A NORMAL SUPREME COURT

EUGENE VOLOKH*

There is little new under the sun, especially when it comes to the Court and its critics. People have long argued that the Court is out of control; but in our system, rightly or wrongly, we have deliberately insulated the Court from certain kinds of control. As a result, the justices make decisions based on their own judgments, however controversial, about how to interpret the Constitution. This is just the normal operation of our Supreme Court, for better or worse. All that's changing is which particular decisions are being made, and which particular precedents are being reversed.

INTRODUCTION

This Symposium panel asks, is the Court out of control? I suppose the question is: Control by whom?

I. MODES OF CONTROL

A. Control by the Political Branches

The Court is certainly out of control of the political branches, as to certain facets of its decision-making. But that has been a feature of the Court for a long time. Eric Segall makes excellent arguments—echoing ones that had been famously made by James Bradley Thayer and others[1]—that there ought to be more control of the Court by the political

* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu).

1. *See, e.g.*, James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); LEARNED HAND, THE BILL OF RIGHTS (1958); *see also* Symposium, *One Hundred Years of Judicial Review: The*

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process.[2] I remember Lino Graglia saying, thirty years ago and in his usual colorful way: "People complain about tyranny of the majority; but the alternative is tyranny of the minority!," meaning tyranny of five justices on the Supreme Court (and perhaps of the socio-ideological class to which they belong).[3] Why should they make the decisions for the rest of us?

These are all eminently plausible arguments; but, rightly or wrongly, our national legal custom has indeed been for the Court to be largely outside majoritarian political control. To be sure, the Court has at times cut back on its own power, for instance when it overruled earlier economic substantive due process and Commerce Clause cases in the 1930s and 1940s. But then judicial supremacy roared right back in other areas, such as free speech, equal protection, criminal procedure, reproductive rights, and more.

What's more, at least as to *Dobbs v. Jackson Women's Health Organization*[4]—likely the decision that academics are most focusing on in the past year—the Court is returning control to the political branches.[5] Now as a policy matter, I support abortion rights, and I'm glad that, for instance, even in Kansas the voters have come out in support of abortion rights.[6] And of course one can argue that abortion rights should remain the federal constitutional rule, whether out of constitutional principle or for *stare decisis* reasons. But in any case, that's not the Court arrogating extra power to itself, except for the power to give the power back to the political process.

New York State Rifle & Pistol Association v. Bruen,[7] to be sure, does constrain the legislature's power to ban public carrying of guns.[8] Even there, though, note that about forty-one to forty-four states (depending on how you count them) have already recognized a statutory right to carry concealed guns in public places.[9] And though people debate

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Thayer Centennial Symposium, 88 NW. U. L. REV. 1 (1993) (documenting the importance of Thayer's work in the legal profession).

2. *See* Eric J. Segall, *Forward II: To Reform the Court, We Have to Recognize It Isn't One*, 2023 WIS. L. REV. 461.

3. *See, e.g.*, Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293 (1996).

4. 142 S. Ct. 2228 (2022).

5. *Id.* at 2277.

6. Eugene Volokh, *Kansas Voters Reject Repeal of State Constitutional Abortion Rights, by >58%-42% Margin*, REASON: THE VOLOKH CONSPIRACY (Aug. 2, 2022, 11:43 PM), https://reason.com/volokh/2022/08/02/kansas-voters-reject-repeal-of-state-constitutional-abortion-rights-by-60-40-margin [https://perma.cc/X3PG-DYAV].

7. 142 S. Ct. 2111 (2022).

8. *Id.* at 2156.

9. *See id.* at 2123 & n.1 (noting that forty-three states are "shall-issue" states, in which pretty much all law-abiding adults can get concealed carry licenses, and that one state, Vermont, does not require licenses and does not even have a licensing system). As

whether, on balance, such "shall-issue" regimes increase violent crime slightly or decrease it slightly, it's pretty clear that the skies have not fallen.

One can of course argue that the Court should be controlled by some other entity as to the restraint that it's placing on gun policy throughout the country.[10] But my point here is simply that it's perfectly normal within U.S. history for the Court to exercise such power, much as it has exercised it regarding broad readings of other provisions of the Bill of Rights.

