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Cover Page Footnote

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ELITES, IDENTITY POLITICS, GUNS, AND THE MANUFACTURE OF LEGAL RIGHTS

Calvin Massey*

INTRODUCTION

Michael Dorf claims that “[c]ourts adjust doctrine largely in response to social and political movements”¹ that are forged in identity politics with which the judiciary is sympathetic. While Professor Dorf disavows any claim “that legal reasoning is only so much window dressing for political judgments”² and concedes that “a link to an identity politics movement is . . . [n]either necessary [n]or sufficient to securing judicial recognition”³ of new rights rooted in equality or autonomy, he does believe that an identity politics movement “is a substantial aid” to that end.⁴ He buttresses his thesis by cataloguing the social and legal history that has resulted in broader legal rights for African Americans, women, and sexual minorities.⁵ In each case, the judiciary became receptive to claims for new legal rights as a consequence of changing social and cultural attitudes that enabled judges to include formerly excluded groups within the general umbrella of equality or personal autonomy. Dorf’s descriptive claim is that the identity politics of these movements reinforced the doctrinal claims made by proponents of change.⁶ Black Americans argued successfully that apartheid was a system of racial subordination, no matter how much nominal equality was delivered to the separate races. A moral claim of equal human dignity congealed around the identity politics of the civil rights movement, and that political cluster undergirded the doctrinal change wrought by rejection of “separate but equal” in *Brown v. Board of Education*.⁷ A similar process informed the doctrinal changes in equal protection that recognized sex discrimination as presumptively void and subject

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1. Michael C. Dorf, *Identity Politics and the Second Amendment*, 73 Fordham L. Rev. 549, 550 (2004).

2. *Id.* at 551.

3. *Id.* at 553.

4. *Id.*

5. *Id.* at 553-64.

6. *Id.* at 553.

7. 347 U.S. 483 (1954).

to heightened scrutiny⁸ and, as Dorf posits, the same process is unfolding with respect to the autonomy and equality claims of homosexuals.⁹

But when it comes to firearms, identity politics play a distinctly different role in Professor Dorf's calculus. He contends that there is a "substantial mismatch between . . . the constitutional arguments for an individual right to own and possess firearms and . . . the identity politics movement that underwrites those arguments."¹⁰ The constitutional arguments sound in history and in a right of self-defense, but Dorf sees a mismatch because the identity of the proponents of those arguments does not reinforce them. The proponents "are neither minutemen nor . . . law-abiding inner-city residents most likely to be victimized by crime."¹¹

Professor Dorf makes two descriptive claims and abjures any "prescriptive statements" other than his final conclusion that it is "entirely appropriate" to "buttress formal legal arguments with attitude-changing actions addressed to the broad mass of the public."¹² I have no quarrel with his description of the process by which African Americans, women, and homosexuals have transformed both public attitudes and constitutional doctrine. I do have a bone to pick with Dorf's contention that there is a "substantial mismatch" between the doctrinal claims and the identity politics of the gun rights movement,¹³ but it is not a very big one, and it pales in comparison to my fundamental point, which is frankly prescriptive.

My prescriptive argument stems from the fact that the Second Amendment is, in Chris Eisgruber's words, "a constitutional ghost town,"¹⁴ a textual structure from which all contextual life has fled. I have contended in prior work that when the intended function of constitutional text cannot be accomplished, the text should be interpreted by application of a constitutional *cy pres* doctrine.¹⁵ As with charitable trusts, if the object of the provision cannot be accomplished, we should seek to get as close as possible to its intended purpose. The Second Amendment should be given contemporary meaning in light of that principle. I do not suggest that we should ignore identity politics when confronting the Second Amendment, but I do not think it should be the driving force of the Amendment's interpretation. I shall first outline the points upon

8. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

9. Dorf, *supra* note 1, at 559-60.

10. *Id.* at 552.

11. *Id.*

12. *Id.* at 572.

13. *Id.* at 552.

14. Christopher L. Eisgruber, *Constitutional Self-Government* 124 (2001).

15. See Calvin R. Massey, *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights* 97-115 (1995); *infra* text following note 56.

which I disagree with Professor Dorf and then elaborate on my prescriptive claim.

I. THE IDENTITY POLITICS OF GUN RIGHTS

Professor Dorf engages in caricature when he describes the identity politics movement that underlies the claim that the Second Amendment secures an individual right to own and possess firearms. These people are the “bubba vote,” “Nascar dads,” and “guys with Confederate flags in their pickup trucks.”¹⁶ They are, we are told, “angry white men”¹⁷ who are, “broadly speaking, anti-abortion, anti-affirmative action, anti-gay marriage, anti-tax, and pro-gun.”¹⁸ But Professor Dorf makes little attempt to probe the reality of his assertions, a surprising omission in an article that Professor Dorf admits “obviously sounds in legal realism.”¹⁹ It turns out that gun owners in America are not quite as monolithic as Professor Dorf would like to believe: “disproportionately white, male, and rural.”²⁰

There are about 294 million Americans²¹ organized into about 107 million households.²² About 40% of these households, or forty-three million, own firearms.²³ Because there are, on average, 2.57 people per household, approximately 110 million Americans live in a

16. Dorf, *supra* note 1, at 552 (internal quotation marks omitted).

17. *Id.* (citing Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413, 455 (1999) (internal quotation marks omitted)).

