

11-1-2004

# Identity Politics and the Second Amendment

Michael C. Dorf

*Cornell Law School*, [michaeldorf@cornell.edu](mailto:michaeldorf@cornell.edu)

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Constitutional Law Commons](#), [Law and Society Commons](#), and the [Politics Commons](#)

---

## Recommended Citation

Dorf, Michael C., "Identity Politics and the Second Amendment" (2004). *Cornell Law Faculty Publications*. Paper 81.  
<http://scholarship.law.cornell.edu/facpub/81>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# LEGAL PERSPECTIVES

## IDENTITY POLITICS AND THE SECOND AMENDMENT

*Michael C. Dorf\**

### I. SOME REALISM ABOUT GUN RIGHTS AND OTHER CONSTITUTIONAL RIGHTS

Two questions dominate judicial and academic consideration of the degree, if any, to which the Second Amendment should be construed to limit government efforts to restrict private ownership and possession of firearms. First, what was the original understanding of those who framed and ratified the Amendment? And second, how, if at all, do changed circumstances since 1791 bear on the application of the original understanding to contemporary circumstances?

The answers to these two questions are obviously relevant to any inquiry into the proper construction of the right to keep and bear arms. After all, even judges and constitutional scholars who do not subscribe to originalism as an overarching interpretive philosophy acknowledge that the original understanding appropriately plays an important role in discerning contemporary meaning.<sup>1</sup> And conversely, even self-described originalists acknowledge that application of the original meaning across a span of centuries requires some effort at “translating” the old text to make it fit the new circumstances.<sup>2</sup> So judges and scholars are not wrong to ask whether the reference in the

---

\* Michael I. Sovern Professor of Law, Columbia University School of Law. I gratefully acknowledge very helpful comments and suggestions from Sherry Colb, Saul Cornell, Robert Cottrol, and Neysun Mahboubi, as well as terrific research assistance from Candice Aloisi and Akiva Goldfarb.

1. For discussion of how and why non-originalists (such as the author) consider original understanding relevant to constitutional interpretation, see Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo. L.J. 1765 (1997).

2. Lawrence Lessig, whom I would describe as a weak originalist (in matters of constitutional interpretation), has developed an account of fidelity across time as translation. See Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993). But even strong-form originalists endorse the concept. See *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J., concurring) (“[I]t is the task of the judge in this generation to discern how the framers’ values, defined in the context of the world they knew, apply to the world we know.”).

Amendment's introductory language to a "well regulated Militia"<sup>3</sup> originally referred to the whole people or a smaller group, whether that language was understood as limiting the operative clause's protection of a "right . . . to keep and bear Arms,"<sup>4</sup> and whether that right, assuming it did protect private weapons ownership and possession, was subject to extensive government regulation. Nor are they wrong to ponder what happens to a right designed to ensure independent militias (if that is what the Amendment was designed to secure), when state-organized militias have been absorbed into a system of national military service, when modern police forces have replaced militias as the principal source of protection (other than self-help) against private violence, and when firearms have become more lethal than they were in the eighteenth century.

But if these questions about original meaning and subsequent evolution preoccupy scholars, so far as the prospects for legal change through the judiciary are concerned, they are, I shall argue here, largely epiphenomenal. Although courts may speak the language of original understanding and subsequent translation when justifying their decisions, the driving force of doctrinal change is rarely the discovery of some previously unknown scrap of paper from Madison's notes or a state ratifying convention.<sup>5</sup> Nor do courts simply decide in response to a lawyer's argument that some changed circumstance demands a changed understanding of the Constitution's original meaning. Courts adjust doctrine largely in response to social and political movements.

---

3. U.S. Const. amend. II.

4. *Id.*

5. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 72-73 (1938), is an ostensible example of a major shift in Supreme Court doctrine that was driven by a new discovery regarding (statutory) original understanding. There, Justice Brandeis justified his conclusion that the prior interpretation of the founding era Rules of Decision Act was incorrect by the discovery of an earlier draft of the legislation:

[I]t was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.

*Id.* at 72-73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 51-52, 81-88, 108 (1923)). The argument is implausible on its face. Where the enacted language made "the laws of the several States" rules of decision in federal court cases, the earlier draft referred to "the Statute law of the several States in force for the time being and their unwritten or common law now in use." Warren, *supra*, at 51, 86. Warren and Brandeis treated the final language as a shorthand for the earlier draft, but it as easily could have reflected a Congressional decision to narrow the scope of the Act. In any event, and more importantly, the *Erie* decision was primarily a response to social, political, and legal trends in the first third of the twentieth century. See Edward Purcell, *Brandeis and the Progressive Constitution* (2000).

That claim obviously sounds in legal realism, but I do not mean to say that legal reasoning is only so much window dressing for political judgments. Legal reasoning makes a difference: Once an issue becomes the legitimate subject of legal contestation before a court, judges acting in good faith will try to sort good legal arguments from bad and to see where the weight of the best arguments leads; and as Benjamin Cardozo long ago observed, legal principles have a life of their own within the courts.<sup>6</sup> But before any of that can occur, an issue must become the legitimate subject of legal contestation. How does that happen?

Social movements change attitudes that previously made some set of arguments seem, in Jack Balkin's phrase, "off the wall."<sup>7</sup> To give a current example, the analogy between anti-miscegenation laws and laws barring same-sex marriage would have seemed ridiculous in 1967, when the Supreme Court decided *Loving v. Virginia*.<sup>8</sup> Today, arguments that such prohibitions deny gays and lesbians the equal protection of the laws are a staple of the academic literature and have found a receptive audience among at least some judges. The difference between 1967 and 2004 is not the discovery of a previously unknown letter revealing that John Bingham and Jacob Howard were lovers or that lawyers and judges are smarter now and thus better able to understand the implications of *Loving*. The main difference is that social and political movements for equality for gays, lesbians, bisexuals, and transgendered persons have changed attitudes among a critical mass of the public. Whether they have changed attitudes sufficiently to secure durable legal protection remains to be seen, but that is not my concern here.

Elsewhere I have explained how social movements prepare the ground for doctrinal change.<sup>9</sup> Here I want to make a related but distinct claim: Successful arguments for doctrinal change typically link the relevant social and political movement with the doctrine that activists seek to change. For example, champions of the rights of African Americans argued in the 1950s and 1960s that Jim Crow was a system of institutionalized white supremacy, and the Supreme Court invalidated Jim Crow in just those terms. Likewise, feminists in the 1960s and 1970s argued that patriarchy's notion of separate spheres subordinated women and, again, the Court responded in the same terms.<sup>10</sup> And today's movement to change the legal status of discrimination based on sexual orientation insists on (state and

---

6. See Benjamin Cardozo, *The Nature of the Judicial Process* 51 (1921).

7. J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *Fordham L. Rev.* 1703, 1733 (1997).

8. 388 U.S. 1 (1967).

9. Michael C. Dorf, *The Paths to Legal Equality*, 90 *Cal. L. Rev.* 791, 805-06 (2002).

10. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

federal) constitutional rights to sexual autonomy and equality that closely track social and political developments.

