

[79] *See* Charles, *supra* note 1, at 23.

[80] *Id.* at 24–25 ("[N]othing in the text, history, tradition, or doctrine of the Second Amendment suggests that the right safeguards any expressive interests."); *see also infra* note 87 and accompanying text (identifying a potential tension in Professor Charles's discussion of the expressive nature of gun possession but offering a possible explanation).

[81] *See supra* Section II.B.

substantive debate about the merits or drawbacks of a given law and has become, in part, a fight about identity. While both sides may dress up their arguments in the neutral language of policy analysis, the stakes, as Professor Charles notes, may transcend policy concerns to implicate gun owners' identities.[82] In particular, attacks on gun rights often appear to gun owners to be attacks on the culture of gun owners, and thus attacks on the owners themselves.[83] Thus, alleged animus against Second Amendment right-holders potentially merges into alleged animus against the right itself.

This relationship between alleged animus against gun rights and gun owners finds an analogue in animus doctrine's migration into religious freedom cases. As Professor Charles notes and as I have previously written, the Court's equal protection animus jurisprudence has traveled a circuitous path, with the Court borrowing the animus concept for use in Free Exercise and Establishment Clause cases, modifying it to meet the needs of those particular doctrinal areas, and then replanting it into equal protection soil.[84] Indeed, Professor Charles's rejection of animus against Second Amendment rights identifies the religion context as an example of a situation where it does make sense to speak of animus against rights.[85]

Comparing these two contexts reveals the insufficiency of any easy conclusion that animus-against-rights claims have no place in Second Amendment doctrine. A foundational characteristic of religion, religious beliefs, and religious practice is that they often help constitute persons' identities.[86] As Professor Charles concedes, gun owners may construct their

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[82] *See infra* note 87 and accompanying text.

[83] The cultural tie-in to the gun-regulation question was illustrated by the controversy that erupted during the 2008 presidential primary campaign when then-candidate Barack Obama stated that people in economically struggling communities "cling to guns" to express their "bitter" feelings and was in turn criticized for allegedly being out of touch with working-class voters. *See* Jeff Zeleny, *Opponents Call Obama Remarks "Out of Touch,"* N.Y. TIMES (Apr. 12, 2008), https://www.nytimes.com/2008/04/12/us/politics/12campaign.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer [https://perma.cc/8J5T-F5MZ]; *cf.* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 461 (1999) ("[T]he reason that members of the anti-[gun-]control minority care so intensely [about the gun issue] is that they know the aim of gun legislation is to disparage their cultural identities. Gun registration might be no more onerous than auto registration, but the social meaning of the former makes it impossible for gun owners to bear . . . .").

[84] *See* Charles, *supra* note 1, at 6; Araiza, *supra* note 13, at 1009.

[85] *See supra* notes 71–73 and accompanying text.

[86] *See, e.g.*, Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1164-65 (1988) ("Religious beliefs, by their very nature, form a central part of a person's belief structure, his inner self. They define a person's very being—his sense of who he is, why he exists, and how he should relate to the world around him. A person's religious beliefs cannot meaningfully be separated from the person himself; they are who he is."). For a discussion of how religion can constitute a core feature of a person's identity, see Avigail Eisenberg, *Religion as Identity*, 10 LAW & ETHICS HUM. RTS. 295, 300 (2016).

identities around their gun ownership.[87] If so, then, just as it is possible to think about animus against particular religious practices[88] (since those practices help define members of the religious sect that performs them), so too it is possible to think about animus against gun possession (since such conduct may well define many gun owners). That equation of gun and religious rights is at least plausible (if concededly not self-evidently correct), because in both cases, the conduct (engaging in particular religious exercises or possessing a gun) is sufficiently central to the actor's identity that animus against that conduct potentially shades into animus against members of the group that performs it.[89]

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This Part's examination of Professor Charles's analysis reveals that beneath the surface plausibility of his rejection of the animus concept in Second Amendment cases, there may lie deeper social meanings in guns themselves, gun owners' identities, and the exercise of gun rights, and a deeper connection between those meanings. Those meanings and the connections between them may justify labeling at least some gun regulations as grounded in animus—or they may not. To resolve this question, it is necessary to consider the conceptual foundation of the animus prohibition.

III. FROM DISGUST TO ANIMUS

This final Part considers that foundation. It relies heavily on legal philosopher Martha Nussbaum's work on the concept of disgust and how that concept relates to legal and social oppression of particular groups.[90]

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[87] *See* Charles, *supra* note 1, at 18. *But see id.* at 24 ("[N]othing in the text, history, tradition, or doctrine of the Second Amendment suggests that the right safeguards any expressive interests."). The seeming tension between these two propositions is resolvable when one realizes that they address different ideas: respectively, gun owners' perceptions of the expressive component of their gun possession conduct and the focus of the Second Amendment right itself.

[88] *See, e.g.*, James Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 330 (2013) (stating that in *City of Boerne v. Flores*, "the Court identified the baseline for what constitutes a free exercise violation as 'legislation enacted or enforced due to animus or hostility to the burdened religious practices'" (quoting City of Boerne v. Flores, 521 U.S. 507, 531 (1997))).