18. *Id.*

19. *Id.* at 551.

20. *Id.* at 552.

21. This is an estimate by the United States Bureau of the Census, which maintains a “population clock” that displays the estimated United States population at any given moment, using estimates of birth and death rates, as well as net migration. See U.S. Census Bureau, U.S. POPClock Projection, at <http://www.census.gov/cgi-bin/popclock> (last visited Sept. 11, 2004); U.S. Census Bureau, U.S. and World Population Clocks – POPClocks, at <http://www.census.gov/main/www/popclock.html> (last visited Sept. 11, 2004).

22. This is an estimate by the United States Bureau of the Census, based on 2000 Census data. See U.S. Census Bureau, Projections of Households by Type: 1995 to 2010, Series 1, 2, 3, at <http://www.census.gov/population/projections/nation/hh-fam/table1n.txt> (last visited Sept. 11, 2004) [hereinafter Household Census Data].

23. There are a number of sources for this information, all of which is derived from polling data. A useful comprehensive overview, using data from 1988 and 1996, is John R. Lott, Jr., *More Guns, Less Crime* 36-42 (1998). More recent surveys have been conducted by both the Gallup and Harris polling organizations. A 2000 Gallup poll revealed that 39% of Americans have a gun at home and another 2% have a gun somewhere else, such as in their vehicle. See Michael D. Cohen, *About Four in 10 Americans Report Owning a Gun*, Gallup Poll News Service, Oct. 5, 2000, at <http://www.gallup.com/poll/content/print.aspx?ci=2473>. A 2001 Harris poll revealed that 39% of Americans have a gun in their “home or garage.” See Humphrey Taylor, *Gun Ownership: Two in Five Americans Live in Gun-Owning Households*, Harris Poll #25, (May 30, 2001), at http://www.harrisinteractive.com/harris_poll/index.asp?PID=234 [hereinafter Harris Poll #25].

household with firearms.²⁴ Approximately half of all Republicans own a gun, slightly less than a third of Democrats own a gun, and 41% of independents own guns.²⁵ Slightly less than twice as many men as women own guns, although the rate of increase of gun ownership among women is extremely high. If recent rates of increase continue, it is not unrealistic to project gun ownership among women beginning to reach levels of about two-thirds that of men.²⁶ Gun ownership is highest among those whose annual income is between \$50,000 and \$75,000, but all income brackets higher than \$35,000 exhibit gun ownership in excess of the national average.²⁷ Gun ownership is fairly evenly distributed around the United States: 43% of Southerners own a gun, 39% of Westerners and Midwesterners own a gun, and 34% of Easterners own a gun.²⁸ About a third more whites than blacks are gun owners.²⁹ Gun ownership is highest in rural areas (slightly over 60%) and lowest in large cities of over 500,000 population (around 20%).³⁰ While it may be a literal truth that gun owners are disproportionately white, male, rural, Republicans living in the South, West, or Midwest, it is a truth that obscures the large numbers of gun owners who are none of those things: racial minorities, women, Easterners, Democrats or Independents, and urban dwellers.

In fact, it is not too hard to find examples of these contrarian gun owners. Consider just two random successive days of news reporting by the *New York Times*. On March 8, 2004, the *New York Times* reported on the "Women's Shooting Sports League, which gathers the first Monday of each month in Chelsea for a night of rifle fire and female bonding."³¹ This Chelsea is in Manhattan, New York, not London, and certainly not Manhattan, Montana or Manhattan, Kansas. New York's women shooters meet each month at the Westside Rifle and Pistol Range on West 20th Street (about forty blocks south of Fordham Law School) where, according to the *New York Times*, they fire off several hundred rounds of high-velocity lead.³² This happens monthly in Manhattan, which is decidedly not

24. See Household Census Data, *supra* note 22.

25. Harris Poll #25, *supra* note 23, at tbl. 3.

26. Lott, *supra* note 23, at 37-38. Between 1988 and 1996 the percentage of women who were gun owners increased by 70% and "women went from owning guns at 41 percent of the rate of men to over 53 percent." *Id.* at 38. Expressed differently, between 1988 and 1996, the rate at which women owned guns as a percentage of male gun ownership increased by 19.5%. If that rate of increase remained constant between 1996 and 2004 (the next eight year interval), women in 2004 own guns at slightly more than 63% of the rate of male gun ownership.