The movement for gun rights is different. There is a substantial mismatch between, on the one hand, the constitutional arguments for an individual right to own and possess firearms and, on the other hand, the identity politics movement that underwrites those arguments. The constitutional argument sounds largely in history: It claims a private right to firearms based on the original understanding of the Second Amendment (or in a variant, the Fourteenth Amendment); and to the extent that supporters of a private right to firearms make frankly normative arguments, they invoke the image of the law-abiding citizen defending herself or himself against an attack that the organized police are unable to prevent or stop.<sup>11</sup> Yet the people who care most about an individual right to firearms ownership and possession are neither minutemen nor, for the most part, the law-abiding inner-city residents most likely to be victimized by crime. The former have vanished, and the latter tend to support gun control.<sup>12</sup>

The people who want an individual right to own and possess firearms are disproportionately white, male, and rural.<sup>13</sup> To put the point crudely, they tend to be the “bubba vote,” “Nascar dads,” or, in Howard Dean’s memorably unfortunate phrase, “guys with Confederate flags in their pickup trucks.”<sup>14</sup> These “angry white men” may well comprise a powerful identity politics movement—one that is, very broadly speaking, anti-abortion, anti-affirmative action, anti-gay marriage, anti-tax, and pro-gun<sup>15</sup>—but, at least with respect to the gun

---

11. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413, 455 (1999) (noting a “positive correlation between opposition to gun control and distrust of the police”) (citing Kenneth Adams, *Guns and Gun Control, in Americans View Crime and Justice: A National Public Opinion Survey* 109, 122-24 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996)).

12. *See id.* at 453, 458.

13. *See* Dan M. Kahan, *The Gun Control Debate*, 60 Wash. & Lee L. Rev. 3, 4 (2003) (citing Tom W. Smith, 1999 National Gun Policy Survey of the National Opinion Research Center: Research Findings 19-24 (2000), available at [www.norc.uchicago.edu/online/gunrpt.pdf](http://www.norc.uchicago.edu/online/gunrpt.pdf); and Gary Kleck, *Crime, Culture Conflict and the Sources of Support for Gun Control*, 39 Am. Behav. Sci. 387, 390, 398 (1996)).

14. Thomas Beaumont, *Kerry Criticizes Dean’s Gun Views*, Des Moines Reg., Nov. 1, 2003, at 1B (quoting a telephone interview with Howard Dean).

15. Kahan, *supra* note 11, at 461 (describing the political tactic of gun control opponents in the House of Representatives as “linking gun control to abortion, promiscuity, irreligiosity, and myriad other practices and policies perceived to be threatening to their constituents’ cultural identities”); *see also* Representative J.C. Watts, *A Call to Arms: Renewing America*, Keynote Address at the NRA Annual Convention in Charlotte, North Carolina (May 20, 2000) (arguing that gun violence in schools is a result of “easy divorce,” the lack of a “male influence” in families, “extremely liberal abortion laws,” “well-intentioned but harmful public welfare policies,” a lack of “real pro-family tax relief,” and “a society which undermines parental authority, which marginalizes religion, and which steeps its children in a violent and sexually obsessed popular culture”), available at <http://www.nraila.org/News/Read/Speeches.asp?ID=11>.

question, they have not, thus far, been able to translate their grievance into the language of judicially enforceable constitutional rights.

This Article compares and contrasts the law and politics of the gun rights movement with the law and politics of movements that have secured constitutional change through, or at least abetted by, the courts. Part II describes the general pattern by which the Supreme Court has recognized previously unrecognized constitutional rights over roughly the last half century, with special reference to claims by African Americans, women, and sexual minorities. Both with respect to equality claims as such and claims for the freedom to engage in some particular form of conduct, the Court has tended to look favorably on rights claims when those claims have been tied to a social movement to end some form of oppression of an identity group. I do not argue that such a link to an identity politics movement is strictly speaking either necessary or sufficient to securing judicial recognition of the claimed rights, but I do provide evidence that it is a substantial aid.

Part III asks how the movement for gun rights compares with the successful rights movements described in Part II. Although I identify some important similarities, on balance I find that the differences are more substantial.

Accordingly, my almost entirely descriptive and predictive (rather than normative) analysis concludes as follows: Whatever the merits of the arguments for the view that the Second Amendment prohibits most or many forms of regulation of private ownership and possession of firearms, conditions are not ripe for the Supreme Court to accept those arguments. That could change of course. For example, new conservative Justices selected for their anti-abortion views or their general jurisprudential approach might turn out to take an expansive view of the Second Amendment. But apart from such fortuitous change through the appointments process, the Court will not likely accept the individual right view until its proponents find a way to link it successfully with an identity politics movement that generates greater sympathy for itself among the general population and, especially, legal elites.

## II. HOW SUCCESSFUL RIGHTS MOVEMENTS ENGAGE IDENTITY POLITICS

Legal rights in the American tradition tend to take the form of universal protection for individuals regardless of their circumstances. The Fourteenth Amendment's Due Process and Equal Protection Clauses apply to every "person."<sup>16</sup> The constitutional proscriptions on discrimination with respect to voting identify particular prohibited

---

16. U.S. Const. amend. XIV, § 1.

classifications—“race,” “sex,” and “age”<sup>17</sup>—rather than identifying protected classes—such as African Americans, women, and young adults. Likewise, the foundational anti-discrimination statute, the Civil Rights Act of 1964, states universal symmetrical principles.<sup>18</sup> The First Amendment protects expression by criminals and corporations no less than politicians because, in the Court’s view, the identity of the speaker is largely irrelevant to whether the “freedom of speech” is being infringed.<sup>19</sup> To be sure, where Congress has unequivocally stated that a legal right belongs to a discrete class of persons—such as those with disabilities—the Court has accepted that limitation.<sup>20</sup> But where claimants have asked the Court for protection

---

17. U.S. Const. amend. XV, § 1 (race); U.S. Const. amend. XIX, § 1 (sex); U.S. Const. amend. XXVI, § 1 (age).

18. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”).

19. See *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (criminal); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 & n.13 (1978) (corporation). *But cf. McConnell v. Fed. Election Comm’n*, 124 S. Ct. 619, 725–26 (2003) (Scalia, J., concurring in part and dissenting in part).

The last proposition that might explain at least some of today’s casual abridgment of free-speech rights is this: that the particular form of association known as a corporation does not enjoy full First Amendment protection. Of course the text of the First Amendment does not limit its application in this fashion . . . [n]or is there any basis in reason why First Amendment rights should not attach to corporate associations—and we have said so.

*Id.* (citing *Belotti*, 435 U.S. at 765).