[89] Professor Charles argues that either all or most gun laws do not target gun owners' identities because they do not target gun owners "*as such*." *See* Charles, *supra* note 1, at 18. I address this argument *supra* Section II.B.2.

[90] *See, e.g.*, NUSSBAUM, DISGUST, *supra* note 2, at 169–70 ("Because gay male behavior in particular has been hypersexualized in the public imaginary[,] . . . it is easy to connect gay men to disease and defilement by focusing on venues . . . where casual sexual interactions take place, and then to stigmatize the entire community by associating it with a scare-image of these places as sites of disease."); *id.* at 17

Professor Nussbaum argues that the Supreme Court's animus jurisprudence rests on the principle that laws cannot legitimately rely on a view that certain groups are "disgusting" (as she uses the term).[91] As she explains, such disgust reactions reflect an understanding of the targeted group as subhuman—indeed, as associated with what she calls the "primary objects" of disgust, namely, "feces, blood, semen, urine, nasal discharges, menstrual discharges, corpses, decaying meat, and animals/insects that are oozy, slimy, or smelly."[92] From the association of particular groups of persons with those objects, it is only a short step to conclude that laws motivated by such views rest on an illegitimate motive—that is, animus.[93]

Professor Nussbaum applies these insights to discrimination, particularly, although not exclusively, against LGB persons and, more precisely, against gay men.[94] Her argument is straightforward, but powerful: when majorities react to such groups in ways akin to their instinctive reactions to disgust's primary objects, they seek to stigmatize, suppress, and exclude them in order to maintain distance from the impurities with which those individuals are associated.[95] Political opposition to such groups, she notes, often emphasizes their association with those impurities: for example, she observes that proponents of Colorado's Amendment 2 (struck down in *Romer*) distributed circulars claiming that gay men eat blood and feces.[96] She suggests that gay men are particularly likely to trigger such disgust reactions,

("Societies have many ways of stigmatizing vulnerable minorities. Disgust is not the only mechanism of stigmatization. It is, however, a powerful and central one . . . .").

[91] *See, e.g.*, NUSSBAUM, HIDING, *supra* note 2, at 150–51 (concluding that, at base, the argument made by the proponents of Amendment 2 and rejected by the Court's animus analysis in *Romer* rested solely on disgust).

[92] NUSSBAUM, DISGUST, *supra* note 2, at 15–16.

[93] *See id.* at 110–13 (discussing *Romer* and noting its foundation in *Cleburne* and *Moreno*).

[94] NUSSBAUM, HIDING, *supra* note 2, at 113 (referring to "the central locus of disgust in today's United States: male loathing of the male homosexual"); *see also id.* at 92–93 (discussing disgust toward disabled persons).

[95] *See* NUSSBAUM, DISGUST, *supra* note 2, at 13 ("People do feel deep disgust with certain practices and, by extension, the groups that engage in those practices. They believe that these practices threaten the social fabric, and they are usually eager to make law in response to that perceived threat."); *id.* at 16 ("All societies, it appears, identify at least some humans as disgusting. Very likely this is a stratagem adopted to cordon off the dominant group more securely from its own feared animality: if those quasi humans stand between me and the world of disgusting animality, then I am that much further from being mortal/decaying/smelly/oozy myself.").

[96] NUSSBAUM, HIDING, *supra* note 2, at 101; *see also* JOHN W. DOWER, WAYS OF FORGETTING, WAYS OF REMEMBERING: JAPAN IN THE MODERN WORLD 30 (2012) (quoting the war correspondent Ernie Pyle's reporting of how Japanese persons were "looked upon" by personnel in the Allied Pacific Theater "as something subhuman and repulsive, the way some people feel about cockroaches or mice," and reporting, upon seeing Japanese prisoners as "wrestling and laughing and talking just like normal human beings," that nevertheless "they gave me the creeps, and I wanted a mental bath after looking at them").

given the features of their sexual practices, in particular, their willingness to be penetrated with the very bodily fluids (especially semen) that are considered disgusting.[97]

Professor Nussbaum's provocative analysis raises the question whether reactions to guns, gun owners, or gun rights can be analogized to the disgust reactions Professor Nussbaum concludes underlay the laws struck down in the canonical animus cases. The three Sections that follow reconsider each of those possibilities, now in the light of insights Professor Nussbaum's analysis makes possible.

