IN THE SUPREME COURT OF ALABAMA
March 4, 2016

1140460

Ex parte State of Alabama ex rel. Alabama Policy Institute, Alabama Citizens Action Program, and John E. Enslen, in his official capacity as Judge of Probate for Elmore County. PETITION FOR WRIT OF MANDAMUS (In re: Alan L. King, in his official capacity as Judge of Probate for Jefferson County, et al.).

ORDER

IT IS ORDERED that all pending motions and petitions are DISMISSED.

Wise and Bryan, JJ., concur.

Moore, C.J., and Stuart, Bolin, Parker, Murdock, Shaw, and Main, JJ., concur specially.

MOORE, Chief Justice (statement of nonrecusal).

On February 11, 2015, the State of Alabama on relation of the Alabama Policy Institute and the Alabama Citizens Action Program initiated this case by filing in this Court an "Emergency Petition for Writ of Mandamus." The petition sought a writ of mandamus "directed to each Respondent judge of probate, commanding each judge not to issue marriage licenses to same-sex couples and not to recognize any marriage licenses issued to same-sex couples."

In its statement-of-facts section the petition described the federal injunctions in Searcy v. Strange, 81 F. Supp. 3d 1285 (S.D. Ala. 2015), and Strawser v. Strange (Civil No. 14-0424-CG-C) (S.D. Ala. Jan. 26, 2015), which enjoined the Alabama Attorney General from enforcing Alabama's Sanctity of Marriage Amendment, Art. I, § 36.03, Ala. Const. 1901 ("the marriage amendment"), and the Alabama Marriage Protection Act, § 30-1-19, Ala. Code 1975 ("the marriage act"). The petition further stated:

> "On February 8, 2015, Chief Justice Roy S. Moore of the Supreme Court of Alabama entered an administrative order ruling that neither the Searcy nor the Strawser Injunction is binding on any Alabama probate judge, and prohibiting any probate judge from issuing or recognizing a marriage license

> which violates the Marriage Amendment or the Marriage Act."

Attached to the petition as Exhibit C was a copy of the referenced administrative order. In subsequent paragraphs the petition identified by name four respondent Alabama probate judges who allegedly were issuing marriage licenses to same-sex couples "in violation of the Marriage Amendment, the Marriage Act, and the Administrative Order." (Emphasis added.) The petition also named as respondents 63 Judge Does "who may issue, or may have issued, marriage licenses to same-sex couples in Alabama as a result of the Searcy or Strawser Injunction, in violation of the Marriage Amendment, the Marriage Act, and the Administrative Order."

The petition argued that the writ should issue because (1) the marriage amendment and the marriage act were consistent with the United States Constitution and (2) this Court was not bound by a federal district court's interpretation of the United States Constitution. Alternatively, the petition stated:

> "Chief Justice Moore's Administrative Order provides a separate basis for mandamus relief because it directly prohibits all Alabama probate judges from issuing marriage licenses to same-sex couples in violation of the Marriage Amendment and the Marriage

> Act. (Admin. Ord. (Ex. C) at 5.) The Administrative Order is binding on all probate judges for the reasons stated in the order. Just as mandamus is appropriate for this Court to command a lower court's compliance [with] this Court's mandate, see, e.g., Ex parte Ins. Co. of N. Am., 523 So. 2d 1064, 1068-69 (Ala. 1988), it is appropriate for this Court to command probate judges' compliance with the Administrative Order."

Because the petition requested, as an alternative to the determination of the constitutional issues, that this Court order the enforcement of the administrative order, I abstained from voting on this Court's order of February 13, 2015, that ordered the respondents to file answers and permitted them to file briefs. I also abstained from voting on the opinion and order of March 3, 2015, that granted the petition and ordered the named probate judges "to discontinue the issuance of marriage licenses to same-sex couples." On March 3, 2015, I explained in a note to my fellow Justices:

> "I have decided to abstain from voting in this case to avoid the appearance of impropriety in light of the memorandum of February 3, 2015, and the administrative order of February 8, 2015 that I provided to Alabama probate judges in my role as administrative head of the Unified Judicial System."

I likewise have abstained from voting on subsequent orders in this case.

In Ex parte Hinton, 172 So. 3d 348 (Ala. 2012), Justice

Shaw addressed the question whether he could sit on a case "given that it was previously before me when I was a judge on the Court of Criminal Appeals." 172 So. 3d at 353. Canon 3.C.(1), Ala. Canons of Jud. Ethics, states: "A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned ...." Justice Shaw noted that "'a reasonable person has a reasonable basis to question the impartiality of a judge who sits in [an appellate court] to review his own decision as a trial judge.'" 172 So. 3d at 354-55 (quoting Rice v. McKenzie, 581 F.2d 1114, 1117 (4th Cir. 1978)). See § 12-1-13, Ala. Code 1975. For an analogous reason I declined to vote in this case when my administrative order was potentially under review. Compare Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339 (1913) (construing federal law and noting that an appellate judge should not pass upon "the propriety, scope, or effect of any ruling of his own made in the progress of the cause in the court of first instance").