20. The Americans with Disabilities Act (“ADA”) does not provide all persons with protection against discrimination against them on the basis of whether or not they have a disability. Rather, it only provides legal protection to persons with disabilities. See 42 U.S.C. §§ 12111(8), 12102(2) (2000). The Supreme Court has enforced that vision strictly by limiting the number of persons who may qualify for protection under the ADA. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483–87 (1999) (rejecting the claim that persons with correctable conditions should be considered disabled under the ADA because, among other things, such a reading of the statute would grant protection to a much larger class of persons than Congress stated it wished to protect). In cases involving statutes other than the ADA, the Court has, with one exception, clearly held that general anti-discrimination laws protect all persons, even if the protection may take somewhat different forms where programs of affirmative action are challenged. See, e.g., *United Steel Workers v. Weber*, 443 U.S. 193, 201 (1979) (holding that an affirmative action plan, collectively bargained for by an employer and a union, did not constitute race discrimination in violation of Title VII of the Civil Rights Act of 1964); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280–81 n.8 (1976) (holding, in a case not involving affirmative action, that Title VII protects whites as well as blacks from certain forms of racial discrimination). The one exception concerns the Age Discrimination in Employment Act (“ADEA”). In *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236 (2004), the Court held that the ADEA’s prohibition on discrimination based on “age” only prohibits discrimination on the basis of old age. It is not obvious that this is a correct reading of the statute. See *id.* at 1250 (Thomas, J., dissenting) (accusing the majority of substituting Congress’s main purpose for the text’s

for rights particular to them as members of a group, they have not fared well, even when, as in the case of the First Amendment's Free Exercise Clause,<sup>21</sup> the relevant legal text could readily be construed to grant such particular protection.<sup>22</sup>

Accordingly, it may be tempting to think that American legal rights—and especially American constitutional rights—simply respond to individual claims. But while this characterization may be broadly accurate with respect to operative *doctrine*,<sup>23</sup> it does not fairly describe the *process* by which courts come to recognize that some general constitutional text encompasses universal protection against some form of discrimination or for some class of activity. That process typically responds to a social movement to end what is claimed to be the oppression of some discrete social group.

The phenomenon is easy to discern with respect to race. Undoubtedly having African Americans in mind, Chief Justice Stone famously observed in his footnote in *United States v. Carolene Products* that the presumption of constitutionality that ordinarily attaches to legislation has less scope where, inter alia, legal disabilities are placed upon “discrete and insular minorities.”<sup>24</sup> Much ink has been spilled on the question of what criteria ought to be used to identify groups in need of protection—whether, for example, political powerlessness, a history of oppression, and the immutability of some important characteristic are as salient as, or more salient than, discreteness and insularity.<sup>25</sup> Perhaps even more ink has been spilled on the question of whether the Supreme Court is right to read the constitutional guarantee of equal protection as attaching to all individuals rather than to members of particular groups, as containing an anti-discrimination principle rather than what has sometimes been called an anti-subordination principle.<sup>26</sup> Here I will put aside these

---

language). But whether rightly or wrongly, *General Dynamics* reads the ADEA as out of step with the main body of federal anti-discrimination law.

21. U.S. Const. amend. I.

22. See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

23. There is an important exception to this broad description, however. Although the Court's precedents nominally require “symmetry” in the treatment of equal protection claims advanced by racial minorities and non-minorities, see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995), in practice the Court arguably applies different standards. See *Grutter v. Bollinger*, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting) (discussing the majority's supposed “abandonment of strict scrutiny”).

24. *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938).

25. For two of the most thoughtful discussions of these and related questions, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985); and Kenji Yoshino, *Suspect Symbols*, 96 Colum. L. Rev. 1753 (1996).

26. For the classic statement of the anti-subordination view, see Owen Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976). For the classic reply, see Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976). For a recent exchange of views, including my own tentative defense of the anti-discrimination approach, see Bepress Online,



interesting questions to note the obvious: In formulating equal protection doctrine, the Court began with the claims of oppressed African Americans and then generalized outward; there was and continues to be disagreement over how far and in what directions to generalize, but the phenomenon is clear enough. The expansion of constitutional doctrine responded to a social and political movement that aimed (initially) to improve the treatment and conditions of African Americans.

In the hagiography of Thurgood Marshall and the Warren Court, courageous lawyers and judges challenged and defeated Jim Crow in the name of the Constitution. That view, of course, is incomplete. As Gerald Rosenberg argues in *The Hollow Hope*,<sup>27</sup> *Brown v. Board of Education*<sup>28</sup> and other Supreme Court desegregation decisions did not actually bring about much in the way of desegregation. That task was accomplished—to the extent that it was—largely after Congress authorized the Justice Department to bring enforcement actions.<sup>29</sup> But Rosenberg's own view of courts as largely paper tigers is itself incomplete, for courts and political actors exist in a dialectical relationship. Rosenberg attributes what progress we as a society have made toward racial equality to the civil rights movement of the 1960s, but he overlooks the extent to which *Brown* and other decisions catalyzed that movement by putting the Court's prestige behind it.<sup>30</sup> And just as *Brown* interacted with a social and political movement, so it came out of one.

It is by now commonplace that *Brown* was more a feature of Cold War ideological struggle than of discerning the Equal Protection Clause's "true" meaning. Competing with Soviet and Chinese Communism for hearts and minds in developing countries, the United States found racial segregation to be an embarrassment.<sup>31</sup>

That is not to say, of course, that lawyering and judging were irrelevant. The legal strategy of the NAACP Legal Defense Fund—using the master's tools to tear down the master's house by first bringing cases like *Sweatt v. Painter*<sup>32</sup> that nominally operated within

---

Symposium on Groups and the Equal Protection Clause (August 2002), at <http://www.bepress.com/cgi/query.cgi>.

27. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

28. 347 U.S. 483 (1954).

29. For this point and other ones relevant to my argument here, see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2091 (2002).

30. See, e.g., Neal Devins, *Judicial Matters*, 80 Cal. L. Rev. 1027, 1042 (1992) (reviewing Rosenberg, *supra* note 27) ("Title IV of the 1964 Act, authorizing the Justice Department to file desegregation lawsuits, seems a direct response to *Brown*.").

31. See Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (2000).

32. 339 U.S. 629 (1950).

the *Plessy v. Ferguson*<sup>33</sup> regime of “separate but equal”—was indeed brilliant. But it was only a legal strategy of a multi-pronged attack on segregation.

More fundamentally for my purposes here—yes, this Article will double back to the Second Amendment in due course, I promise—the formal constitutional arguments in *Brown*, the sorts of things that get studied in constitutional law courses, such as original understanding and reasoning by analogy, seemed to have little to do with the outcome. How else could one explain the fact that half a century later, we are still puzzling over how the Court might have written a better opinion?<sup>34</sup> Or that the sum of the Court’s explanation for why the Fifth Amendment’s Due Process Clause, adopted in 1791 by a slave-owning republic, barred racially segregated schools, was that any other result would be “unthinkable.”<sup>35</sup> My point is not that the Court was wrong to hold that racial apartheid denies equal protection. My point is simply that the Court’s decision to do so was a response to social and political forces that shifted racial segregation from the category of unchallengeable to unsustainable.

The relevance of the original understanding in *Brown* is instructive. After the case was first argued, the Court-ordered re-argument focused on the question of the original understanding of the Fourteenth Amendment.<sup>36</sup> Whether the Court was genuinely interested in the question in 1953 or whether the question was simply a stalling tactic in light of internal divisions is not entirely clear. It is clear, however, that the original understanding was not the basis for the Court’s ruling; it was at best an obstacle to be overcome, which is exactly how the Court treated it, saying that evidence of the original understanding was “inconclusive”<sup>37</sup> and proceeding directly to normative arguments. The Court’s essential reasoning—that “separate [is] inherently unequal”<sup>38</sup> because apartheid was intended to and in fact stigmatized African American schoolchildren—was a quite straightforward translation of the moral argument made in the political realm.