A. Disgust Toward Guns

Begin with the possibility that reactions to guns can be analogized to the primary-object disgust reactions Professor Nussbaum identifies as the cornerstone of animus. Her focus on such reactions seemingly undermines the coherence of any argument that negative public reactions to guns themselves constitute animus against those objects. Persons may dislike guns or even fear them, even to the point of not wishing to touch them. But even such reactions to danger are a far cry from the disgust Professor Nussbaum links to those primary objects[98] and their association with the targets of animus.[99]

It may seem that Professor Nussbaum's identification of primary objects that trigger such intense and innate disgust reactions raises doubts about hoplophobia's relationship to those reactions. As noted above, even strongly negative reactions to guns simply do not reflect the innate aversion Professor Nussbaum discusses. Moreover, she characterizes disgust reactions as cross-cultural, "standardly felt" "[i]n virtually all societies."[100] By contrast, hoplophobia is surely culture-specific: a warrior culture or subculture, or a subculture that experiences guns as benign objects (for example, as items used in a reenactment of a Revolutionary War military

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[97] NUSSBAUM, DISGUST, *supra* note 2, at 18–19; Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL'Y 127, 187 (2008) (noting the particularly visceral negative public reaction to gay male sex).

[98] *See* NUSSBAUM, HIDING, *supra* note 2, at 88 (distinguishing danger reactions from disgust reactions).

[99] *See supra* note 96 and accompanying text; *cf.* NUSSBAUM, DISGUST, *supra* note 2, at 16 (discussing disgust projected on "untouchables in the Indian caste system" for an association with their responsibilities for cleaning latrines and disposing of corpses as well as on women for "their role in birth[] and menstruation").

[100] NUSSBAUM, DISGUST, *supra* note 2, at 15.

parade or as part of a family hunting outing), would likely not experience disgust reactions when presented with a gun.[101]

To be sure, some Americans' culturally specific negative reactions to guns likely reflect a connection between them and something beyond the items themselves. Indeed, they must, lest those reactions be purely arbitrary. It may be that guns—not disgust triggering in themselves—might nevertheless be connected with either activities or persons that trigger deeper levels of disgust than would be naturally attributable to guns themselves.[102] This possibility is considered later, when this Essay considers disgust toward gun possession (conduct) and gun owners (persons who engage in that conduct).

This analysis suggests that any disgust toward guns arises at most indirectly, from reactions toward gun-related conduct or persons engaging in that conduct, either of which might trigger disgust toward guns themselves. Such a dynamic is one step further removed from the disgust reactions Professor Nussbaum identifies when discussing targets of animus such as gay men. The disgust reaction to gay men directly connects them to the primary objects of disgust—gay men are themselves associated with bodily fluids, oozy insects, and the like.[103] By contrast, the disgust toward guns under consideration here connects guns with either persons or conduct that others in turn associate with those primary objects.

Such disgust reactions toward guns can be powerful, even if indirect. For example, Professor Nussbaum describes the more direct association of primary disgust objects with animus targets as "extend[ing] from object to object in ways that could hardly bear rational scrutiny."[104] But she could just as well be describing cases in which municipalities have sought to exclude facilities such as firing ranges for reasons that collapsed under any meaningful scrutiny.[105] Nevertheless, more important than the intensity of

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[101] For one example of a cross-cultural study about attitudes toward guns, see Claire Ann Cook, *Young People's Attitudes Towards Guns in America, Great Britain, and Western Australia*, 30 AGGRESSIVE BEHAV. 93, 100–03 (2004) (finding both differences and similarities in such attitudes among young people in three English-speaking nations).

[102] Such reactions may also flow from other impulses—for example, the association of guns with danger. *See* NUSSBAUM, HIDING, *supra* note 2, at 88 (distinguishing this impulse from disgust).

[103] *See* NUSSBAUM, DISGUST, *supra* note 2, at 18–19 ("The idea of semen and feces mixing together inside the body of a male is one of the most disgusting ideas imaginable—to males, for whom the idea of nonpenetrability is a sacred boundary against stickiness, ooze, and death. . . . Thus disgust is ultimately disgust at one's own imagined penetrability and ooziness, and this is why the male homosexual is . . . regarded with disgust . . . .").

[104] *Id.* at 15.

[105] *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 709 (7th Cir. 2011) ("In the district court, the City presented no data or expert opinion to support the range ban, so we have no way to evaluate the

such indirect disgust is the fact that it is indeed indirect, flowing from an association with something else, rather than flowing directly from the primary-object disgust reactions she considers virtually instinctive to humans.

Still, even this more indirect relationship raises interesting questions about alleged hoplophobia. The question here would be whether any such indirectly derived disgust can reasonably be analogized to the disgust Professor Nussbaum discusses. If so, such reactions would derive from disgust toward either gun owners or gun-related conduct. This Essay now turns to those latter possible objects of disgust.

B. Disgust Toward Gun Owners

Does it make sense to think about gun laws as reflecting disgust toward gun owners, and thus, ultimately, animus toward them? Recall from the previous Section's discussion of hoplophobia that the relevant type of disgust involves an identification of a group with the primary objects of disgust—the bodily wastes, decaying flesh, and insect-like items that trigger innate feelings of revulsion. As noted earlier, Professor Nussbaum argues that the victims of at least some of the laws struck down in canonical animus cases have been or can be associated with such objects. Anti-gay activists have explicitly associated gay men with those objects.[106] Professor Nussbaum also notes the existence of similar revulsion to the very sight of some disabled people—perhaps, she suggests, because such people are visual reminders of human decay.[107] Indeed, the background facts of the canonical animus case involving disabled persons, *City of Cleburne v. Cleburne Living Center, Inc.*,[108] feature neighbors' reactions to the proposed group home for intellectually disabled persons that take on the characteristics of disgust reactions.[109] Some of those reactions, to the extent they emphasized fear of

seriousness of its claimed public-safety concerns. Indeed, on this record those concerns are entirely speculative and, in any event, can be addressed through sensible zoning and other appropriately tailored regulations.").