B. Control by Precedent

Of course, a second possible argument is that the Court has given up some traditional self-control, for instance by not feeling controlled by its own precedents. But again, anybody who studies the late 1930s Court or the Warren Court is surely familiar with the many important precedents that those Courts reversed—many quite rightly, I think.[11]

And it's not clear that the Court should always be constrained by precedents. Indeed, given the difficulty of correcting the Court's past errors through the constitutional amendment process, perhaps the justices ought to be more willing to decide whether some past precedents are indeed erroneous.[12] The Court may need the power to reverse its own constitutional precedents because, largely, nobody else can.

Now some have argued, especially regarding *Dobbs*, that the Court had never before reversed a precedent that protected individual rights. This argument may have to do with a progressive constitutionalist view in favor of more individual rights (though of course the criticism of *Bruen* illustrates that progressives are, unsurprisingly, skeptical of some constitutional rights claims).

But of course, the Court has indeed reversed important precedents protecting what it had earlier seen as constitutional rights. In fact, this was so as to the same constitutional provision: the Due Process Clause as applied to unenumerated rights. In the early 1900s, the theory was that

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the Court notes, "[t]hree States—Connecticut, Delaware, and Rhode Island—have discretionary criteria but appear to operate like 'shall issue' jurisdictions," *id.*, so out of caution I give the range as forty-one to forty-four. *See id.*

10. *See, e.g.*, Caroline Fredrickson, *Fixing The Confirmation Process, or Fiddling While Rome Burns*, 2023 WIS. L. REV. 629, 637; Segall, *supra* note 2, at 472.

11. *See Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONST. ANNOTATED, https://constitution.congress.gov/resources/decisions-overruled/. The data on this page can be filtered by year, so filtering for 1961 to 1969 shows you all the precedents overruled during the second half of the Warren Court years.

12. *See, e.g.*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (plurality opinion) (endorsing "this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases").

people have various liberty of contract rights to dispose of their labor without undue regulation. In the 1930s, the Court reversed that.[13]

Now, of course, one might argue that those were bad cases, meaning the Court was right to reverse them, and that *Roe* was a good case that the Court was wrong to reverse. But that's just an objection that the Court is out of the control of the critics' own personal moral judgment.

C. By Judicial Minimalism

Another form of self-control might have to do with judges deliberately avoiding major culture war controversies. They might, for instance, choose not to decide some questions that are too controversial, or they might choose to take small steps rather than bigger ones.

But the Court often decides which cases to hear based on splits among the federal circuit courts or state supreme courts. Categorical minimalism would leave these disagreements unresolved, with one understanding of federal rights prevailing in one region of the country while an opposite understanding controls another region.

Bruen offers a classic example: There some circuit courts held there was an individual right to keep and bear arms in public places, and others held there wasn't.[14] The Court could indeed have just sat that out; but I doubt it would have been right for, say, the Illinois and D.C. legislatures to remain constrained by one reading of the Second Amendment, and the California and New Jersey legislatures to be freed by a different reading. We should indeed be concerned about public confidence in the Court, and in the court system more broadly. But I doubt that such an enduring inconsistency in how federal rights are understood by federal courts would yield more public confidence.

As to incrementalism, some justices may prefer incremental movement, but see their adversaries, either on the current or past Courts, making radical changes. Say what you would about *Roe v. Wade*,[15] but it was a radical decision. It's not clear that many justices would or should feel obligated to be incrementalist when the other side is not. And of course, this is equally true as to both sides of the aisle. If some justices

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13. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–93, 400 (1937).

14. *Gould v. Morgan*, 907 F.3d 659, 676–77 (1st Cir. 2018), *Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012), *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013), *United States v. Masciandaro*, 638 F.3d 458, 460, 473–74 (4th Cir. 2011), and *Young v. Hawaii*, 992 F.3d 765, 773 (9th Cir. 2021), had upheld broad restrictions on carrying in public. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), and *Wrenn v. District of Columbia*, 864 F.3d 650, 667–68 (D.C. Cir. 2017), had struck them down.

15. 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

think that *Bruen* or *District of Columbia v. Heller*[16] were radically wrong, I doubt those justices would or should be particularly incrementalist in dealing with those cases if they got a majority for reversing them (though, of course, who knows for sure?).