Other constitutional equality movements over the last half century have followed the same pattern. Women’s quest for equality in the New World is at least as old as the Republic, but even if we discount Abigail Adams’s plea that John and his co-revolutionaries

---

33. 163 U.S. 537 (1896).

34. See What *Brown v. Board of Education* Should Have Said (Jack M. Balkin et. al. eds., 2001).

35. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

36. See *Gebhart v. Belton*, 345 U.S. 972 (1953) (order restoring the case to the docket for re-argument).

37. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

38. *Id.* at 495.

“[r]emember the [l]adies,”<sup>39</sup> we do well to recall that the 1848 Seneca Falls Declaration preceded the adoption of the Fourteenth Amendment by two decades and preceded the adoption of the Nineteenth Amendment by more than seven decades. Why then, was it not until the early 1970s that the Supreme Court ruled that legal distinctions drawn on the basis of sex should trigger heightened judicial scrutiny?<sup>40</sup>

The answer, once again, has hardly anything to do with the original understanding. Far from intending to eliminate most official sex distinctions, the framers and ratifiers of the Fourteenth Amendment’s Equal Protection Clause *introduced* into the Constitution (in the Fourteenth Amendment’s Section 2) a sex line. That provision penalizes states for disenfranchising their “male inhabitants” aged twenty-one and over.<sup>41</sup> Is it likely that the people who saw no difficulty in thereby (implicitly but clearly) authorizing the disenfranchisement of women thought that Section 1 of the Fourteenth Amendment extended equal civil rights to women? “The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother,” Justice Bradley famously opined just four years after the Fourteenth Amendment’s adoption,<sup>42</sup> and his was hardly a minority view.

Only after a century of political and social struggle was the Supreme Court prepared to hold, as it finally did in *Craig v. Boren*, that official distinctions drawn on the basis of sex trigger heightened judicial scrutiny.<sup>43</sup> The Court’s reasoning in *Craig* and related cases transparently tracked social and political developments. The Court decried “archaic and overbroad generalizations” as well as “increasingly outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.”<sup>44</sup> In other words, times and attitudes change, and interpretation of the Constitution changes with them.

The merits of this approach to constitutional interpretation—sometimes associated by its proponents and critics alike with what has been called the “living” Constitution<sup>45</sup>—is not my concern here,

---

39. Letter from Abigail Adams, to John Adams (March 31, 1776), in 1 Adams Family Correspondence 370 (L.H. Butterfield et al. eds., 1963).

40. See *Frontiero v. Richardson*, 411 U.S. 677 (1973).

41. U.S. Const. amend. XIV, § 2.

42. *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring in the judgment).

43. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating what has come to be known as the intermediate scrutiny test).

44. *Id.* at 198–99 (internal quotation marks and citations omitted).

45. Compare William J. Brennan, Jr., *Education and the Bill of Rights*, 113 U. Pa. L. Rev. 219, 224 (1964) (“[T]he genius of our Constitution resides not in any static meaning it may have had in a world that is dead and gone, but in its applicability and adaptability to current needs and problems.”), with William Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976) (criticizing this approach).

though in the interest of full disclosure, I can explain briefly in a footnote why, if pressed, I would cast my lot with the proponents.<sup>46</sup> My point is descriptive rather than prescriptive: As a matter of observed sociological fact, the shift in constitutional doctrine governing judicial review of official sex discrimination followed shifts in public attitudes, which the doctrine came to mirror.

The same pattern is now playing out with respect to discrimination on the basis of sexual orientation. In 1965, in *Griswold v. Connecticut*, even the Justices staking out the most liberal position on the question of the state's (lack of) power to regulate contraception were at pains to note that they would not invalidate state regulation of homosexuality, which they regarded as "promiscuity or misconduct."<sup>47</sup> Two decades later, in *Bowers v. Hardwick*, a majority of the Court still thought that private consensual homosexual conduct could only be distinguished from "adultery, incest, and other sexual crimes" by "fiat."<sup>48</sup> By then, however, the social movement for equal rights for gays and lesbians had made sufficient progress that the equation was controversial, prompting a vigorous four-Justice dissent. And by 2003, the tide had turned, so that now only three dissenting Justices were prepared to say that the state could prosecute a man for "deviate sexual intercourse, namely anal sex, with a member of the same sex."<sup>49</sup>

The view of legal realism that says that judges decide cases based on what they had for breakfast is a caricature to which almost no one subscribes. But the view of legal realism that says that, over the long run, judicial attitudes towards social issues track attitudes within the

---

46. The principal argument against living constitutionalism is that Article V's amendment procedure allows for evolution through the political process, so that absent amendment, unelected judges should not take it upon themselves to change the Constitution's meaning. The whole point of a written Constitution, in this view, is to prevent backsliding against a standard set by the framers and ratifiers of a constitutional provision; living constitutionalism is unnecessary to prevent backsliding and may even promote it, critics argue, because attitudes can evolve to undercut old rights just as they can create new ones. See Antonin Scalia, *A Matter of Interpretation* 38–46 (1997). Although not without force, I find these arguments ultimately unpersuasive given the supermajorities required for amending the Constitution. To privilege the original understanding of ambiguous constitutional text is, in these circumstances, to privilege the results of a political process that was, by modern standards, woefully under-inclusive. It is bad enough that our foundational documents were written and adopted by (what is by today's standards) an unrepresentative group of men; it adds insult to injury to construe their handiwork in a manner that preserves their privileges based on their less-than-fully-articulated expectations and prejudices. Accordingly, although it appeals to popular sovereignty, the argument against the living Constitution is inconsistent with (any currently acceptable account of) popular sovereignty, at least where the question concerns the rights of people who were excluded from the political process when the relevant constitutional provision was adopted. I could make an argument for the living Constitution more generally, but it would not fit in this footnote.

47. *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring).

48. *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986).

49. *Lawrence v. Texas*, 123 S. Ct. 2472, 2476 (2003).

larger society in which they live seems unassailable. Justice White wrote in 1986 that “to claim that a right to engage in” homosexual acts “is ‘deeply rooted in this Nation’s history and tradition’ . . . is, at best, facetious.”<sup>50</sup> Though he may have been wrong to make history at this level of specificity the constitutional touchstone, in a sense, Justice White was clearly right—circa 1986, such a right was not deeply rooted. By 2003, when Justice Kennedy assimilated the claim to a more general right to sexual privacy, the willingness to see gay people as, for these purposes, no different from straight people, was certainly *more* deeply rooted. And in fifty or a hundred years, the claim that Justice White dismissed as facetious may well be taken for granted, in the way that we now take for granted that racial apartheid and exclusion of women from the workplace are inconsistent with a right to legal equality.

Let me be clear about what I am and am not saying. First, I am not saying that the Court’s constitutional jurisprudence is a march of progress from the in-egalitarian past to the ever-more egalitarian future. I happen to think that changes in social attitudes with respect to race, sex, and sexual orientation over the last half century do constitute moral progress. But that is hardly crucial to my argument—nor do I think that our moral commitments as a nation become ever-better.<sup>51</sup> My point is that the Court responds to social and political movements, not that the social and political movements to which it responds necessarily have justice on their side.