[106] *See supra* note 96 and accompanying text.

[107] *See* NUSSBAUM, HIDING, *supra* note 2, at 92–93.

[108] 473 U.S. 432 (1985).

[109] *See, e.g.*, Scott McCartney, *Quiet Neighborhood Becomes Court Battleground*, HENDERSONVILLE TIMES-NEWS, Nov. 22, 1984, at 32 ("The older women are fearful of this thing. There are a lot of older women in this neighborhood and they don't want these people around." (quoting a resident)); Richard Carelli, *Texas Town Divided over Proposed Group Home*, BOWLING GREEN DAILY NEWS, May 5, 1985, at 23-B ("I'm a coward. It's not a very pleasant thought to go to bed and know there's 13 demented, self-afflicted people across the street from you." (quoting a witness at the zoning hearing)); *see also* ARAIZA, *supra* note 46, at 37–39 (providing additional factual background to the city's deliberations and decision).

spatial proximity, reflect scholars' theories of how disgust reactions manifest more generally in the case of disabled persons.[110]

More speculatively, we can widen our gaze and identify groups that experience such disgust reactions in other legal contexts analogous to animus. Most notably, in the free religious exercise context, dislike of minority religions can easily be understood to trigger reactions that, in the equal protection context, one would characterize as animus based. For example, in a 1993 free exercise case that began the borrowing of animus-style reasoning into free exercise jurisprudence, the Court focused heavily on the subjective hostility community members felt toward a minority religious group that performed animal sacrifices.[111] The fact that the religious group in question apparently garnered enmity because of its animal-sacrifice rituals[112] suggests that, indeed, the animus the Court perceived arose from a disgust-related association between the group and the blood that characterized its practices and thus defined the group itself.[113]

Thus, disgust appears to be a prime instinct prompting government actions the Court has condemned as animus or (in religion cases) something closely analogous.[114] This observation allows us to examine the public's reaction to gun owners to determine if those reactions reflect that same sort of disgust. With the question so framed, Professor Charles's analysis of animus toward gun owners quite appropriately considers whether gun

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[110] *See, e.g.*, Karen Soldatic & Barbara Pini, *The Three Ds of Welfare Reform: Disability, Disgust and Deservingness*, 15 AUSTL. J. HUM. RTS. 77, 82 (2009) ("Disgust symbolises disability exclusion, w[h]ere bodies are spatialised to minimise biological, moral, cultural and social contamination. In a desire to minimise moral contagion, disability is separated, excluded and then bounded outside the public sphere."). Professor Nussbaum expresses ambivalence about the nature of persons' disgust reactions toward disabled persons. *See* NUSSBAUM, HIDING, *supra* note 2, at 92–93 (stating that "[t]o a great extent, [disgust toward disabled persons] is socially constructed"); *id.* at 93 (speculating that "there is some primary disgust attaching to the sight" of a disabled person).

[111] *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 540–42 (1993) (opinion of Kennedy, J.). This part of the otherwise-majority opinion spoke only for Justices Kennedy and Stevens. However, later religious freedom cases featured Court majorities incorporating animus-style reasoning. *See* Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct 1719, 1731 (2018); Trump v. Hawaii, 138 S. Ct. 2392, 2420–21 (2018). *See generally* Araiza, *supra* note 13, at 993–97 (discussing how the Court discerned whether animus existed in both Free Exercise Clause cases such as *Lukumi* and *Masterpiece* and Establishment Clause cases such as *Hawaii*).

[112] *See Lukumi*, 508 U.S. at 548–56 (reprinting the ordinances and including, within the ordinances' recitals, grounds for the residents' concern about religious groups conducting animal sacrifices).

[113] The idea of blood as an object of disgust is well accepted by theorists of disgust. *See, e.g.*, NUSSBAUM, DISGUST, *supra* note 2, at 15; *see also* Thomas Kazen, *The Role of Disgust in Priestly Purity Law*, 3 J.L. RELIGION & ST. 62, 72 (2014) (suggesting the relationship between disgust and the various impurities identified in ancient biblical texts, including menstrual blood).