27. Harris Poll #25, *supra* note 23, at tbl. 3.

28. *Id.*

29. Lott, *supra* note 23, at 39 fig. 3.3.

30. *Id.* at 40 fig. 3.4.

31. Alan Feuer, *Female Bonding, Punctuated by Gunfire*, N.Y. Times, Mar. 8, 2004, at A17.

32. *Id.*

western or rural, virtually cleansed of Republicans, where the “bubba vote” is virtually non-existent, a place where almost nobody can identify a NASCAR driver, and where the “angry white men” are more likely to model themselves after Michael Moore than Dick Cheney. On March 9, 2004, the *New York Times* reported on the attitude of gay Republicans toward President Bush in the wake of his call for a constitutional amendment to ban same-sex marriages. The article began by presenting the attitudes of a Pennsylvania Republican, Margaret Leber, “a lesbian in a long-term relationship” who objects to the President’s proposed constitutional amendment, but who “is also a member of the Pink Pistols, an organization of gay and lesbian gun owners.”³³ It turns out that Ms. Leber supports the President mostly out of her concern for her gun possession rights: “All the Democrats just rolled into Congress to vote for this gun-control bill,” she says. “Somebody with my values and beliefs can’t be a single issue voter.”³⁴

Of course, anecdotal evidence is selective, and in this case the anecdotes are newsworthy because they run counter to the stereotyped image of gun owners. While the demographic facts serve to remind us that the tent of gun ownership is a big one, it is also one that shelters a disproportionately large number of rural white men of at least modest affluence. Perhaps the problem with the identity politics of gun ownership is one of perception, the public’s proclivity to indulge in exclusively stereotypical thinking. As Amy Heath, Manhattan resident and founder of the Women’s Shooting Sports League, puts it: “When people think of gun owners, they think of butt-scratching bubbas with no teeth.”³⁵

Perhaps the lesson Professor Dorf invites us to learn is that an identity politics movement that is popularly thought of as comprising toothless butt-scratching bubbas is not likely to have much impact on legal doctrine. But why is that so? Even granting the caricature, are not toothless butt-scratching bubbas fellow citizens? Is what underlies this demeaning characterization the assumption that such folk are lawless predators, as in James Dickey’s *Deliverance*?³⁶ Surely that cannot be universally so; even granting the stereotype that Professor Dorf perpetuates, most such people are likely to be ignorant, unsophisticated rustics who may harbor values that we in the elite do not share, but who are unlikely to use their firearms to advance their values through criminal action.³⁷

33. David D. Kirkpatrick, *Gay and Republican, But Not Necessarily Disloyal to President*, N.Y. Times, Mar. 9, 2004, at A1.

34. *Id.*

35. Feuer, *supra* note 31, at A17.

36. James Dickey, *Deliverance* (1994).

37. If this were not so, surely we would observe considerably more violent crime by rural white men of modest affluence than, in fact, we do see. *Cf.* U.S. Census Bureau, Statistical Abstract of the United States, 2003, at tbl. 306 (2003 violent crime

Perhaps the ultimate point of Professor Dorf's article on identity politics and legal change is to demonstrate that only those identity politics movements that resonate with the values of the elite class from which the judiciary is drawn are likely to influence legal doctrine. If so, we may better understand why it is that gun owners do not have traction in the courts, but we are left with another quandary: What justification is there for developing constitutional doctrine to suit current fashions of social elites?

Professor Dorf offers some answers. He thinks that constitutional doctrine moves in response to changed societal attitudes, and that such changes are most likely to occur when rights claims "have been tied to a social movement to end some form of oppression of an identity group."³⁸ However, that cannot be the complete answer. The increasing legal and social ostracism faced by tobacco smokers would certainly qualify as oppressive, at least from the perspective of a tobacco addict. The national war on drugs would certainly strike most marijuana users as oppressive. But social movements to end oppression of these identity groups are, almost without exception, failures when it comes to altering the legal doctrine that has an impact upon them.³⁹ The lesson we are invited to learn is that only identity politics movements that resonate with extremely broad cultural and social changes are likely to produce change in constitutional doctrine.

Such a conclusion, however, simply raises more questions. If the only identity politics movements that have the power to alter our understanding of the Constitution are those that produce cultural and social changes that are so widely accepted that they approach consensus, why should judges alter the Constitution to do what society will do in any event? Put another way, why should judges preempt the democratic process to declare new rights with little if any pedigree in text, intention, history, or constitutional structure when the democratic process will eventually recognize those rights through statutory change? The costs of such preemption generally go unrecognized. When the judiciary declares new rights that the people will eventually come to recognize through democratic processes, the people are both excused from their responsibility of doing so and

rate in rural areas was 211 per 100,000 population; in metropolitan areas the violent crime rate was 560 per 100,000 population), *available at* <http://www.census.gov/prod/2004pubs/03statab/law.pdf>. Of course, it's possible that those toothless butt-scratching bubbas are traveling to metropolitan areas to wreak their criminal havoc on unsuspecting urbanites.