I am also not saying that the Court always adjusts doctrine to track social attitudes exactly. The Court’s Eighth Amendment jurisprudence expressly follows “the evolving standards of decency that mark the progress of a maturing society,”<sup>52</sup> but in most areas of constitutional doctrine, social attitudes play a less direct role. Justices, to be confirmed, cannot be perceived as too far outside the mainstream; once on the Court, they continue to participate in the changing society around them; and other things being equal, they would certainly prefer not to risk the Court’s prestige on wildly unpopular decisions. These factors ensure that over the long run, constitutional doctrine evolves with social attitudes. But over the long run, we are all dead.<sup>53</sup> In the meantime, constitutional doctrine can lag social and political change.

---

50. *Hardwick*, 478 U.S. at 194.

51. For example, I am disheartened by the increasing tendency to regard misfortune as principally a matter of individual rather than social responsibility over roughly the same period.

52. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (citing *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

53. John Maynard Keynes, *A Tract on Monetary Reform* 80 (1923) (“[L]ong run is a misleading guide to current affairs. *In the long run* we are all dead.”).

Constitutional doctrine can also lead social and political change. As I noted above, that is probably the best account of the Court's desegregation decisions; they catalyzed the civil rights movement.

But the nation does not always follow where the Court aims to lead. Death penalty abolitionists thought that the Supreme Court decision in *Furman v. Georgia*,<sup>54</sup> invalidating then-extant capital sentencing procedures, might put an effective end to the death penalty in the United States, at least in the medium term.<sup>55</sup> When the states responded by amending their statutes to conform with the nominal mandate of the Court's decision, the Justices pulled back and affirmed the new statutes.<sup>56</sup>

Likewise, we may now be witnessing a popular counterrevolution with respect to the rights of sexual minorities. Although the Court itself went out of its way in *Lawrence v. Texas* to distinguish laws barring same-sex marriage from those barring same-sex intimacy,<sup>57</sup> advocates quickly seized upon the majority opinion's reasoning (and the dissent's parade of horribles) to challenge marriage restrictions. Some public officials and courts accepted the argument (in some instances on state rather than federal constitutional grounds),<sup>58</sup> and we are now witnessing the counter-attack of those who would restrict marriage to heterosexual couples.

To repeat, whether, and to what extent, the movement for the rights of sexual minorities succeeds in securing durable protection through the courts is not my concern here. Instead, I am claiming that success or failure will likely turn on the ability of advocates to succeed in the social and political realm, and then to be able to present the legal argument in a way that is true to the social and political argument.

The *Loving* analogy is instructive.<sup>59</sup> There is, to my mind, a persuasive technical legal argument that constitutional doctrine *already* protects same-sex marriage. *Loving* says that state laws that proscribe marrying someone because of his or her race are race-based, and thus subject to strict scrutiny, which they fail miserably. It follows that laws that proscribe marrying someone because of his or her sex—

---

54. 408 U.S. 238 (1972).

55. See James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2033-38 (2000) (describing the ultimately unsuccessful litigation strategy of seeking procedural hurdles as a means of reducing the total number of death sentences meted out).

56. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

57. *Lawrence v. Texas*, 123 S. Ct. 2472, 2488 (2003) (O'Connor, J., concurring) ("Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

58. The most notable case thus far is *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), which, in the course of finding a right to same-sex marriage under the Massachusetts Constitution, cites the Supreme Court's decision in *Lawrence* repeatedly.

59. *Loving v. Virginia*, 388 U.S. 1 (1967).

as same-sex marriage prohibitions do—are sex-based, and thus trigger the requirement of “an exceedingly persuasive justification,”<sup>60</sup> which the state cannot provide. Q.E.D.

There is something profoundly right about the foregoing argument: Distinctions drawn on the basis of sexual orientation *are* sex-based distinctions, because they make numerous assumptions about the proper sex roles of men and women. But there is also a sense in which the *Loving* analogy is a kind of lawyer’s trick. It leverages moral opposition to sex discrimination into opposition to sexual orientation discrimination. Yet someone who thinks it legitimate for the state to draw some distinctions between straights and gays will undoubtedly resist the leveraging; whatever reasons he or she has for thinking sexual orientation discrimination is not invidious (at least when it comes to marriage) will operate either to resist the sex discrimination analogy or to imagine a sufficiently important state interest justifying distinctions drawn on the basis of sexual orientation. To put the point as simply as possible, the race-sex-sexual orientation analogy is only going to be persuasive to those who are already sympathetic to the argument that sexual orientation discrimination is invidious. Should the *Loving* analogy succeed, that will be because people (including Justices) have become sympathetic to the cause of same-sex marriage rights, rather than vice versa.

The pattern of constitutional doctrine responding to social and political movements translated into legal language holds for liberty claims as well as equality claims. One might think that social and political movements are necessary for securing legal protection against certain forms of group-based discrimination or stereotyping because such protection is triggered by one’s membership in, or perceived connection to, a social group, but that liberty claims are different. Liberty claims, in this view, are about the individual qua individual. Certainly there is something to be said for this distinction, and one can find strongly libertarian rhetoric in, for example, the Court’s privacy/sexual autonomy cases.<sup>61</sup> Nonetheless, social and political movements have played roughly the same role in preparing the ground for judicial recognition of liberty claims as they have played with respect to equality claims.

Consider liberty claims related to the three social and political movements discussed thus far. First, the social and political

---

60. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

61. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

movement for the rights of African Americans (and other racial minorities) has been essential to the recognition of rights well beyond the Equal Protection Clause itself. Doctrines involving freedom of association,<sup>62</sup> freedom of speech,<sup>63</sup> and the rights of criminal suspects,<sup>64</sup> first took their modern shape in a context that was clearly shaped by the civil rights movement. That is not to say that in each of these areas the doctrine was confined to claims by racial minorities. On the contrary, once articulated, the doctrines were generalized. But the initial successes were undoubtedly due in substantial measure to the fact that the social and political movement for racial equality was able to show a clear link between the justice of its cause and the injustice of the challenged practices.<sup>65</sup>

Likewise the abortion right was sought, and in large part achieved, as part of the social and political movement for equal rights for women.<sup>66</sup> Justice Blackmun's opinion in *Roe v. Wade*<sup>67</sup> has been criticized for, among other things, failing to recognize the connection between the liberty claim and the social impact of legal abortion for women as a group, but it is a mistake, in my view, to make this criticism as a matter of the formal doctrinal pigeonhole—the Due Process Clause or the Equal Protection Clause—into which the ruling

---

62. See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958).

63. See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

64. See Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 Geo. L.J. 1153 (1998).

65. See *id.* Kahan & Meares contend that:

The need that gave birth to the existing criminal procedure regime was institutionalized racism. Law enforcement was a key instrument of racial repression, in both the North and the South, before the 1960's civil rights revolution. Modern criminal procedure reflects the Supreme Court's admirable contribution to eradicating this incidence of American apartheid.

*Id.* In *NAACP*, the Court reasoned:

Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. . . . [The NAACP] has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. . . . [C]ompelled disclosure of [NAACP's] Alabama membership is likely to affect adversely the ability of [NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate . . . .

*NAACP*, 357 U.S. at 462-63; see also *Sullivan*, 376 U.S. at 257-71 (characterizing an allegedly libelous advertisement of the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," as "an expression of grievance and protest on one of the major public issues of our time," and delimiting the state's power to award damages for libel in actions brought by public officials against critics of their official conduct).

66. See Lucinda Finley, *The Story of Roe v. Wade*, in *Constitutional Law Stories* 359 (Michael C. Dorf ed., 2004).

67. 410 U.S. 113 (1973).



best fits.<sup>68</sup> The better criticism of the *Roe* opinion along these lines is that it is tone deaf to the real stakes in failing adequately to connect the right recognized to the concerns raised by the social movement that sought the right. As has been noted ad nauseam, *Roe* reads like a case about doctors' rights rather than women's rights. But the issue is not due process liberty versus equal protection; as the Court's partial re-conceptualization of the abortion right in *Planned Parenthood v. Casey* illustrates, one can ground a liberty claim in concerns about the unequal effects that failure to recognize the liberty claim will have.<sup>69</sup> Whether the Court's abortion jurisprudence correctly interprets the Constitution is not my concern here. My point is sociological. *Roe*—a case about both liberty and equality—was made possible by a social movement, and one of the shortcomings of the *Roe* opinion was its failure to connect the doctrine closely to the concerns of the underlying social movement.

Finally, consider the social and political movement for equal rights for sexual minorities. That movement has scored two principal victories in the Supreme Court. In *Romer v. Evans*, the Court held, as a matter of equal protection, that a state could not insist that sexual minorities obtain protection against discrimination on that basis only through the state constitution.<sup>70</sup> Though the result in *Romer* was welcomed by the gay rights community, the Court did not say that discrimination on the basis of sexual orientation triggers heightened judicial scrutiny. The movement scored a second, and arguably clearer, victory in *Lawrence v. Texas*, where the Court categorically invalidated a state sodomy prohibition.<sup>71</sup> The ruling was grounded expressly in liberty rather than equality, but it was no less the product of changed public attitudes because of that fact. Although Justice Kennedy's opinion opens with an abstract paean to autonomy and is peppered with individualistic language, its moral core resonates with the message of the gay rights movement: Leaving *Bowers v. Hardwick*<sup>72</sup> on the books "demeans the lives of homosexual persons," the Court said.<sup>73</sup>

### III. UNSUCCESSFUL MOVEMENTS

Thus far, I have provided examples of social and political movements successfully translating their public demands into the language of constitutional law. It may be useful to contrast these

---

68. See, e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1199–1209 (1992).

69. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992).

70. *Romer v. Evans*, 517 U.S. 620 (1996).

71. *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003).

72. 478 U.S. 186 (1986).

73. *Lawrence*, 123 S. Ct. at 2482.

successful efforts to secure changes in constitutional doctrine with an unsuccessful effort, so as to see the role that the social and political movements play. We can then ask whether the gun rights movement looks more like the successful or unsuccessful movements that have gone before.

Accordingly, consider the unsuccessful effort, culminating in the 1997 decisions in *Washington v. Glucksberg*<sup>74</sup> and *Vacco v. Quill*,<sup>75</sup> to secure, on the basis of the Fourteenth Amendment's Due Process and Equal Protection Clauses, respectively, what is commonly called a right to physician-assisted suicide. The plaintiffs argued in these cases that given the Court's tacit recognition in *Cruzan v. Missouri Department of Health*,<sup>76</sup> of the right of a mentally competent adult to refuse medical treatment, including food and water, even where the result is death of the patient, and given broader notions of individual autonomy in matters of life and death as expressed in the Court's abortion jurisprudence, it followed that a terminally ill patient had the constitutional right to the aid of a willing physician in controlling the circumstances and timing of his or her own death.<sup>77</sup>

The Court rejected these arguments, invoking the traditional place of the act/omission distinction in the common law.<sup>78</sup> I believe, for reasons articulated in an amicus brief I co-authored, that although the act-omission distinction has salience in many contexts, it does not bear the weight the Court placed on it in *Glucksberg* and *Quill*.<sup>79</sup> And although five Justices expressed some measure of agreement with the plaintiffs' case, the bottom line was 9-0 to reject their claims. Rather than re-litigate the issues here, however, I want to suggest that the failure of the plaintiffs' case was not primarily a matter of doctrine or moral philosophy. They failed in substantial part because a powerful and sympathetic social and political movement was on the opposite side of the issue.

---

74. 521 U.S. 702 (1997).

75. 521 U.S. 793 (1997).

76. 497 U.S. 261 (1990).

77. See *Glucksberg*, 521 U.S. at 723-24.

78. *Quill*, 521 U.S. at 802-08; *Glucksberg*, 521 U.S. at 725.

79. Brief of Amicus Curiae of State Legislators in Support of Respondents at 8, *Vacco v. Quill*, 521 U.S. 793 (1997) (No. 95-1858) and *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110). The back-of-the-envelope version of my argument goes as follows: suppose a terminally ill patient wishes to remain connected to a respirator, so as to savor whatever precious moments of life he has remaining. Suppose further that the patient's sworn enemy surreptitiously disconnects the respirator, hastening death. The sworn enemy thereby commits murder because he takes the affirmative act of disconnecting the respirator. One might think, per *Cruzan*, that there is a substantial moral distinction between such an act, taken against the patient's will, and the merciful act of disconnecting a respirator from a patient who wishes to expire. But the distinction is not between acts and omissions. It is between non-consensual and consensual acts. Likewise, the longer version of the argument explains, the key feature of a physician's provision of death-causing medication to a terminally ill patient is the patient's desire for the medication.

Groups like “Not Dead Yet” and other organizations representing the interests of Americans with disabilities opposed judicial (and statutory) recognition of a right to physician-assisted suicide because they feared, perhaps not unreasonably, that a right to die could become a duty to die.<sup>80</sup> They worried that legislatures and judges would extend the right to those groups, and only those groups, of individuals whose lives the majority (including a majority of judges) thought were not worth living: people with severe physical, mental, and emotional disabilities.<sup>81</sup>

I happen to think (as my co-counsel and I argued in our amicus brief) that the concerns of the disability advocates could have been met by a right subject to various forms of regulation. But the disability rights advocates did not share that confidence, and perhaps more importantly, their presence in the case as amici and as protesters outside the Supreme Court building was undoubtedly felt inside the Justices’ chambers.<sup>82</sup> The position of the disability rights advocates provided a powerful counterweight to the suggestion by some on the plaintiffs’ side that opposition to a right to physician-assisted suicide was necessarily part of an effort to impose a religious view on others.<sup>83</sup> It made the cases appear as a conflict between, on the one hand, libertarians claiming a right for themselves and, on the other hand, a vulnerable population that would suffer death as the price for others’ liberty.

---

80. Brief of Amici Curiae of Not Dead Yet and American Disabled for Attendant Programs Today in Support of Petitioners at 11, *Vacco v. Quill*, 521 U.S. 793 (1997) (No. 95-1858).