[114] *See, e.g.*, *Lukumi*, 508 U.S. at 541 (describing the reaction to the targeted group's practices as "evidenc[ing] significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice").

owners, like LGB or disabled persons, have experienced stigmatization.[115] Professor Charles's specification of stigmatization as an indicator of animus reflects, at a more general level, Professor Nussbaum's identification of disgust as the critical phenomenon in animus cases. Stigmatization literally signifies an indelible marking of something, usually in order to brand it as undesirable.[116] More generally, stigma has been defined as "a mark of disgrace associated with a particular circumstance, quality, or person."[117] So understood, Professor Charles's idea that animus reflects stigma jibes nicely with Professor Nussbaum's explanation that primary objects of disgust still trigger disgust even when those objects' disgusting qualities are cordoned off from persons who otherwise encounter those items.[118]

Professor Charles appears on firm ground in distinguishing any negative feelings persons may feel toward gun owners from the stigmatization that equates LGB and disabled persons with primary objects of disgust. Some people with homophobic or ableist attitudes may see in LGB or disabled persons the qualities that would otherwise disgust them: indelible connections with bodily discharges, impurity, decay, or death.[119] But not even the most rabid anti-gun activist likely thinks of gun owners in such terms. At most, disgust reactions to gun owners reflect a socially constructed disgust deriving from opposition to their gun-related conduct and, by extension, to what Professor Dan Kahan calls "the moral commitments associated with [gun owners'] cultural style."[120] While that opposition may be a powerful feeling—one sufficient to engender vociferous opposition to such conduct—it appears qualitatively different from the more

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[115] Charles, *supra* note 1, at 20. The text sentence limits itself to LGB persons, to reflect its focus on *Romer* and the other sexual orientation animus cases. However, disgust-based stigmatization of transgender persons is a real phenomenon, as measured by scholars. *See, e.g.*, Logan Samuel Casey, The Politics of Disgust: Public Opinion Toward LGBTQ People & Policies 44 (2016) (Ph.D. dissertation, University of Michigan) (on file with the University of Michigan Library) (discussing the relevance of disgust for transgender communities).

[116] *See* Martha Nussbaum, *Inscribing the Face: Shame, Stigma, and Punishment*, *in* POLITICAL EXCLUSION AND DOMINATION: NOMOS XLVI 259, 275 (Stephen Macedo & Melissa S. Williams eds., 2005) ("Many occasions for social shame are straightforwardly physical . . . . Some are features of the person's form of life: sexual minorities, criminals, and the unemployed are major recipients of stigma. These latter types of deviation from the normal are not branded on the face. Societies have, in consequence, found it convenient to inflict a visible mark. The word 'stigma' is in fact the name for this mark.").

[117] *Stigma*, THE OXFORD DICTIONARY OF PHRASE AND FABLE (2d ed. 2005), https://www.oxfordreference.com/view/10.1093/oi/authority.20111007171501221 [https://perma.cc/CD3Z-E7QD].

[118] *See* NUSSBAUM, HIDING, *supra* note 2, at 88 (describing experiments demonstrating this effect).

[119] *See* Yoel Inbar, David A. Pizarro, Joshua Knobe & Paul Bloom, *Disgust Sensitivity Predicts Intuitive Disapproval of Gays*, 9 EMOTION 435, 436, 438 (2009).

[120] Kahan, *supra* note 83, at 460.

visceral reactions Professor Nussbaum and others associate with opposition to LGB and disabled persons.

Or maybe not.

C. Disgust Toward Gun Possession

Can the insights of Professor Nussbaum and others[121] about disgust toward persons nevertheless apply to gun owners via a disgust reaction toward conduct, in this case gun possession or display? As this Essay discussed in its preliminary evaluation of Professor Charles's examination of animus toward gun rights, the plausibility of any claim of animus toward gun possession turns largely on the connection between such conduct and gun owners' identity.[122] That preliminary evaluation suggested that gun-related conduct can in fact be expressive of identity.[123] Do Professor Nussbaum's and others' insights about disgust provide further grounds to interrogate the possibility of disgust, and thus animus, toward such identity-forming conduct?

They might. It may be that the exercise of gun rights can be said to elicit a disgust reaction exactly because that exercise becomes associated with a class of persons (gun owners), who then become the actual objects of that reaction. To investigate this, consider first what such disgust reactions might look like. Professor Nussbaum's discussion of same-sex sexual conduct provides the most graphic illustration of such reactions. She cites the reluctance of the judge in Oscar Wilde's famous sodomy trial even to describe his peers' likely reactions to the conduct of which Wilde had been convicted.[124] The depth of Victorian society's disgust toward sodomy reflects Blackstone's description of it (a description with which the judge in the Wilde case very likely would have been familiar): a crime "the very mention of which is a disgrace to human nature" and thus "not fit to be named."[125] Bringing such disgust reactions into the contemporary world, Chief Justice

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[121] *See, e.g.*, Soldatic & Pini, *supra* note 110, at 78 (discussing concepts of disgust in relation to disability discrimination).

[122] *See supra* notes 86–89 and accompanying text.

[123] *See supra* notes 81–83 and accompanying text.