38. Dorf, *supra* note 1, at 553.

39. A recent exception is *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), in which the court of appeals concluded that there was a sufficient probability that the Controlled Substances Act, 21 U.S.C. § 801 (2000), was an unconstitutional exercise of Congress's Commerce Clause authority to warrant a preliminary injunction against enforcement of the Act to prevent plaintiffs, users and growers of marijuana for medical purposes, from possessing, obtaining, manufacturing, or providing marijuana for medical use.

deprived of the ability to reinforce their commitment to self-government. That these costs are intangible does not make them less costly; indeed, it is their apparent invisibility that is worrisome because we fail to account for these costs until they manifest themselves in an atrophied democracy.

Of course, there are also costs of judicial inaction. The pace of democratic change is often slower than that of judicial change and, in the interim, as we wait for legislatures and executives to act, rights that will ultimately be embraced go unrecognized to the detriment of the putative holder of those rights. This assumes that when judges declare new constitutional rights they are highly skilled seers of the cultural and social changes that will ultimately produce ambient legal change via the democratic process. Perhaps they are, but I am less optimistic than Professor Dorf about the judge as fortune teller. Bismarck famously advised us not to watch either sausages or laws being made. If Bismarck were a contemporary American constitutional law professor, he would surely add constitutional adjudication to the list.⁴⁰ Of course, it may be that when “Bismarck

40. Bismarck is popularly attributed as the source of the remark, but there is no known source that definitely establishes Bismarck as the author of the quip, although a host of internet quotation sources credit Bismarck, as a Google search for “Bismarck” and “law” and “sausages” will reveal. A number of judicial opinions cite Bismarck but the earliest is a 1958 opinion of the Florida Supreme Court, which noted “the famous epigram of Bismarck, ‘to retain respect for sausages and laws, one must not watch them in the making.’” *In re Graham*, 104 So. 2d 16, 18 (Fla. 1958). Fred Shapiro, public affairs librarian at the Yale Law Library, is of the opinion that the lack of any nineteenth century source attributing the remark to Bismarck implies that Bismarck never uttered it, and that “the attribution is a later tradition.” See E-mail from Fred Shapiro, Public Affairs Librarian, Yale Law Library (Dec. 4, 2002, 12:44PM), at <http://lawlibrary.ucdavis.edu/LAWLIB/Dec02/0082.html> [hereinafter UC Davis: Bismarck, Laws, and Sausages]. Kent Olson, a librarian at the University of Virginia Law Library, has noted that an American nineteenth-century source attributes the remark to an unknown Illinois legislator:

Some twenty years ago, as I was sitting in the . . . Illinois legislature, watching its closing hours, a member who had never spoken during the entire session arose to address the House He said: “I have come to the conclusion that the making of laws is like the making of sausages—the less you know about the process the more you respect the result.”

Frank W. Tracy, *The Report of the Committee on Uniform Laws, of the American Bankers' Association*, 15 Banking L.J. 542 (1898), quoted in UC Davis: Bismarck, Laws, and Sausages, *supra*; see also *Cnty. Nutrition Inst. v. Block*, 749 F.2d 50 (D.C. Cir. 1984). In *Block*, then-Judge Scalia began the opinion:

This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck’s aphorism that “No man should see how laws or sausages are made.” At issue are regulations promulgated by the Secretary of Agriculture prescribing labeling requirements for meat products made in part with meat separated from bone by crushing bones and meat and forcing the resulting paste through a sieve.

Id. at 51 (internal citation omitted). Other judicial citations to Bismarck include *Atlantic Fish Spotters Ass’n v. Evans*, 321 F.3d 220, 226 (1st Cir. 2003) (“Chancellor Bismarck’s famous comparison of making laws to making sausage ‘is at no time more

remarked that no one should wish to know too much about the making of laws or sausages, he meant that the process was distasteful but the results were not."⁴¹ That could be so with respect to sausages (though I doubt it), but it is surely not so with respect to law, for law is as much about process as substance.

To be fair, Professor Dorf qualifies his claim. His point "is that the Court responds to social and political movements, not that [such] movements . . . necessarily have justice on their side."⁴² He does not claim "that the Court always adjusts doctrine to track social attitudes exactly,"⁴³ but rather that over time "constitutional doctrine evolves with social attitudes."⁴⁴ According to Dorf, when identity politics movements are the engine of such evolution, they succeed when they turn public opinion in their favor and can urge doctrinal change that meshes neatly with the social and political message; they fail when they are opposed by other sympathetic identity politics movements, especially when one movement is making "an individual libertarian claim pitted against the asserted interests of a vulnerable population"⁴⁵ that is itself an identity politics movement. This latter pattern, asserts Dorf, characterizes the movement for gun rights.

