

FOREWORD

Roberts' Rules: Deference Trumps Law

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The Cato Institute's Center for Constitutional Studies is pleased to publish this 14th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended, plus a look at the term ahead—all from a classical Madisonian perspective, grounded in the nation's first principles, liberty through limited government. We release this volume each year at Cato's annual Constitution Day conference. And each year in this space I discuss briefly a theme that seemed to emerge from the Court's term or from the larger setting in which the term unfolded.

As many have said, this was an unusual “liberal” term for the Roberts Court, at least as defined by outcomes consistent with modern liberal views in the larger political community. And it was, as also widely noted, partly because of the docket this term, but also because the Court's four liberals voted as a block 90 percent of the time, which meant that to carry the day in a given case only one of the five more conservative justices needed to join them. As in the past, that role was filled most often by the Court's two moderate conservatives, Chief Justice John Roberts and Justice Anthony Kennedy. Both joined the liberals in the first of the term's two most high-profile cases, *King v. Burwell*, upholding the Affordable Care Act; and Kennedy wrote for the liberal side in *Obergefell v. Hodges*, which made same-sex marriage the law of the land.

Two decisions do not make a term, of course. But a look at the reasoning of both justices in those emblematic cases, including that of Roberts in his blistering *Obergefell* dissent, may shed at least some light on both Roberts' noted “minimalism” and why, despite their

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numbers, the Court's conservatives seem often to come up short. Conservatives lost both cases, liberals won both, while for classical liberals like the editors of this *Review* it was a split.

We take it as given that legal reasoning, far from a free-standing matter, is a function of the role of a judge—to apply the law to the facts before the court, which first means reading the law correctly. That begins with the plain text of the law. And it ends there, unless it is necessary to move, as relevant and in rough order, from text to original understanding, structure, function, history (including precedent), and policy, all with an eye toward securing and preserving the rule of law. That brings us, not surprisingly, to the decision that effectively reversed that order of things, the first of those two emblematic cases.

King v. Burwell

Let us stipulate that it would be surprising if a statutory scheme as complicated, as rushed to completion and passage, and as ill-thought-out as the 900-page Affordable Care Act (ACA) were to admit of anything but multiple interpretations. All the more reason when a passage is clear and unambiguous on its face for a judge to latch on to it as an anchor in a potential political firestorm. That is not, however, what Chief Justice Roberts did in *King v. Burwell*. Writing for a majority of six, and drawing heavily on his reading of the policy behind the ACA, he rejected what he allowed was “the most natural reading” of the text at issue, finding instead that it was ambiguous when read in the context of “the statute as a whole.” Writing for the dissent, Justice Antonin Scalia put it best, alluding to *NFIB v. Sebelius*, the Court's 2012 go-round with the ACA: “Under all the usual rules of interpretation, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.”

That was clear from the start: Step by step, Roberts bent over backwards to save not only the ACA but Congress itself from itself. The question before the Court was really quite simple: Does a provision of the ACA that authorizes tax credits for qualified individuals who purchase health insurance through “an Exchange established by the State” *also* authorize subsidies for qualified individuals who purchase insurance through an exchange established by the federal

government? Interpreting the provision on its terms, the IRS had initially said no, but the Obama administration prevailed upon it to rule otherwise, thus making tax subsidies available in the 34 states that had declined to establish exchanges. And Roberts, thinking the question too important to be left to an agency to decide, found that when the ACA says “Exchange established by the State” it means, as Scalia put it, “Exchange established by the State or the Federal Government.” “That is of course quite absurd,” Scalia added, “and the Court’s 21 pages of explanation make it no less so.”

Roberts’ argument had two steps: first, to show that the provision at issue, appearances aside, is ambiguous; second, to show that one of its permissible meanings—the one that makes tax credits available not just through state but through federal exchanges as well—is compatible with “the statute as a whole.”

He began, therefore, by saying that the meaning—or ambiguity—of certain words may become apparent only “when placed in context. So when deciding whether the language is plain we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’” In other words, perhaps Congress didn’t mean what its words plainly say. Notice that this would seem to get things backward from the start. We ordinarily look to context to clarify ambiguous text, not to discover ambiguity in clear text, much less, as Scalia said, as an excuse to *rewrite* clear text—adding that the more unnatural the proposed rewrite, “the more compelling the contextual evidence must be to show that it is correct.”