D. By Text, Original Meaning, and Tradition

Another possible argument is that the Court refuses to be controlled by the constitutional text, original meaning, and tradition—the classic criticism that had been levied by conservatives against past Courts.

I think *Bruen* is consistent with the constitutional text, with our best inference as to original meaning, and with the American tradition of allowing some form of carrying (depending on the time and place, open or concealed). But of course, human nature being what it is, it's unsurprising that, when people look at ambiguous texts and traditions—or texts and traditions that others might see as ambiguous—they see things they like. Indeed, this might be a problem with the traditional conservative argument that attention to text, original meaning, and tradition will constrain judges: perhaps, realistically, it doesn't actually constrain them.[17]

But it's not like living constitutionalism offers much more constraint, right? If all of the conservatives on the Court said, we see the light, we are living constitutionalists now, I very much doubt that people on the Left would applaud the results. After all, the conservatives would then likely say—again, human nature being what it is—that the Constitution has evolved to the point of recognizing the importance of armed self-defense,[18] the importance of leaving difficult questions like abortion to the political process, and who knows what other things that conservatives might like and progressives might not.

E. By Equality Principles

Of course, there are other things that people might argue should control the Court. Perhaps, for instance, the Court should feel controlled by particular substantive principles, such as equality.

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16. 554 U.S. 570 (2008).

17. *See, e.g.*, Barry Friedman, *What It Takes to Curb the Court*, 2023 WIS. L. REV. 513.

18. *Cf.* David Kopel, *The Right to Arms in the Living Constitution*, 100 CARDOZO L. REV. DE NOVO 99, 136–38 (2010) (suggesting that a living-constitution approach to the Second Amendment should indeed lead to broad protection for gun rights); Eugene Volokh, *Who's Right on Second?*, NAT'L REV. (Dec. 6, 2002, 5:25 PM), https://www.nationalreview.com/2002/12/whos-right-second-eugene-volokh/ [https://perma.cc/UK4J-2HFU] (same).

So, for example, some suggest that the Court's new Free Exercise Clause jurisprudence wrongly protects just conservative Christians.[19] But I don't think this is so on the facts (and I say this as a longstanding defender of *Employment Division v. Smith*[20] and therefore a critic of some of the Court's recent moves towards a broader reading of the Free Exercise Clause[21]). Consider, for instance, the outcomes of the Court's recent religious exemption cases, whether under statutory schemes (RFRA and its sibling RLUIPA) or under the Free Exercise Clause:

- *Gonzalez v. O Centro Espírita Beneficente União do Vegetal*[22] protected a small Brazilian religion that is centered around the use of a hallucinogenic plant (*União do Vegetal* translates to "the Union of the Plants"),[23] which is very far removed culturally and theologically from American Christianity.
- *Burwell v. Hobby Lobby Stores, Inc.*[24] indeed protected conservative Christians who objected to funding what they viewed as coverage of abortion.
- *Holt v. Hobbs*[25] protected Muslim prisoners who objected to beard bans. Such beard mandates are usually characteristic of Muslims, Jews, and Sikhs.[26]
- *Roman Catholic Diocese of Brooklyn v. Cuomo*[27] protected Catholics' religious gatherings, but its companion case was

19. *See* Mary Anne Franks, Remarks at the *Wisconsin Law Review* Symposium: Controlling the Supreme Court: Now and "far into the future" (Oct. 28, 2022).

20. 494 U.S. 872, 872 (1990).

21. *See, e.g.*, Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999); Brief Amicus Curiae of Professor Eugene Volokh in Support of Neither Party, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123).

22. 546 U.S. 618 (2006).

23. *Centro Espírita Beneficente União do Vegetal in the United States*, UDV USA, https://udvusa.org/ [https://perma.cc/8GS5-PW2W] (last visited Feb. 14, 2023).

24. 573 U.S. 682 (2014).

25. 574 U.S. 352 (2015).