Perhaps Professor Dorf's description is correct, but even his refined and qualified description invites us to conclude that identity politics movements succeed when they appeal to the consciousness and experiences of the legal, social, and cultural elites that compose the judiciary. Professor Dorf hints as much when he notes that Justices Scalia and Thomas sometimes signal their sympathies with what Dorf characterizes as the identity politics of "angry white men."⁴⁶ In fact, in those cases, Justice Scalia typically has charged the majority of the Supreme Court with kowtowing to elite tastes as it fashions constitutional law,⁴⁷ rather than relying upon text and historical

apt than during the appropriations process" (citation omitted)); In re *Top Grade Sausage, Inc.*, 227 F.3d 123, 130 n.5 (3d Cir. 2000) ("[A]dmonition often attributed to Bismarck that 'No man should see how laws or sausages are made.'"); *Danielson Food Products, Inc. v. Poly-Clip Systems*, 120 F. Supp. 2d 1142, 1142-43 (N.D. Ill. 2000) ("When Bismarck remarked that no one should wish to know too much about the making of laws or sausages, he meant that the process was distasteful but the results were not."); *Stewart v. Industrial Commission*, 481 N.E.2d 1279, 1285 (Ill. App. Ct. 1985) (Webber, P.J., dissenting) (noting that the court's result "recalls Bismarck's aphorism: if you like law and sausage, you do not want to know too much about how either is made").

41. *Danielson Food*, 120 F. Supp. 2d at 1142-43.

42. Dorf, *supra* note 1, at 560.

43. *Id.*

44. *Id.*

45. *Id.* at 567.

46. *Id.* at 552 (internal quotation marks omitted).

47. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (arguing that the Court "is the product of a law-profession culture[] that has largely signed on to the . . . agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual

tradition. Of course, it may be the case that Justice Scalia's fondness for text and tradition are simply rhetorical tropes that enable him to respond to the identity politics of the political right without overtly appearing to do so. I suppose the conclusion that we are invited to draw from this line of suppositional inquiry is that constitutional law boils down to a question of whose identity politics ox is being gored by the Court at any given moment. Perhaps that is so; but if it is, our Republic and its Constitution are in sufficiently big trouble that discussion of the identity politics of firearms seems hardly worth the candle.

Even if Professor Dorf is correct in all points—that gun owners are rural, politically right-wing white men and that an identity politics movement is a huge boost to judicial recognition of legal rights that secure the social objectives of the identity politics movement⁴⁸—his argument ultimately exposes a deeply disturbing aspect of contemporary constitutional law. The conclusion to be drawn is that only some identity politics movements have traction when it comes to igniting legal change that protects the movement. The claims of women, racial minorities, and homosexuals have such power; the claims of gun owners, tobacco smokers, and marijuana users, to cite just a few disfavored identity politics movements, lack the same force. Professor Dorf's apparent answer is that these latter identity politics movements assert an "individual libertarian" interest that is in tension with "the asserted interests of a vulnerable population."⁴⁹ But who composes the "vulnerable population" threatened by tobacco users or marijuana smokers? Something more is at work, and the possibilities are not all benign.

If Professor Dorf's description is accurate, we should be troubled. Reliance on the appeal of identity politics as a substantial factor in constitutional adjudication—perhaps a decisive factor—raises additional questions about the legitimacy of the process. For constitutional interpretation to be plausible, it must use a method that relies upon some source of meaning extrinsic to the subjective tastes of the justices *du jour*. It is as unacceptable to have constitutional interpretation driven by the identity politics of right-wing zealots, as it

conduct."); *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (writing that the Court has "embarked on a course of inscribing one after another of the . . . counter majoritarian preferences of the society's law-trained elite . . . into our Basic Law"); *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."). Justice Scalia continued in *Lawrence*: "[The] Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed." *Lawrence*, 539 U.S. at 602.

48. Dorf, *supra* note 1, at 552-53.

49. *Id.* at 567.

is to have constitutional meaning informed by the identity politics of left-wing zealots. This is not to claim that there is but one authentic, legitimate form of constitutional interpretation; it is to say that mere aggregation of the personal preferences of the justices is not a legitimate form of interpretation.