As contextual evidence purporting to show that “state” includes “federal,” consider just the first two of several points Roberts raised. Looking beyond the provision that establishes state exchanges—the provision at issue—he pointed to the later section of the Act that authorizes federal exchanges. That provision provides that if a state does not establish an exchange, the secretary of health and human services shall establish and operate “such exchange” within the state. By using the phrase “such exchange,” Roberts wrote, that section “instructs the Secretary to establish and operate the same Exchange that the State was directed to establish” under the earlier section. “In other words,” he concluded, “State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes.”

Notice the work that Roberts is asking the general phrase “such exchange” to do: It is to import into federal exchanges all the features of exchanges established by states, including tax credits, and to do so in the face of a provision that expressly authorizes tax credits only for exchanges “established by the State,” an authorization that is missing from the section of the Act that authorizes federal exchanges. That is a substantial leap, first, because, as Roberts grants, the two exchanges are established by different sovereigns, but second, and more to the point, an exchange established by the federal government is *not* an exchange “established by the State,” the *sine qua non* of tax credit eligibility. (Moreover, both here and elsewhere, Roberts failed to seriously address the idea that Congress may have had a good reason for omitting tax credits for federal exchanges, a point I will discuss more fully below.)

But Roberts’ second point purporting to show that federal exchanges are “established by the State” for tax credit purposes shows only a further difficulty of drawing that inference, as he himself recognized: “After all,” he wrote, “the Act defines ‘State’ to mean ‘each of the 50 States and the District of Columbia’—a definition that does not include the Federal Government.” So here too we must read “established by the State” in context, “with a view to [its] place in the overall statutory scheme.” And the section of the Act authorizing state exchanges provides that all exchanges “shall make available qualified health plans to qualified individuals.” But another section, he continued, defines “qualified individual” in part as

an individual who “resides in the State that established the Exchange.” And that’s a problem: If we give the phrase “the State that established the Exchange” its most natural meaning, there would be *no* “qualified individuals” on Federal Exchanges. But the Act clearly contemplates that there will be qualified individuals on *every* Exchange. As we just mentioned, the Act requires all Exchanges to “make available qualified health plans to qualified individuals”—something an Exchange could not do if there were no such individuals.

True. But how does that observation serve to show that federal exchanges are “established by the State” for tax credit purposes? That inference is a *non sequitur*. Here, Scalia responded with a homely example of directions given to a class of people, although they apply

only to some in the class. And he went on to show that the balance of Roberts' contextual arguments not only did not show that the text at issue was ambiguous, but that Congress had good reasons for distinguishing state and federal exchanges. As he concluded, "reading the Act as a whole leaves no doubt about the matter: 'Exchange established by the State' means what it looks like it means."

Nonetheless, having concluded that the phrase "an Exchange established by the State" is ambiguous when read in context, Roberts turned next to the second step in his argument, to show that only one of the phrase's permissible meanings—the one that makes tax credits available in federal as well as state exchanges—"produces a substantive effect that is compatible with the rest of the law." By contrast, the plain reading would destabilize the individual insurance market in any state with a federal exchange, he argued, creating the very "death spirals" that Congress sought to avoid. Explaining how that would happen, he concluded that Congress meant for those credits to apply in both exchanges.

Not surprisingly, this venture into policy and into the question of what Congress intended generated a challenge from the dissent about whether Roberts had correctly discerned Congress's intent. And here things got interesting. Scalia began by observing that if Roberts' dire predictions were accurate, they "would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says." And he added that "no law pursues just one purpose at all cost," noting, in particular, that the ACA "displays a congressional preference for state participation in the establishment of Exchanges."

By way of background, under the federalism principles the Court recognized in 1992 in *New York v. United States*, Congress could not simply "dragoon" states into creating exchanges. But for political reasons, apparently, neither did Congress want to replace our traditional state-centered health insurance arrangements with a federal system. So like the incentives Congress offered states to participate in Medicaid, here too, to encourage states to establish exchanges, Congress offered incentives in the form of tax credits for their citizens. Indeed, MIT Professor Jonathan Gruber, one of the principal advisors to the congressional and administrative staff that drafted the ACA, addressed the point directly in a January 2012 speech, when it looked like states might not be responding to those incentives:

I think what's important to remember politically about this, is if you're a state and you don't set up an exchange, *that means your citizens don't get their tax credits*. But your citizens still pay the taxes that support this bill. So you're essentially saying to your citizens, you're going to pay all the taxes to help all the other states in the country. I hope that's a blatant enough political reality that states will get their act together and realize there are billions of dollars at stake here in setting up these exchanges, and that they'll do it (emphasis added).