81. *See id.*

82. The Justices expressly worried about vulnerable populations in *Glucksberg* and *Quill*. *See Quill*, 521 U.S. at 808–09 (“[P]rotecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia—are . . . valid and important public interests [that] easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end.”). According to *Glucksberg*:

Leaving aside any difficulties in coming to a clear concept of imminent death, mistaken decisions may result from inadequate palliative care or a terminal prognosis that turns out to be error; coercion and abuse may stem from the large medical bills that family members cannot bear or unreimbursed hospitals decline to shoulder. Voluntary and involuntary euthanasia may result once doctors are authorized to prescribe lethal medication in the first instance, for they might find it pointless to distinguish between patients who administer their own fatal drugs and those who wish not to, and their compassion for those who suffer may obscure the distinction between those who ask for death and those who may be unable to request it.

*Glucksberg*, 521 U.S. at 782–83.

83. That argument was advanced in Ronald Dworkin et al., *Assisted Suicide: The Philosophers’ Brief*, reprinted in N.Y. Rev. Books, Mar. 27, 1997, at 41. For an extended version of the argument, see Ronald Dworkin, *Life’s Dominion* 179–217 (1993).

The configuration of interests in the physician-assisted suicide cases—an individual libertarian claim pitted against the asserted interests of a vulnerable population—can also be found in at least two other contexts: abortion and gun rights. For predictive purposes, therefore, one would want to know whether a putative individual right to own and possess firearms—with the collateral consequence that some innocents who otherwise would have lived will die as a result of the use of those firearms—is more like a putative right to physician-assisted suicide—with the collateral consequence that some people will be pressured into prematurely ending their lives—or the constitutional right to abortion—which has the collateral consequence of killing fetuses, but which the Court nonetheless recognized.

With respect to gun rights, the Court seems unlikely to follow the pattern it followed in its abortion jurisprudence because the configuration of organized interest groups is not strictly analogous. When the Court decided *Roe* in 1973 there was an active women's rights movement, arguably at the height of its power. By contrast, while there certainly were people who strongly opposed abortion on religious and moral grounds, the national pro-life movement that has grown up in opposition to *Roe* had nothing like the organizational sophistication it now has.<sup>84</sup> Advocates for abortion rights were able to portray the case as primarily about women's safety rather than the lives of fetuses, perhaps because of the widespread (and arguably accurate) perception in 1973 that a legal right to abortion would not actually have led to more abortions; it would simply move abortion from unsafe back alleys to the relative safety of hospitals, clinics, and doctors' offices.<sup>85</sup>

Like the abortion rights advocates of the early 1970s (and beyond), advocates of an individual constitutional right to own and possess firearms resist the notion that a right for them would mean death for others. Slogans like "guns don't kill, people kill" and research by scholars like John Lott purporting to show that gun rights increase

---

84. Lucinda Finley argues that views about religion and sex roles largely determine individual views about abortion, but she acknowledges the symbolic use of *Roe* as a rallying point for organizing anti-abortion/pro-life sentiment. See Finley, *supra* note 66, at 403–05.

85. Abortion complications accounted for approximately fourteen percent of maternal mortality in 1930, twenty-five percent by 1950, and forty-five percent by 1960. Leslie J. Regan, *When Abortion Was a Crime* 213–14 (1997). For Justice Powell, the health crisis facing women was an important rationale for *Roe*. A few years before the decision, Powell was called by a distraught, young office clerk who had attempted an abortion on his lover. The woman had asked the clerk to follow her instructions but during the attempt, she hemorrhaged and died. With Powell's assistance, the boy told his story to local prosecutors, who declined to press charges. According to John Jeffries, "[t]his incident convinced Powell that women would seek abortions whether they were legal or not and that driving the practice underground led to danger and death." John Jeffries, *Justice Lewis F. Powell Jr.* 347 (1994).

rather than decrease public safety<sup>86</sup> aim to sway public opinion (including judicial opinion) on the question of the collateral effects of an individual right to own and possess firearms.

But the social, political, and legal landscape with respect to gun rights today is significantly different from the landscape with respect to abortion rights in 1973. Notwithstanding the political power of the National Rifle Association (“NRA”), there is a highly motivated social and political movement that argues against gun rights. Presidential candidates must pay attention to swing voters in western Pennsylvania who favor gun rights, but as a more general matter, the NRA does not have the political stage to itself. Organizations like the Violence Policy Center, the Brady Campaign to Prevent Gun Violence, and many others vigorously argue that widespread firearms possession endangers rather than protects human security. Who has the better of this empirical argument is not my concern here. The point is that judges are likely to understand it as a political dispute between well-organized persons with different ideological viewpoints, and accordingly, they will see no great need to intervene on one side or the other.

Moreover, by contrast with prior successful movements for constitutional change through the courts, the movement for gun rights does not pit an oppressed group against an oppressive majority. After all, supporters of gun rights are not, by any reasonable measure, oppressed. Groups like the NRA fight tepid regulation like the assault weapons ban and the Brady Act’s waiting period for gun purchases not because they consider such regulations in themselves to be substantial denials of the right to own and possess firearms, but because they fear a political slippery slope. Whether that fear is realistic, the claim that *if government goes much further than it is currently just barely going, we will be oppressed*, is not a very effective slogan for rallying sympathy for a group seeking judicial recognition of a constitutional right.

This is not to say that the disproportionately white, male, and rural citizens who support gun rights cannot and do not make a more general claim to being victimized by what they and their sympathizers regard as an elitist liberal establishment (even when all branches of the national government and most state governments are in Republican hands). Such “angry white men” have found a sympathetic audience in Justices Scalia and Thomas on issues like

---

86. See generally John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun-Control Laws* (1998). I say “purporting” because Lott’s methods and claims are dubious. See generally Ian Ayres and John J. Donohue III, *Shooting Down the More Guns, Less Crime Hypothesis*, 55 *Stan. L. Rev.* 1193 (2003).

affirmative action, women's rights, and gay rights,<sup>87</sup> but even these Justices have not connected support for the individual-right conception of the Second Amendment with any identity politics movement, seeing the former as simply a matter of the original understanding (if that).<sup>88</sup> As I have endeavored to show in this Article, arguments about the original understanding play some role in the public justification of the Court's decisions, but do not, by themselves, suffice to bring about doctrinal change.

One might think that the failure of the gun rights movement to portray itself as oppressed does not distinguish that movement from the abortion rights movement. As John Ely observed in *Roe's* aftermath, for a Court that cares about oppressed minorities, women's sheer numbers and their superior ability—relative to fetuses—to organize politically, ought to have counted as an argument *against* taking abortion out of the political process, rather than as a reason to side with women against fetuses.<sup>89</sup> But, so far as I can tell, that point was mostly lost on the Court,<sup>90</sup> and more importantly, for all the talk of the Court's role in protecting those unable to protect themselves in the political process, if a broad-based social movement has not developed to protect the interests of some group—as no such movement with respect to fetuses had yet developed circa 1973—the Court is unlikely to treat that group as entitled to judicial solicitude.