II. THE CONSTITUTIONAL *CY PRES* APPROACH TO THE SECOND AMENDMENT

How should we approach the interpretation of the Second Amendment, if resolution of the issue through the lens of identity politics and elite tastes is unsatisfactory? The answer to that depends on which theory of constitutional interpretation is used, so let me emphasize at the outset that I am guided by a few general principles. It is a written Constitution, so I start with text, which often does not supply answers. So it is with the Second Amendment: choose your clause, but only one, and text will provide an answer. Alas, there are two clauses. However unhelpful text may be at times, I also assert that all of the text matters. Put another way, a constitutional interpretation that renders any portion of text useless today is not a good interpretation. I disagree with Robert Bork's ink blot analogy—the idea that some portions of text are so enigmatic that they should be treated as obscured by an ink blot.⁵⁰ So, too, do I disagree with the notion that some portions of constitutional text have been rendered nugatory by social change that has occurred since the Founding Era. I repeat: In my constitutional calculus, all of the text must have a current meaning.

Context, or the place of any given bit of text within the structure of the Constitution, is also helpful, though in the case of the Second Amendment there is little insight to be gained by examining its structural role as an enumerated right. From a purely structural standpoint, it is equally plausible that the Second Amendment secures a collective right of the people of the respective states to maintain their militia independent of the federal government or an individual right to possess and own firearms. Thus, the competing interpretive armies in the Second Amendment war battle to a draw on the field of structural argument.

50. See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary*, 100th Cong. 249 (1989) (testimony of Robert Bork).

I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.

Id.

History is a useful addition to text and structure, but history is itself a multifaceted concept. Included within history are such disparate notions as original intention, original meaning, past practices and understandings, and the trend, or direction, of practices and understandings. Too many trees have already died in the historical wars over the Second Amendment, so I shall not slaughter more to repeat here what has been said before; rather, I endorse the nuance-filled version of Second Amendment history offered by Saul Cornell and Nathan DeDino.⁵¹

However helpful history may be, it is rarely the decisive factor in constitutional interpretation, because history is itself interpretation: it offers a range of plausible explanations rather than definitive answers.⁵² Thus, when text, structure, and history are irresolute, we often turn to even softer modes of reasoning. Prudential considerations, or what is workable or practical, are helpful in some circumstances, but are not particularly relevant to interpretation of the Second Amendment. Finally, what Philip Bobbitt calls ethical considerations,⁵³ or the felt sense of the constitutional “ethos” at any given moment in time, is what Professor Dorf emphasizes in his article. But, as Dorf admits, the role of social movements advanced by identity politics is an incomplete explanation of constitutional development.⁵⁴

All of these aspects of constitutional interpretation are relevant, but none is determinative by itself. The best interpretation is one that provides a plausible account of all of these modes of constitutional interpretation. An interpretation that makes sense of text and structure, fits comfortably into both static and dynamic readings of history, is workable and practical, and is in harmony with the consensus of social and cultural norms, is a sound interpretation. An interpretation that is awkward, implausible, or contrary to any of these interpretational modes is not sound, is unlikely to prevail, and is even less likely to endure.

The problem with the Second Amendment is that the text delivers two plausible but contrary answers; structural analysis is of no help, prudential considerations support either the collective or individual rights approach, and appeal to social and cultural norms leads to sharp disagreement rather than consensus. History is thus an appealing avenue for resolution of the issue, but the problem with resort to history is that there is so much poor and highly partisan historical analysis that is employed on both sides of the Second Amendment

51. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *Fordham L. Rev.* 487 (2004).

52. See H. Jefferson Powell, *Rules for Originalists*, 73 *Va. L. Rev.* 659, 678-83 (1987) (“Rule 9: *At best, history yields probabilities, not certainties.*”).

53. See Philip Bobbitt, *Constitutional Fate* (1982).

54. See Dorf, *supra* note 1, at 552-53.

war. Thus, to wade into history is ordinarily to enlist in one of the two contending armies. In the middle lies a lonely band of blue-helmeted historical peacekeepers, who argue that the Second Amendment secures a "civic right. . . . exercised by citizens, not individuals, . . . who act together in a collective manner, for a distinctly public purpose: participation in a well-regulated militia."⁵⁵ For purposes of my prescriptive argument, I accept this historical assessment as the best account of the Second Amendment's meaning. But that reading of history raises another problem: The Second Amendment as a civic right is a lifeless husk in our contemporary circumstances. The militia is no longer the armed citizenry, coming together to muster and drill for collective defense, a citizen-soldiery sufficient to obviate a standing army. Today, the militia is as likely to be in Iraq as in Iowa, the standing army is a fixture of the military landscape, and the militia is simply the operational reserve of the standing army. It is thus accurate to call the Second Amendment a constitutional ghost town.⁵⁶ But just as ghost towns can be revitalized by finding a new and contemporary purpose, so it should be with constitutional ghost towns.