26. Beards are common among Christian Orthodox priests but are apparently not required for them and are certainly not required for the Christian Orthodox laity. *See, e.g.*, *Religious Beards: From Sikhs to Jews*, HUFFPOST (Oct. 8, 2014, 10:21 AM), https://www.huffpost.com/entry/religious-beards_n_5947438 [https://perma.cc/87PJ-K2P9]; Patricia Claus, *Why Greek Orthodox Priests Have Beards*, GREEK REP. (Mar. 18, 2022), https://greekreporter.com/2022/03/18/greek-orthodox-priests-beards/ [https://perma.cc/S9XS-ZF9B]; *Concerning the Tradition of Long Hair and Beards*, ORTHODOX CHRISTIAN INFO. CTR., http://orthodoxinfo.com/praxis/clergy_hair.aspx [https://perma.cc/P2SB-87S6] (last visited Feb. 16, 2023).

27. 141 S. Ct. 63 (2020).

Agudath Israel of America v. Cuomo, brought by a Jewish congregation.[28]

- *Fulton v. City of Philadelphia*[29] protected a Catholic group.
- *Dunn v. Ray*[30] rejected a Muslim death row inmate's claim about a right to have a spiritual advisor of his faith present during the execution, while *Murphy v. Collier*[31] accepted such a claim (as to a stay application) by a Buddhist, and *Ramirez v. Collier*[32] accepted such a claim by a Baptist. But, again, one of the prevailing inmates was a non-Christian, and it appears that the non-Christian inmate who lost did so because the Court concluded his claim was untimely.[33]

Of course, religious freedom protections may end up applying to Christians more often (as they did in three of these six cases) just because there are more Christians in America. You wouldn't expect Jews or Muslims to be the primary beneficiaries when they are two percent and one percent of the population, respectively.[34] But in any event, there doesn't seem to be any real evidence of a departure from religious equality in the cases.

Likewise with regard to race and guns. People of all races may have reason to own guns (just as people of all races may want to vote for gun controls).[35] A recent large survey by a Georgetown professor concludes, for instance, that though black gun ownership percentages are somewhat lower than white gun ownership percentages, 44% of black gun owners reported defensive gun uses as opposed to 29% of white gun owners (perhaps because black people are more likely to live in communities that

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28. *Id.*

29. 141 S. Ct. 1868 (2021). I set aside here the cases that deal with the exemption to antidiscrimination laws for the clergy and for teaches of religion. This exemption has long been treated as subject to a different rule than normal religious exemption requests. Though these cases did indeed involve Christian defendants, their holdings equally protect all religious groups (for instance, Orthodox Jewish congregations or traditional Muslim groups that don't allow female rabbis or imams).

30. 139 S. Ct. 661 (2019).

31. 139 S. Ct. 1475 (2019).

32. 142 S. Ct. 1264 (2022).

33. *Dunn*, 139 S. Ct. at 661; *Ramirez*, 142 S. Ct. at 1285–86 (Kavanaugh, J., concurring).

34. *Religious Landscape Study*, PEW RSCH. CTR., https://www.pewresearch.org/religion/religious-landscape-study/ [https://perma.cc/Z4XJ-CW5K] (last visited Feb. 14, 2023).

35. For works explaining the special value of the Second Amendment to minority groups, see, for example, Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Nicholas J. Johnson, *Firearms and Protest: Lessons from the Black Tradition of Arms*, 54 CONN. L. REV. 953 (2022); CHARLES E. COBB JR., THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE (2015).

are threatened by violent crime, and thus are more likely to need armed self-defense).[36] The net result is that the percentage of black people who reported using guns defensively is nearly identical to the percentage of white people.[37] Indeed, perhaps unsurprisingly, the percentage was highest for American Indians among all the identified groups included in the study.[38]

To be sure, black people are also more likely to be victimized by gun violence; but I doubt that a different result in *Bruen* would have had much effect on criminal gun users. If people want to rob you, they're not willing to comply with a law against robbery, so they're probably not willing to comply with a law against gun possession in public, either. It's the law-abiding people who are most likely to comply with restrictions on gun ownership and gun carrying.

None of this says that that gun rights are good policy. None of it disposes of the constitutional question. But it does undermine the claim that *Bruen* is about protecting white people.