To put the last point starkly, a group whose oppression is so complete as to be invisible to mainstream public opinion, including the mainstream judges who sit on the Supreme Court, will not register with the Justices as oppressed. Think of African Americans in the early Republic, women in the late nineteenth century, sexual minorities in the middle of the last century, and non-human animals today. I am suggesting that circa 1973, fetuses were seen by the Court as comparable, and accordingly, that when it was decided, *Roe* was not seen as a case that pitted one well-organized group claiming to be oppressed—women—against another well-organized group—fetuses—claiming to be oppressed by the rights claims of the first group. It was instead seen as a case pitting one oppressed group—women—against laws enacted by the oppressor class—male-

---

87. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 349-78 (2003) (Thomas, J., dissenting); *United States v. Virginia*, 518 U.S. 515, 566-603 (1996) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636-53 (1996) (Scalia, J., dissenting).

88. See *Printz v. United States*, 521 U.S. 898, 938-39 (1997) (Thomas, J., concurring) (inviting future litigation on the question of whether, and to what extent, the Second Amendment bars firearms regulation).

89. John Hart Ely, *The Wages of Crying Wolf*, in *On Constitutional Ground* 281, 289 (1996).

90. In trivializing the interests at stake for women forced to bear an unwanted pregnancy, Justice White's *Roe* dissent did portray the case as a conflict between fetal life and women's "convenience," but his was not a point about the political process. *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting) (Justice White's *Roe v. Wade* dissent is published in *Doe v. Bolton*).

dominated legislatures.<sup>91</sup> That is not the political valence of the gun rights debate today. Today, both the advocates of gun rights and victims of gun violence claim to be oppressed by the policies the other group favors, and there is no reason to think the Court is more likely to see the issue from the perspective of the gun rights advocates.

Before concluding, I must address an objection that my critics are no doubt by now practically screaming. The objection goes like this: We can assume, *arguendo*, that Dorf is right that to obtain heightened equal protection scrutiny on the basis of some classification, or to have some conduct engaged in by some particular group recognized as a fundamental right for substantive due process purposes, a mobilized social movement is necessary. But matters are entirely different where, as in the case of a claimed right to own and possess firearms, there is an express provision of the Bill of Rights on point. There, the ordinary reasons that counsel caution in the recognition of new equality or liberty claims do not apply, and courts are free to pick the best interpretation, having in mind such conventional constitutional factors as the original understanding, post-enactment history, structure, and so forth.

This objection may be meant (by my hypothetical apoplectic reader) prescriptively. Express provisions of the Bill of Rights (and other express constitutional provisions) have a greater call on judges, in this view, than the open-ended Equal Protection and Due Process Clauses. The objection is then a brief for textualism à la Hugo Black or Antonin Scalia. It is also, in the context of my argument, a non sequitur, for I am not making the prescriptive claim that constitutional doctrine *should be* responsive to social and political movements; I am making the descriptive claim that it *is* so.

Suppose then that the objection is meant descriptively. There are numerous statements by the Court, going back at least to the *Carolene Products* footnote itself, indicating that the Justices have a freer hand, because their actions are more legitimate, when they construe a specifically enumerated right than when they rely on the open-ended language of the Fourteenth Amendment alone.<sup>92</sup> But it is not at all

---

91. Although irrelevant to my argument, I should point out that nothing I say in the text commits me to the view that *Roe* was wrongly decided. That would require an evaluation of the arguments from what H.L.A. Hart called an “internal point of view.” H.L.A. Hart, *The Concept of Law* 89 (1st ed. 1961). This Article takes an external point of view on constitutional argument, describing the social circumstances that typically give rise to doctrinal change, as opposed to prescribing the circumstances under which courts should implement doctrinal change. Were I to take an internal point of view, I might find persuasive the feminist argument that women cannot be forced by law to give up their bodily autonomy for fetuses, even on the assumption that fetuses are full persons. *See, e.g.*, Eileen L. McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (1996). Or I might not.

92. For a description and critique of the Court’s view and some of the confusions to which it has led, see Peter J. Rubin, *Square Pegs and Round Holes*, 103 *Colum. L. Rev.* 833 (2003).

clear that the Court has meant what it said. Oliver Wendell Holmes, Jr. wrote in 1918 that, notwithstanding specific enumeration in the First Amendment, “free speech stands no differently than freedom from vaccination,”<sup>93</sup> and it was not until the 1960s, in *Brandenburg v. Ohio*,<sup>94</sup> that the Court developed a truly speech-protective jurisprudence. Likewise, the express protections for criminal suspects contained in the Fourth, Fifth, and Sixth Amendments were not interpreted robustly until the same period.<sup>95</sup> What changed was not the Court’s view of the original understanding of these provisions but its view of the role of police and prosecutors relative to the (disproportionately African American) population of suspects.

Likewise, it is not as though people who favor gun control ask the Court to ignore the Second Amendment.<sup>96</sup> They say, as those resisting the new interpretations of the First, Fourth, Fifth, and Sixth Amendments said in the 1960s, that the Amendment, best understood, does not mean what the advocates of changed doctrine claim. In particular, they say that the Second Amendment is best read to protect state militias against federal encroachment or that if read to protect an individual right to own, possess, and/or use firearms, it is a right subject to extensive regulation of the sort that many of the individualists would deem unacceptable. The debate, in other words, is not over whether to enforce the Second Amendment, but over what it means. And within that realm, there is little reason to think that the sociology of rights claims, in which the Court responds to sympathetic social and political movements, differs substantially from cases involving other rights.

#### CONCLUSION

Absent a substantial change in personnel, the Supreme Court will not likely grant robust judicial protection to an individual right to own and possess firearms in the near future. Should the Court take a case in which the issue is presented, no doubt it will produce a scholarly disquisition on the original understanding and subsequent development of the right to keep and bear arms. But the real determinants of its decision will likely lie elsewhere—in its attitude towards the social and political movements surrounding the gun

---

93. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *Stan. L. Rev.* 719, 757 (1975) (reproducing Letter from Oliver Wendell Holmes, to Learned Hand (June 24, 1918)).

94. 395 U.S. 444, 447 (1969).

95. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

96. Well, oddly enough, perhaps some scholars do say something like this. See generally William Merkel & Richard Uviller, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* (2002) (arguing that the Second Amendment is obsolete); David Williams, *The Mythic Meanings of the Second Amendment* (2003) (same).



question. At present, the gun rights movement does not have the characteristic features of a movement that obtains desired doctrinal change.

In the extremely unlikely event that I were asked to serve as a consultant to the gun rights movement, and in the even more unlikely event that I were to take the job, my advice about how to obtain judicial change would be simple: Make whatever legal arguments you find most persuasive, but go for the hearts and minds of your fellow citizens. To some extent, by attempting to appeal to women and minorities who feel vulnerable to private violence, groups like the NRA have already adopted this strategy as a matter of affecting political change.

More broadly, my argument here runs both parallel and counter to the familiar lament that Americans turn too readily to the courts rather than the political process for redress of their grievances. If I am right that social and political movements spur doctrinal change, then a strategy that targets just the courts will not likely succeed even in the courts. To affect change through the courts, activists of all stripes must pay the lion's share of attention to building a social and political movement. And although I have avoided prescriptive statements throughout this Article, I would conclude with a frankly normative observation: The need to buttress formal legal arguments with attitude-changing actions addressed to the broad mass of the public seems entirely appropriate in a constitutional democracy that properly fears both the tyranny of the majority and government by judiciary.