Well 34 states did not do it. Whatever their reasons—Scalia listed various burdens states would take on if they established exchanges—there certainly would be less reason if tax credits were available under *either* scenario. “So even if making credits available on all Exchanges advances the goal of improving healthcare markets,” Scalia noted, “it frustrates the goal of encouraging state involvement in the implementation of the Act.”

Focusing on only the first of those goals, Roberts responded feebly that the section of the Act that establishes federal exchanges refutes the incentives argument by providing that

if a State elects not to establish an Exchange, the Secretary “shall . . . establish and operate such Exchange within the State.” The whole point of that provision is to create a federal fallback in case a State chooses not to establish its own Exchange. Contrary to petitioners’ argument, Congress did not believe it was offering States a deal they would not refuse—it expressly addressed what would happen if a State *did* refuse the deal.

Actually, the Act’s provision for federal exchanges does not refute the incentives argument. To be sure, *a* point of what Congress did was to create a federal fallback. But it was not “the *whole* point” of what it did. By not providing for tax credits for federal exchanges, as it had done for state exchanges, Congress *also* sought to incentivize states to create their own exchanges.

It is noteworthy at least that an argument that relies so heavily on judicial discernment of congressional intent should give such short shrift to so central a feature of Congress’s scheme. The mere fact that two-thirds of the states had declined to establish exchanges should alone have alerted the Court to the very real possibility, given the dire consequences that the Court said would follow were the law

read as written, that there was a flaw in the scheme and that it would fall to the Congress and not to the Court to fix it. Not that Roberts was unsolicitous of the point: Noting that the Court's role is "more confined" than Congress's, he wrote that the Court "must respect the role of the Legislature, and take care not to undo what it has done." But if holding Congress to its own words would undo its scheme, it is not the Court that would be undoing what Congress had done. Congress would have undone itself. It is not the role of the Court to serve as handmaiden to the legislature by rewriting what the legislature has written.

Here again, Scalia said it best: "The Court's insistence on making a choice that should be made by Congress both aggrandizes judicial power and encourages congressional lassitude." In a case of statutory interpretation where the text is clear, as here, deference is due to what Congress wrote, not to what it should have written. It is no small irony that Chief Justice Roberts, known for his judicial modesty and minimalism, deferred to his understanding of what Congress meant rather than to what it wrote.

Obergefell v. Hodges

Misdirected deference was a problem in *Obergefell v. Hodges* as well, but mainly for the dissenters—Chief Justice Roberts, who wrote the main dissent, and Justices Scalia, Clarence Thomas, and Samuel Alito, each of whom wrote a dissent. Whereas deference in this case should again have gone to the text—here, the text of the Fourteenth Amendment—theirs went to "tradition" and hence to the state respondents that had refused to recognize same-sex marriages. And in Roberts' dissent we see the same pattern we saw in his opinion for the Court in *King*, an obsession with the role of the Court that superseded a focus on the law. To develop those points more fully, let us first look briefly at Justice Kennedy's opinion for himself and the Court's four liberals, which had its own share of misdirection, then at the dissents, especially that of Roberts.

If the Court's opinion in *King* was as much policy as law, its opinion in *Obergefell* was even more so, yet it need not have been since there was a simple and straightforward answer to the question before the Court: If a state licenses, recognizes, and affords benefits for opposite-sex marriages, must it do so for same-sex marriages as well? It must. Pursuant to the Fourteenth Amendment's Equal Protection

Clause, unless a state has a compelling reason for discriminating against same-sex marriages, it must treat them as it treats opposite-sex marriages. In other words, such “policy” as is reflected in that conclusion is entailed by the law that is the Equal Protection Clause. And it is that law to which the Court should have deferred in overriding the decisions of the state respondents to discriminate against same-sex marriages.

Unfortunately, Kennedy rested his otherwise correct conclusion to that effect mainly on the Fourteenth Amendment’s Due Process Clause. Only at the end of his opinion did he turn to the Equal Protection Clause, incompletely and as something of an afterthought. Waxing at once rhapsodic and banal—Scalia barely contained himself—Kennedy found that a fundamental “liberty” and hence a fundamental “right” of same-sex couples to marry was supported by “four principles and traditions”: respect for individual autonomy and choice, the unique association entailed by marriage, the well-being of children reared by couples, and social order and stability.