When the original purpose and meaning of a constitutional provision can no longer be attained because of irrevocably changed circumstances, it is necessary to employ the *cy pres* principle. The ghostly constitutional provision must be read in a way that enables us to get as close as possible to what was once intended but is no longer possible. There are several ways of doing so; their explanation requires a brief foray into actual constitutional practice and theories of constitutional interpretation. The very nature of a written constitution requires that some attention be paid to the intended meaning of that text. I am not making the usual originalist claim that we are bound eternally by the intentions of the founders; rather I am asserting a version of the argument made by Keith Whittington that an inescapable aspect of a written constitution is that there is intended meaning imbedded in text.⁵⁷ It is, of course, an entirely separate question whether we are, or ought to be, bound by that intended meaning, once it is located.⁵⁸ Time does not permit development of this inquiry, which has occupied a good deal of thought of contemporary constitutional theorists, so I must be content with making some claims that, admittedly, deserve a deeper foundation than I will provide in this forum.

55. Cornell & DeDino, *supra* note 51, at 491.

56. Eisgruber, *supra* note 14, at 124.

57. See Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999).

58. See, e.g., Powell, *supra* note 52, at 662-66 ("Rule 1: *History itself will not prove anything nonhistorical*"); *id.* at 666-68 ("Rule 2: *History is the servant, not the master, of constitutional interpretation.*").

Prevailing constitutional practice conflates two separate inquiries: the search for the intended meaning of text and the search for a satisfactory contemporary application of text. Whittington unbundled these quests and labeled the former task constitutional interpretation and called the latter constitutional construction.⁵⁹ The difference lies in the fact that text, even when authoritatively interpreted, may still be insufficiently determinate to serve our purposes. To use Whittington's example, a textual instruction to "buy a dog" tells us we may not buy a cat, a parrot, or a python, but does not help us choose among spaniels, retrievers, shepherds, and terriers, or, having selected a group and a breed, to pick the precise dog.⁶⁰ That non-interpretive task is the work of constitutional construction, and the essence of that effort is fundamentally political—it is an exercise of popular sovereignty.⁶¹ Our two-centuries-old tradition of constitutional judicial review, however, ties together the separate functions of interpretation and construction into one product: constitutional law.

Our practice of constitutional conflation exacerbates the interpretive conflict surrounding the Second Amendment, for the outcome becomes "all or nothing." Advocates of gun control argue for a collective rights reading so that firearms can be regulated or banned. Advocates of the individual rights reading see that interpretation as critical to prevention of their greatest fear, confiscation of private firearms. Yet, a constitutional middle ground can be reached if the constitutional *cy pres* doctrine is applied.

I shall apply the constitutional *cy pres* doctrine in two different contexts. In the first, I shall use constitutional *cy pres* as an aid to the conventional approach to constitutional interpretation. This approach seeks to provide a plausible account of text, structure, and history while delivering a workable result that is consistent with widely-held contemporary values. In the second, I shall apply constitutional *cy pres* in the context of Whittington's approach to constitutional interpretation. This approach separates the judicial task of interpretation from the essentially political task of construction.

Application of constitutional *cy pres* to the Second Amendment within the context of conventional judicial review requires the constitutional analyst to project the impossible-to-achieve intended objectives of the Second Amendment at the narrowest level of generality that is sufficient to attain those lost objectives in today's world. An analogy to charitable trusts, from which, of course, *cy pres* is derived, may be helpful. A trust to benefit a charity aiding Union veterans of the Civil War states an objective that is impossible to achieve, because there are no living Union veterans. Perhaps the next

59. Whittington, *supra* note 57, at 7.

60. *Id.*

61. *See, e.g., id.* at 110-59.

level of generality at which the trust purposes can be practically formulated is to aid all veterans of American armed service. Of course, in most charitable trust circumstances we may wish to inquire into the purposes of the donor, in order to restate the failed trust's purposes most closely in accord with the donor's intentions. Thus, a trust to benefit the education of women at Radcliffe College states an objective that is impossible to attain because Radcliffe College no longer exists. Application of the generality principle might indicate that the trust should benefit the Radcliffe Institute of Harvard University, or perhaps to benefit female students at Harvard. Suppose that further inquiry into the donor's intent produced convincing evidence that the donor's desire was that the trust benefit the higher education of women in greater Boston in a single-sex environment, in which case it is possible that the trust should now benefit Wellesley College. In the context of the Second Amendment, we may usefully pay attention to each of these variables: generality and intention.

The Second Amendment was intended to accomplish several related civic objectives, but foremost among them was collective defense against external threats to civic peace and obviation of the need for a standing army. The first objective can be fulfilled, and is presently being fulfilled, by evisceration of the second objective. Of course, we are not about to repudiate our commitment to a standing army, so the *cy pres* dilemma becomes rather stark.