F. By Non-Establishment Principles

Finally, some have suggested that the problem with *Dobbs* is that it lets states implement one particular, religious understanding of when life begins, or more precisely of when the right to life vests. But of course, any legal system must adopt *some* rule on this subject. The line could be drawn at conception, at the end of the first trimester, at viability, at the end of the second trimester, at birth, or after birth—ancient Romans, for instance, allowed exposing unwanted children to leave them to die.[39] All these decisions are based on unproven and unprovable views, whether moral, spiritual, or otherwise.

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36. William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 7–8, 12 (Georgetown McDonough Sch. of Bus., Research Paper No. 4109494, 2022), https://ssrn.com/abstract=4109494.

37. 25.4% of black respondents owned firearms, and 44.3% of those reported defensive gun uses; the numbers for whites were 34.3% and 29.7%. *Id.* Multiplying, we get an estimate of 10.2% of white American adults having used guns defensively, and 11.2% of black American adults.

38. 38.2% of American Indian respondents owned guns and 47.7% of those reported defensive gun uses, so the estimate is that 18.2% of American Indian adults had used guns defensively. *Id.* at 12; Email from William English, Assistant Professor, Georgetown McDonough Sch. of Bus., to author, Sept. 12, 2022, 8:29 PM.

39. *See, e.g.*, Judith Evans Grubbs, *Infant Exposure and Infanticide*, *in* THE OXFORD HANDBOOK OF CHILDHOOD AND EDUCATION IN THE CLASSICAL WORLD 83, 85 (Judith Evans Grubbs, Tim Parkin & Roslynne Bell eds., 2013). Indeed, ancient Roman law allowed the eldest male in the family to kill any family member, even an adult, though the power may have been more formal than real. *See, e.g.*, BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 65–67 (1975).

Likewise for animal rights. In my own state of California, it's a crime to sell horse meat for human consumption.[40] That's based on a nonrational moral or spiritual judgment: One argument for a similar proposal in Illinois, for instance, described eating horse meat as "morally perverse," "a perversion of the human-animal bond."[41] And it's a judgment that controls what people can put into their own bodies. Yet it's precisely the sort of judgment that democracies generally leave to the political process. The same is true for many other decisions about which animals the law should protect, and against what forms of treatment.

And of course, many voters' and legislators' moral judgments turn on their religious beliefs. Consider the draft, or the decision whether to start a war (or to stop one). Some people oppose all war for religious reasons. Some oppose unjust war for religious reasons.[42] Some support some wars for religious reasons. ("As He died to make men holy, let us die to make men free."[43])

Most of the coercive laws that we hotly debate involve forcing a majority's views on the minority. That is true, as noted above, of laws protecting endangered species, antislavery laws, antidiscrimination laws, animal cruelty laws, environmental laws, intellectual property laws—or for that matter, bans on infanticide, child sexual abuse, or more generally, theft, sexual assault, or murder. Some of these laws may be sound on the merits and others unsound. But the fact that they force one group's views on another doesn't make them violations of the Establishment Clause, regardless of the source of the first group's views.

Religious people are as entitled as nonreligious people to implement into law their views about right and wrong, even if those views are matters not of logic or empirical evidence but of fundamentally moral and spiritual (or, to religious people, religious) judgment. And of course, the Supreme Court has repeatedly reaffirmed this, for instance in *Harris v. McRae*,[44] a case involving bans on abortion funding.[45]

To be sure, justices shouldn't decide cases purely based on their theological beliefs, or skew their readings of, say, text or original meaning or tradition based on what their own religious beliefs (or their own secular philosophical beliefs) command. But there's no Establishment Clause barrier to their returning disputes to the political

40. CAL. PENAL CODE § 598d (West 2022).

41. *Horse Lovers Tell Illinois Lawmakers: Stop Turning Mr. Ed into Mr. Edible*, ILL. TIMES: NEIGHSAYERS (Nov. 6, 2003), https://www.illinoistimes.com/springfield/neighsayers/Content?oid=11436462 [https://perma.cc/8LPF-FUGH].

42. *See Gillette v. United States*, 401 U.S. 437, 441 (1971).

43. Julia Ward Howe, *The Battle Hymn of the Republic*, *in* THE NEW OXFORD BOOK OF WAR POETRY 140 (Jon Stallworthy ed., 2014).