But as Thomas pointed out in dissent—drawing on the theory of the Constitution and the Lockean state-of-nature, natural-rights theory that underpins it—no state prevented same-sex couples from marrying. They were perfectly free to go to any willing clergyman who would marry them and the state would not have interfered with their liberty or their right to do so. What they wanted, he saw, was a state *license*, the state’s positive *recognition* of the marriage, and the *legal benefits* that go with the state’s recognition. But those are not “liberties” protected under the Due Process Clause, said Thomas. They are *privileges* the state affords pursuant to its general police power. And he was right.

Thus, the right to marry someone of the same sex is a natural right that anyone would enjoy in the state of nature. But once we leave that state and enter into civil society, if an actual state grants the privileges of marriage—as all states do—those privileges cannot be denied to any person who meets the criteria for being granted them (about which more below). Their denial is then properly litigated against the state under the Equal Protection Clause, not the Due Process Clause. Unfortunately, Thomas never developed those points, nor did Kennedy get to the heart of the matter in his brief and gauzy discussion of equal protection, which he used only to “shore up” his due process analysis, Thomas said. But neither did the other dissents.

Instead, each focused almost exclusively on the Court's mistaken due process analysis.

However misdirected, the conservatives' arguments are worth examining, if only to see why that crucial fifth vote is so often lost. In general, the dissents all noted the Constitution's silence concerning marriage, the resulting limited role of the Court in addressing the question before it, and the role of the people in their states in deciding whether same-sex marriage should be recognized. But they directed their fire mainly at the majority's resort to "substantive due process" whereby the Court finds unenumerated rights under the Constitution's Due Process Clauses.

The Fourteenth Amendment's Due Process Clause prohibits states from depriving "any person of life, liberty, or property, without due process of law." Narrowly read, with an emphasis on democratic decision-making in the states, that clause would allow majorities to deprive minorities of life, liberty, and property as long as "due process of law" is afforded. That is how many conservatives read it. Indeed, Thomas railed against "the dangerous fiction of treating the Due Process Clause as a font of substantive rights." And Scalia wrote that "the Constitution places *some* constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments" (first emphasis added). Scalia went on to cite a few of those constraints—"enumerated" rights—but he concluded that aside from those, the "powers 'reserved to the States respectively, or to the people' can be exercised as the States or the People desire," quoting thus from the Tenth Amendment.

Conspicuous by its absence in any of the four dissents was any mention of the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others *retained by the people*." Clearly, we cannot "retain" what we do not first have to be retained; nor can we enumerate in a constitution the infinite number of rights we retained when we established and empowered government in the first place. That is one of the reasons the Ninth Amendment was written and ratified—to make it clear that we have both enumerated *and* unenumerated rights. And just as clearly, it was to protect those rights—both enumerated *and* unenumerated—that the Due Process Clauses were written.

It is at this point—this "most sensitive category of constitutional adjudication" as he put it—that we pick up Roberts' argument, for it

is here, he wrote, that the petitioners' claim rests. Noting first that the Court "has interpreted the Due Process Clause to include a 'substantive' component that protects certain liberty interests against state deprivation 'no matter what process is provided,'" Roberts pointed next to the "obvious concerns" this raises about the judicial role, then to the Court's 1997 decision in *Washington v. Glucksberg*, which purported to give judges guidance in finding unenumerated rights. There the Court held that to be "fundamental," implied rights must be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."

Obviously, Roberts will go on to argue that an unenumerated right to same-sex marriage will not satisfy those criteria because it is not "deeply rooted in this Nation's history and tradition." But the broader problem with the *Glucksberg* criteria should be equally obvious: If any right at issue before the Court is already deeply rooted, it is likely already protected; and if it is not deeply rooted, then it is likely not to get protected. Barely noticing that problem, Roberts focused instead on what plainly for him was the far more serious problem—an unrestrained judiciary. Indeed, almost to the point of obsession, he went on to cite the 1905 case of *Lochner v. New York* no fewer than 16 times as emblematic of the dangers of substantive due process under a willful judiciary. Yet his arguments, apparently uninformed by recent scholarship on the case, fell far short.