[124] *See* NUSSBAUM, HIDING, *supra* note 2, at 72 ("The judge . . . said that he would prefer not to describe 'the sentiments which must rise to the breast of every man of honour who has heard the details of these two terrible trials,' but his virulent condemnation of the defendants made his disgust amply evident." (quoting MONTGOMERY H. HYDE, THE THREE TRIALS OF OSCAR WILDE 339 (1956))); *id.* at 104 ("In . . . the Wilde case, the moralism [of the presiding judge] seems to be a cloak for a quite familiar type of disgust, expressing contamination from the presence of an allegedly vile creature . . . .").

[125] 4 WILLIAM BLACKSTONE, COMMENTARIES *215.

Burger's concurring opinion in *Bowers v. Hardwick* quoted that passage from Blackstone.[126]

Such visceral reactions appear to have no connection to the reactions even vehement anti-gun advocates have toward the exercise of gun rights. But that doesn't mean animus cannot creep in. Rather, it is possible that vociferous opposition to gun-related conduct can combine with the identity-creating force of such conduct to generate an instinctive dislike of persons whose identity is tied up with the disfavored conduct that creates that identity.

Consider the steps in such an analysis. First, opposition to gun-related conduct runs deep among some American communities (just like, on the other side, opposition to gun regulations runs deep in other communities).[127] Second, as Professor Charles observes, it is probably fair to say that many gun owners view gun possession in ways constituting their identity.[128] Of course, it may be overly simplistic to embrace the simple syllogism that follows from these steps: "(1) feelings about gun-related conduct run deep; (2) gun-related conduct helps constitute many gun owners' identities; (3) therefore, feelings about gun owners' identities run deep." Nevertheless, the tight connection between conduct and identity makes it plausible to conceive of visceral opposition to gun-related conduct as spilling over into a dislike of those whose very identity is bound up in that conduct.

We have been down this road before. During the seventeen years between *Bowers*'s upholding of sodomy prohibitions and *Lawrence v. Texas*'s overruling of *Bowers*,[129] gay rights litigators struggled mightily, with only partial success, to disentangle LGB status and same-sex sexual conduct.[130] As Professor Nussbaum explains, the disgust some persons feel toward that conduct easily slides into a feeling of aversion for those who

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[126] 478 U.S. 186, 197 (1986) (Burger, C.J., concurring), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[127] *See, e.g.*, ERIC MCGHEE, PUB. POL'Y INST. OF CAL., CALIFORNIA'S POLITICAL GEOGRAPHY 2020 (2020), https://www.ppic.org/publication/californias-political-geography/ [https://perma.cc/DT9G-JZFP] (describing an "extremely sharp geographic divide" among different parts of California with regard to gun control); Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2021), https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns/ [https://perma.cc/7MJ3-24TW] (showing geographic splits in Americans' views about guns more generally).

[128] *See* Charles, *supra* note 1, at 18; *see also* KIM PARKER, JULIANA HOROWITZ, RUTH IGIELNIK, BAXTER OLIPHANT & ANNA BROWN, PEW RSCH. CTR., AMERICA'S COMPLEX RELATIONSHIP WITH GUNS 31 (2017) (noting that 50% of gun owners believe that owning a gun is either very important or somewhat important to their identity).

[129] *See Lawrence*, 539 U.S. at 578.

[130] *See, e.g.*, Padula v. Webster, 822 F.2d 97, 98, 102 (D.C. Cir. 1987) (upholding government employment sexual orientation discrimination against an equal protection challenge largely on the strength of *Bowers*'s upholding of laws criminalizing sodomy); *id.* at 103 ("[T]here can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.").

perform it and indeed whose proclivity to perform it is understood to define them.

An understanding that conduct often shades into identity renders more comprehensible some of the more extreme examples of the regulation of gun-related conduct, such as municipal prohibitions on firing ranges and gun stores Professor Charles identifies.[131] Such exclusionary actions have at least a facial similarity to the physical exclusion the Cleburne City Council mandated through its refusal to allow intellectually disabled persons to establish a group home in a residential neighborhood. More conceptually, they also resemble Amendment 2, struck down in *Romer*, especially when one considers Justice Kennedy's evocative conclusion that Amendment 2 made LGB persons "stranger[s] to its law[]."[132] Even though the gun restrictions mentioned above deal with regulations of conduct, they feature exclusionary elements common to regulations that were understood in *Cleburne* and *Romer* as condemnations of status, and condemned by the Court for that reason.

Indeed, even deeper parallels emerge between the gun-related conduct laws Professor Charles mentions and the status regulations in *Cleburne* and *Romer*. As Professor Charles notes, the city in the firing-range case could offer no plausible reason for excluding those facilities. Indeed, by insisting that any person wishing to exercise her Second Amendment right receive gun training, and then without any reasonable justification making it impossible to obtain that training within the city limits, the city was exposed as simply wishing to banish the exercise of gun rights within that city.[133] So understood, one can analogize such cases to animus cases such as *Romer* and *Cleburne*, in which the Court examined the government's ostensibly reasonable justifications for the challenged laws and found them wanting,[134] thus leaving banishment—metaphorical or physical—as the only justification.