How do we reformulate the objective of providing for our collective defense while embracing the standing army? There are several possibilities. We might implement the Second Amendment's collective defense objective as a guarantee of every citizen's right (and, perhaps, obligation) to perform military service. That move emphasizes the collective aspect of the Second Amendment and would, no doubt, be welcome to the advocates of gun control. Or, we might emphasize the self-defense aspect of the Second Amendment, and read it today as a guarantee of a limited individual right to use and possess firearms for purposes of lawful defense of oneself and others.⁶² Gun rights enthusiasts would no doubt prefer that reading. The problem is that the basic interpretive difficulty with the text of the Second Amendment has now been carried forward to the next level of generality at which its intentions can be applied in a contemporary context. This does not suggest that constitutional *cy pres* is a failure, but it does suggest that we must engage in what Whittington calls constitutional construction,⁶³ whatever label the Supreme Court might place on this analytical task.

62. I have made an extended argument in this direction. See Calvin Massey, *Guns, Extremists, and the Constitution*, 57 Wash. & Lee L. Rev. 1095 (2000).

63. Whittington, *supra* note 57, at 7.

If we untie constitutional interpretation from constitutional construction, as Whittington asks us to do, and then apply constitutional *cy pres* to the problem of the Second Amendment, our task is of lesser difficulty. Strict adherence to Whittington's dichotomous formula would cause us to say that the proper interpretation of the Second Amendment is that it secures a civic right to possess and use firearms only in the course of performing the civic duty of collective self-defense as a citizen-soldier. Beyond that, the *cy pres* task is for the people, as sovereigns, to reformulate the Second Amendment in terms that suit our contemporary needs best. In a real sense, the long-running argument about the meaning of the Second Amendment and the proper scope of gun regulation is the living proof of the creation of a constitutional construction. Of course, the bitterly divisive nature of that debate is also proof that we have not settled on such a construction.

That being so, I make the prescriptive claim that the proper constitutional construction of the Second Amendment is that it secures a collective and an individual right. The collective right is your right (and, perhaps, duty) to serve in the armed services, though I doubt I shall soon see a freshly applied bumper sticker reading "Support Your Right to Get Drafted." The individual right is a limited right to possess firearms for personal self-defense and the defense of others. As I have argued in an earlier article,⁶⁴ I do not think this right is anything close to an absolute. A great deal of regulation of such an individual right can, and should, be permitted. Individuals who challenge the validity of any such regulations should be required to prove that the regulation at issue materially infringes upon the self-defense right. A material infringement is anything that erects a substantial obstacle to the efforts of a law-abiding, adult, mentally stable, individual to defend himself by lawful resort to arms. Once a material infringement has been proven, the government should have the burden of justifying such an infringement by proving that it substantially furthers a compelling government objective. I have elaborated on this argument in an earlier article,⁶⁵ and will not detain you with a full explication of the reasons for selection of this as the standard of review. It will suffice to say that this level of "semi-strict" scrutiny would allow a considerable amount of gun regulation because the needs of public safety are certainly a compelling objective. Recognition of a limited individual right to gun possession, however, would allay the fear of gun enthusiasts (or shooters, as they generally prefer to be called) that the ultimate aim of gun control advocates is to stamp out private gun possession. As is true now, most of the battle for settling on a constitutional construction of the Second

64. Massey, *supra* note 62.

65. *Id.*

Amendment would be fought in the political arena, which, perhaps, is the proper forum for the contest.

CONCLUSION

Identity politics may well drive the manufacture of some constitutional rights, as Professor Dorf has ably demonstrated. The identity politics of the Second Amendment may well suggest that an individual right to gun possession will continue to go unrecognized. That, however, is not the end of the story. First, the “identity” portion of the identity politics movement for individual gun rights is clouded by ignorant and stereotypical thinking on the part of the legal and cultural elites that, in general, oppose the recognition of individual gun rights. In any case, the role of identity politics in the manufacture of constitutional rights is a bit dangerous; one must be justly suspicious of the least democratic branch of government relying upon its perceptions of popular trends as the basis for its veto of popularly enacted legislation. Second, the role of identity politics in supplying contemporary meaning to the Second Amendment is, at most, more diffuse than Professor Dorf has suggested, and, at least, of far less significance than he has suggested. The role of identity politics is more diffuse because the essential task of interpreting the Second Amendment is to find a contemporary meaning for a constitutional provision for which the intended meaning is no longer capable of accomplishment.

We must thus resort to constitutional *cy pres* or some other device to transpose the Second Amendment from its eighteenth-century key to one understandable to a twenty-first-century ear. When we do so, we are confronted with the prescriptive question of how much of this reconstituted interpretation should be fixed in the cast bronze of constitutional law and how much should be left to the modeling clay of public debate. I have offered what I believe is a sensible middle ground: one that is attentive to the impossible-to-attain objectives of the Second Amendment and which also seeks to resolve a portion of the contemporary debate by recognizing an incomplete and inchoate objective of the Second Amendment in constitutional law, while still leaving most of the terrain free for us—the ultimate sovereigns of our public life—to resolve.