The *Lochner* Court overturned a New York statute that limited the hours bakers could work, citing the freedom of contract and adding that the statute could not be justified as a health and safety measure. Enacted on behalf of large unionized bakeries facing competition from small, often immigrant-owned rivals, the statute was a textbook example of special-interest legislation, but Roberts dressed it up in the garb of democratic legitimacy. And he charged the majority with "unprincipled" judicial policymaking, adopting "naked policy preferences," and "empowering judges to elevate their own policy judgments to the status of constitutionally protected 'liberty,'" as if that were what the majority was doing. Trotting out the familiar Holmesian tropes in dissent—that the case was "decided upon an economic theory which a large part of the country does not entertain" and that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," as if those were constitutionally cognizable

concerns—Roberts even quoted Holmes’ contention to the effect that “the Constitution ‘is not intended to embody a particular economic theory’” (actually, Holmes wrote “a constitution”). *The Constitution, our Constitution*, protects property, contract, and liberty, of course, which should settle the question of its neutrality as between capitalism and socialism.

The point of this obsession with *Lochner* becomes clear once Roberts draws what he sees as the parallels with *Obergefell*. “Ultimately,” he wrote,

only one precedent offers any support for the [Obergefell] majority’s methodology: *Lochner v. New York*. The majority opens its opinion by announcing petitioners’ right to “define and express their identity.” The majority later explains that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” This freewheeling notion of individual autonomy echoes nothing so much as “the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor” (here quoting *Lochner*, emphasis added by Roberts).

And Roberts continued in this vein: “The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to.”

Is that a problem—allowing same-sex couples to marry “because they want to”? For the chief justice, apparently, it is. For he added: “Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*.” In other words, Roberts reads the guarantees of the Fourteenth Amendment narrowly—which means that *he reads the powers of the states broadly*. And what justifies that broad reading here? In the nearest Roberts came to answering that question, he spoke of “the States’ ‘legitimate state interest’ in ‘preserving the traditional institution of marriage’” as “the union of a man and a woman.” But apart from mere tradition, what privileges that conclusory definition? Each of the dissents set forth a few of the by-now familiar policy rationales for rejecting same-sex marriage; but like the health and safety rationales in *Lochner*, those rationales have grown increasingly unconvincing and unable to withstand scrutiny, especially in the face of pleas like those of the petitioners to be free to marry whomever they choose.

In the end, then, Roberts' argument turns on the definition of marriage, plus the question of who decides, as he signaled it would early on. But by settling on the states' definition, as he did, he begged the very question before the Court. It is a circular argument—unless, of course, states are unrestrained in exercising that power. But that was the whole point of the Fourteenth Amendment, to *restrain* the police power of the states, and to do so in a principled way, repairing to life, liberty, property, due process, and the equal protection of the laws. If, without sufficient justification, as just noted, states discriminate by virtue merely of their definition of marriage, thereby denying benefits to some that are available to others, the denial of those benefits amounts to harming those so denied.

Kennedy had it backwards, then, a point Thomas saw but never developed: The Due Process Clause harm is a function of the Equal Protection Clause denial of recognition and benefits. And the equal-protection problem becomes even clearer once we look critically at the traditional definition of marriage and recognize that marriage, at bottom, is a contract pertaining to certain personal commitments. As with all contracts, therefore, it should fall to the parties to set the terms, not to the state—especially not in a discriminatory manner. To be sure, there may be limited scope for licensure regarding consent and evidence of marriage, which *can* be justified in a non-discriminatory way; and enforcement is always an issue, as with any contract. But none of that distinguishes same-sex from opposite-sex marriage contracts.

Justice Kennedy may have rested his conclusion upholding same-sex marriage on the wrong constitutional foundation, but it was not without salutary effect. For his venture down the path of substantive due process induced his conservative critics to follow him, which brought to the surface both the substantive and the methodological infirmities that have so often afflicted their Fourteenth Amendment jurisprudence. Substantively, conservatives too often fail to credit the fact that the law at issue prohibits actions that harm no one, whether it restricts the sale and use of contraceptives (*Griswold v. Connecticut*), interracial marriage (*Loving v. Virginia*), same-sex sodomy (*Lawrence v. Texas*), or much else. Here is Roberts, for example:

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to in-

clude same-sex couples, the majority insists, would “pose no risk of harm to themselves or third parties.” This argument again echoes *Lochner*, which relied on its assessment that “we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.”