Even more importantly to the relationship between status and conduct, the banishment condemned in *Romer* and *Cleburne* took the form of exclusions that targeted the exercise of rights. Amendment 2 did not attempt to expel LGB Coloradans from the state (as, of course, Colorado could not

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[131] *See* Charles, *supra* note 1, at 28–29 (discussing a city's requirement that a person wishing to own a gun obtain firing-range training, paired with a prohibition on firing ranges within the city); *id.* at 13–14 (discussing a city's attempt to ban the location of a high-end gun store within the city).

[132] *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

[133] *See* Charles, *supra* note 1, at 29; *see also* Ezell v. City of Chicago, 651 F.3d 684, 691, 709–10 (7th Cir. 2011) (acknowledging the comprehensive firing-range ban as disproportional to the public interests claimed).

[134] *See Romer*, 517 U.S. at 634–35; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

do): instead, it "merely" prevented the assertion of nondiscrimination claims based on those persons' defining characteristic.[135] The Cleburne City Council's zoning decision *did* effectively exclude the intellectually disabled, at least from a particular neighborhood.[136] However, as Justice Marshall's separate opinion in *Cleburne* pointed out, the city's decision also burdened the exercise of a right, as it prevented that group from establishing a home in their desired location.[137]

Thus, in *Romer* and *Cleburne* the challenged laws could be understood as burdening the exercises of rights as manifestations of dislike of the groups that would exercise those rights, and doing so in ways that suggest, respectively, social and physical exclusion or distancing. So too, one can understand the firing-range and retail prohibitions Professor Charles discusses[138] as reflecting a similar desire to accomplish such distancing, via laws that similarly burdened the exercise of rights. Concededly, the analogy is not complete, even leaving aside obvious—indeed, compelling—objections that gun owners and gun rights are simply different from, respectively, LGB and disabled persons and the rights they were prevented from exercising.[139] Unlike with the groups targeted in *Romer* and *Cleburne*, a community's physical distancing of itself from guns—and thus from gun possession—can more readily be defended in terms of legitimate interests in public safety. In other words, physically distancing a community from the exercise of Second Amendment rights could plausibly be defended as a reasonable police power measure.[140]

Despite that difference, given that individual gun possession is now established as a constitutional right, it is hard to see community opposition to a firing range, when combined with a requirement of firing-range training as a condition of owning a gun, as reflecting anything other than hostility to the exercise of Second Amendment rights. More to the current point, such hostility to the exercise of those rights arguably shades over into hostility to the group with whom such exercise is linked so closely as to become part of

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[135] *See Romer*, 517 U.S. at 624 (quoting Amendment 2).

[136] *See* 473 U.S. at 435–37 (explaining the actions of the organization that sought to establish a group home for intellectually disabled persons).

[137] *See id.* at 455, 461 (Marshall, J., concurring in the judgment in part and dissenting in part).

[138] *See supra* note 131 and accompanying text.

[139] *See* Brower, *supra* note 3, at 87 (suggesting this fundamental difference).

[140] As a general matter, police power regulations are reviewed deferentially by courts, to the extent they do not trench on constitutionally protected rights guaranteed by the Fourteenth Amendment. *See, e.g.*, Lynn Marmer, *The New Breed of Municipal Dog Control Laws: Are They Constitutional?*, 53 U. CIN. L. REV. 1067, 1070–72 (1984) ("As a general rule, exercises of the police power by a state or city are presumed to be constitutionally valid.").

that group's perceived identity. In other words, hostility to the conduct becomes hostility to the group with which that conduct is identified.

But is that hostility based on primary-object disgust of the sort Professor Nussbaum examines? Ultimately, that answer appears to be no. To be sure, one might speculate that dislike of gun owners, fueled by opposition to the exercise of Second Amendment rights, could take the form of dislike, verging on disgust, toward perceived attributes of gun owners' broader identities. But even such disgust, to the extent it exists and is found to motivate the more extreme gun regulations Professor Charles discusses, does not reflect the primary-object-centered disgust Professor Nussbaum discusses, unless one is willing to credit cartoonish pictures of anti-gun sentiment as resting on elitist disgust toward perceived backwoods hillbillies. Indeed, even if we further credit that caricature as viewing those hillbillies as somehow dirty and thus "disgusting," it remains miles away from aversion to disabled persons as reminders of our own inevitable death and decay, not to mention descriptions of gay men's "typical sexual practices" as featuring "drinking urine [and] ingesting feces . . . in extremely unsanitary places."[141] Put more abstractly, while strong opposition to gun possession might push anti-gun opinion toward viewing gun owners themselves negatively, those negative views are simply not grounded in reactions to primary disgust objects that Professor Nussbaum connects to animus claims as they have developed in constitutional law.

CONCLUSION

Nothing in this Essay is intended to detract from the care and detail with which Professor Charles states his case against importing animus doctrine into Second Amendment law. Nor is it even to dispute his conclusion that better ways exist to enforce the Second Amendment than having animus colonize Second Amendment jurisprudence, even if his argument omits both important factual and doctrinal nuances and consideration of the theoretical foundation of animus.