44. 448 U.S. 297, 319 (1980).

45. *See also Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

process, where voters and legislators can make decisions based on their own moral judgment, including religiously informed moral judgment. And of course, if justices are supposed to evaluate rights questions with an eye towards what they think is the proper standard of human dignity or liberty or equality, then religious justices must be as free to consider their own religiously informed moral thoughts as much as, say, Kantian or Rawlsian or Dworkinian justices are free to consider their own philosophically informed moral thoughts.

Naturally, this doesn't preclude arguments that the Constitution does secure a right to abortion, or a broader individual right to control one's own body (whether that means a right to get an abortion or a right not to have the body used to kill enemy soldiers), entirely apart from whether restrictions on such rights are motivated by religion. My point is simply that, whenever this question turns on matters of morality, religious people are as entitled as secular people to use their own morality to decide them, even when that morality is religiously infused.

II. LIFE AND LIBERTY

All this brings me back to one of my favorite passages on constitutional law—not from a case, but from a speech by Abraham Lincoln at the peak of the Civil War:

> The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing*. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny.
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> The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a *liberator*, while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty; and precisely the same difference prevails *today* among us human creatures, even in the North, and all professing to love liberty. Hence we behold the processes by which thousands are daily passing from under the yoke of bondage, hailed by some

> as the advance of liberty, and bewailed by others as the destruction of all liberty.[46]

Now Lincoln certainly thought there was one definition that was right, and another that was wrong. Ultimately one definition was, thankfully, entrenched in American law by a political process (albeit backed by a military victory that was itself backed by a political process). Yet, the broader point still stands: claims of liberty presuppose controversial judgments about who is entitled to rights and to which ones.

If you change the words a bit, you see how this encapsulates the American debates about abortion. Both sides say they support liberty and life; they just have very different senses of what those mean, based in large part on a disagreement whether the rights of a particular group (the unborn) count. I doubt that framing abortion as a question of "necropolitics"[47] is helpful, but if it is, then surely those who view the unborn as persons can view the pro-abortion-rights position as being a particularly awful instance of necropolitics. Again, I generally take the pro-abortion-rights view. But it's unsurprising to me that others who disagree with me claim the mantle of individual rights as much as those who agree with me.

Likewise as to the Second Amendment. Some people think that the right to armed self-defense is fundamental to protecting life and liberty. (Certainly, if you want to look for an unenumerated right hallowed by long, broad, and deep tradition, the right to self-defense would qualify;[48] and one can certainly argue that the right to self-defense must include the right to use the technological tools necessary for self-defense.[49]) Others think that banning guns is fundamental to protecting life and liberty. Others take some intermediate perspectives.

You can see the same debate about religious exemptions, about broad readings of the Establishment Clause that ban government money from flowing to religious education alongside secular education, and more. And you can see that with regard to debates about criminal procedure rights and the like.

So again, maybe this comes back to Eric Segall's point: maybe if there is such a radical lack of agreement on liberty, it's a mistake to try to make the moral arc of the Constitution bend towards justice—whether

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46. Abraham Lincoln, Address at a Sanitary Fair in Baltimore (APR. 18, 1864), *reprinted in* THE LANGUAGE OF LIBERTY: THE POLITICAL SPEECHES AND WRITINGS OF ABRAHAM LINCOLN 690, 691 (Joseph R. Fornieri ed., 2009).

47. *See* Franks, *supra* note 19.

48. *See* Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399 (2007).

49. *See, e.g.*, Victoria Dorfman & Michael Koltonyuk, *When the Ends Justify the Reasonable Means: Self-Defense and the Right to Counsel*, 3 TEX. REV. L. & POL. 381 (1999).

in the form of liberty or the equally contested term "equality"—through anything other than political processes.[50] But in the current system where we have deliberately insulated the Court from certain kinds of control, the justices, unsurprisingly, make decisions based on their own judgments, however controversial, about what constitutes constitutionally protected liberty.

CONCLUSION

What we are seeing with the Supreme Court today, I think, is just its normal operation, for better or worse. All that is changing is which particular decisions are being made, and which particular precedents are being reversed.

50. *See* Segall, *supra* note 2.