Kennedy was right: same-sex marriage harms no one. But so was Justice Rufus Peckham right in *Lochner*: freedom of contract harms no one.

And conservative methodological infirmities (and more) were captured in this instructive, albeit opaque, Roberts passage, which directly follows the passage above:

Then and now, this assertion of the “harm principle” sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of “due process.” There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought.

Note first that, in fact, the “harm principle” does sound very much in law, starting with the law of torts. Beyond that, however, whether the “perceptions” Roberts mentions refers to the harm principle or to a justice’s “moral, philosophical, or social insights,” it is clear at least that he has severed “life, liberty, and property” from “due process,” leaving that phrase to denote simply “the democratic process.” That enables “the people”—which means, at best, the majority, but more often some special interest—to run roughshod over the lives, liberties, and property of *actual* people, and all in the name of a Court “guided by law”—as if the Fourteenth Amendment did not incorporate “a particular school of social thought,” namely, the one that elevates life, liberty, property, equal protection, and due process above majoritarian rule.

But the methodological problem is deeper still. It concerns ultimately the very conception of the Constitution and how to treat

claims brought under the Fourteenth Amendment. In brief, both liberals and conservatives have gone about their substantive-due-process jurisprudence backwards. Both have asked the Court either to recognize the unenumerated rights at issue or to not do so, which has driven the Court to try to discern rights pursuant to the *Glucksberg* formula. But the proper question, as is implicit in the Ninth Amendment, is not whether there is a right but whether the state has a justification for the restriction it has imposed or the discrimination it has practiced. Once the plaintiff has filed his prima facie complaint, that is, the burden should be on *the state* to justify its police power action. That power, after all, is not unlimited. In fact, it is authorized mainly to protect our rights and to provide those “public goods” that might otherwise not be provided by private markets owing to high transaction costs, free-rider problems, and the like, as economists have argued. The further it strays from those basic purposes, especially if it ventures into morals legislation, the more difficult it is to justify it in a plural society dedicated to liberty and tolerance, as this case illustrates. Indeed, from *Lochner* to *Griswold*, *Loving*, *Lawrence*, and more, what rights are those police power laws protecting?

Thus, what we have in these *Obergefell* dissents is the latest iteration of the error we find in the late Judge Robert Bork’s discussion of his “Madisonian dilemma.” America was founded on two opposing principles, he wrote, which must continually be reconciled:

The first principle is self-government, which means that in *wide* areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second principle is that there are nonetheless *some* things majorities must not do to minorities, *some* areas of life in which the individual must be free of majority rule” (emphasis added).

Unfortunately, that gets Madison exactly backward. America’s first *political* principle may indeed have been self-government, but its first *moral* principle—and the reason we instituted government at all—was individual liberty, which the Declaration of Independence makes plain for all to see and the Fourteenth Amendment incorporated at last in the Constitution as against the states. That means that in “wide areas” individuals are entitled to be free simply because they are born so entitled, while in “some” areas majorities are entitled to

rule not because they are inherently so entitled but because we have authorized them to, as a practical compromise.

That gets the order right: individual liberty first, self-government second, as a means toward securing that liberty. And that, precisely, is what too many conservatives get backwards, as is evident in the dissents here. At an intuitive level, Justice Kennedy seems to appreciate that order of things—not always, but often, even if his reasoning and rhetoric sometimes cloud the matter, as here. And that is at least part of the reason the Court’s conservatives come up short on occasion. In at least some Fourteenth Amendment cases, the Court’s liberals, plus Kennedy, seem to have a better grasp of the principles of the matter than the conservatives.

But another reason is the lingering overhang of the “judicial restraint” school of which Bork was perhaps the most prominent member. We see that here, in both decisions. In *King*, Chief Justice Roberts seemed driven to keep the Court out of the political process that had produced the Affordable Care Act, and so he ignored the plain text before him—resulting, ironically, in the very “judicial activism” that school condemned. And in *Obergefell* he seemed driven again to keep the Court out of the political process that had produced such discriminatory state actions, thus ignoring the plain text of the Fourteenth Amendment’s Equal Protection Clause, which prohibited those actions. Judicial “modesty” and “minimalism” aside, better it would have been to focus on the law than on judicial behavior, especially if the latter distracts one from an accurate reading of the law.