With regard to those more theoretical conceptions, this Essay's examination of Professor Nussbaum's theory of disgust suggests that her construct fails to support arguments finding animus in regulations of guns, gun owners, or gun rights.[142] However, even if primary-object disgust-based

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[141] NUSSBAUM, DISGUST, *supra* note 2, at 1 (quoting PAUL CAMERON, MEDICAL CONSEQUENCES OF WHAT HOMOSEXUALS DO).

[142] *See, e.g.*, Jarret T. Crawford, Yoel Inbar & Victoria Maloney, *Disgust Sensitivity Selectively Predicts Attitudes Toward Groups that Threaten (or Uphold) Traditional Sexual Morality*, 70 PERSONALITY & INDIVIDUAL DIFFERENCES 218, 222 (2014) (concluding, based on empirical research,

animus is a poor explanation for gun regulation, laws that arguably rest on a dislike of a perceived group identity may still be vulnerable to animus claims. Thus, perhaps the main lesson of this Essay's analysis is that animus may in fact lurk in situations not easily explainable by her focus on primary objects of human disgust. The Court's foundational animus language certainly suggests as much.[143]

That lesson does not refute Professor Nussbaum's theory. However, it may suggest that her theory appropriately serves as either the core or a subset of a broader theoretical foundation for animus, with other instantiations of animus related to her disgust focus, but not precisely explainable by it.[144] In turn, that suggestion calls out for further research about how Professor Nussbaum's insights about the disgust foundation for much of what we call animus relates to other instances of that phenomenon that her insights cannot fully explain. For example, what is the relationship between disgust reactions and the social distancing that marks many contemporary xenophobic attitudes we might label as animus?[145] Can disgust help explain government actions, like the food stamp cutoff in *Moreno*, that were allegedly motivated by a desire to punish an identifiable social group? Perhaps most generally, can disgust help explain racial and other attitudes that scholars have characterized as socially subordinating?[146]

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that "disgust sensitivity does not simply increase disliking of left-aligned groups (and liking of right-aligned groups) across the board," including on gun-control and gun-rights issues; "rather, it is selectively associated with attitudes toward groups associated with sexual morality").

[143] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." (emphasis omitted)).

[144] *See, e.g.*, discussion *supra* note 110 (noting Professor Nussbaum's ambivalence about whether ableist attitudes reflect innate or socially constructed disgust reactions).

[145] For example, many American communities have experienced situations in which individuals or groups have heatedly protested the establishment of mosques or the settling of refugees. *See, e.g.*, Chris McGreal, *Ground Zero Mosque Plans 'Fuelling Anti-Muslim Protests Across US,'* GUARDIAN (Aug. 12, 2010), https://www.theguardian.com/world/2010/aug/12/ground-zero-mosque-islamophobia [https://perma.cc/983V-XXP3] (discussing protests to new Islamic centers); Marta Zakrzewska, Jonas K. Olofsson, Torun Lindholm, Anna Blomkvist & Marco Tullio Liuzza, *Body Odor Disgust Sensitivity Is Associated with Prejudice Toward a Fictive Group of Immigrants*, 201 PHYSIOLOGY & BEHAV. 221, 221–22, 224–25 (2019) (finding that body odor disgust sensitivity is positively correlated with xenophobic reactions to a fictional refugee group, and concluding based on that result that such sensitivity has a weak positive correlation with xenophobia).

[146] *See, e.g.*, NUSSBAUM, DISGUST, *supra* note 2, at 22–23 (providing examples of "disgust-based subordination"); NUSSBAUM, HIDING, *supra* note 2, at 114 (discussing Hindu nationalists' portrayal of Indian Muslims as "hypersexual animal beings, whose bodily fertility threatens the control of the pure Hindu male," and describing that feeling as "disgust"). The obvious connection between that portrayal and the analogous portrayal of Black American men suggests the disgust foundation for that latter portrayal. Marques P. Richeson, *Sex, Drugs, and . . . Race-to-Castrate: A Black Box Warning of Chemical*

These questions matter because animus matters. At least as long as animus doctrine continues to "flourish[]"[147] at the Court, it behooves scholars to continue trying to understand the theoretical foundations of the animus idea. Indeed, these questions matter regardless of animus doctrine's ultimate fate as a matter of constitutional law doctrine. In a world marked simultaneously by increasing xenophobia and social conflict but also increasing assertions of new and fluid group identities, attitudes appropriately labeled as "animus" will continue to arise and exclusionary laws based on those attitudes will likely continue to be enacted. Locating the headwaters of those attitudes should matter to the judicial response to those laws, regardless of the label courts affix to them.[148]

Castration's Potential Racial Side Effects, 25 HARV. BLACKLETTER L.J. 95, 117 (2009) (noting mass media's portrayal of Black men as hypersexual and sexually aggressive).

[147] Charles, *supra* note 1, at 6.

[148] *Cf.* William D. Araiza, *Call It by Its Name*, 48 STETSON L. REV. 181, 185–91 (2019) (urging the Court to label such actions by their appropriate name: animus).