Justice Shaw identified, however, an exception to the principle that a judge should not review a case in which the

judge had participated below: "The principle that a judge must recuse himself or herself in an appeal where the judge ruled in the case while a member of a lower court has been held not to apply if the issue on appeal is different from the issue ruled upon below." 172 So. 3d at 355. In my administrative order, I addressed the issue whether probate judges in Alabama were bound by the orders in Searcy and Strange when they were not parties to those cases. This Court's order of March 3, 2015, which held that the United States Constitution did not require a state to recognize same-sex marriage, mooted that issue.

The issuance of the opinion in Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), on June 26, 2015, has sufficiently altered the posture of this case to cause me to reconsider my participation. The effect of Obergefell on this Court's writ of mandamus ordering that the probate judges are bound to issue marriage licenses in conformity with Alabama law is a new issue before this Court. The controlling effect of Obergefell was not at issue when I earlier abstained from voting. The issue then addressed was the effect of the order of a federal district court, which I had addressed in my

administrative order. In his analysis of the recusal issue in Hinton, Justice Shaw said:

> "Participation in the instant case does not involve a determination of the correctness, propriety, or appropriateness of what I did as a member of the Court of Criminal Appeals in Hinton v. State, because we are now faced with an issue that had not been decided by the trial court in the case that was before the Court of Criminal Appeals while I was serving on that court. My impartiality cannot be questioned because I am not called upon to review my prior decision ...."

172 So. 3d at 355. Likewise in this case, the issue now before the Court "does not involve a determination of the correctness, propriety, or appropriateness" of my administrative order.

In joining this case to consider the effect of Obergefell, I am not sitting in review of my administrative order, nor have I made any public statement on the effect of Obergefell on this Court's opinion and order of March 3, 2015. My expressed views on the issue of same-sex marriage are also not disqualifying.

> "'A judge's views on matters of law and policy ordinarily are not legitimate grounds for recusal, even if such views are strongly held. After all, judges commonly come to a case with personal views on the underlying subject matter. ... Far from necessarily warranting recusal, typically such views merely mark an active mind.'"

Barber v. Jefferson Cty. Racing Ass'n, Inc., 960 So. 2d 599, 618 (Ala. 2006) (Stuart, J., statement of nonrecusal) (quoting United States v. Snyder, 235 F.3d 42, 48 (1st Cir. 2000) (citations omitted)).

In Barber, the defendants were charged with "operating illegal gambling devices at the Birmingham Race Course." 960 So. 2d at 601. They sought Justice Bolin's recusal because a voter guide for the 2004 election listed him as opposing gambling. Justice Bolin responded as follows:

> "My position on that issue is consistent with the law of Alabama; gambling is illegal in this State. I also oppose other acts that violate the laws of the State of Alabama, such as murder, rape, and robbery, but my personal opposition to the above acts does not prevent me from fairly and unbiasedly participating in cases involving such acts."

Barber, 960 So. 2d at 620 (Bolin, J., statement of nonrecusal) (emphasis added). See also Barber, 960 So. 2d at 618 (Stuart, J., statement of nonrecusal) (stating that her "decision in a case [is] based on the application of the law to the facts in that particular case, regardless of my personal opinion").

Although I have made public comments critical of Obergefell in which I quoted extensively from the four dissenting Justices in that case, "'a judge's expressing a

viewpoint on a legal issue is generally not deemed to be disqualifying in and of itself; this is usually true without regard to where such judicial views are expressed, and even if they are expressed somewhat prematurely or harshly.'" Ex parte Ted's Game Enters., 893 So. 2d 376, 392 (Ala. 2004) (See, J., statement of nonrecusal) (quoting Richard E. Flamm, Judicial Disqualification § 10.7 (1996)). Most noteworthy, I have not publicly commented on the question whether this Court is bound to follow Obergefell or on the effect of Obergefell on this Court's March 3, 2015, order.[1]

Furthermore, my job as Chief Justice requires me to participate in every case in which I am qualified to sit.

> "By establishing a Supreme Court consisting of nine Justices, Alabama law presumes that those Justices have something of value to contribute to the resolution of a case. Consequently, when a Justice recuses himself or herself unnecessarily, the recusal deprives the parties and the public of the benefit of the Justice's participation and the Justice fails to do the job he or she was elected to do."

Jones v. Kassouf & Co., 949 So. 2d 136, 145 (Ala. 2006)

[1]By contrast, Supreme Court Justice Ruth Bader Ginsburg presided at a same-sex wedding while Obergefell was pending before the Supreme Court, thus demonstrating her view of the merits of that very case. Maureen Dowd, Presiding at Same-Sex Wedding, Ruth Bader Ginsburg Emphasizes the Word "Constitution," New York Times, May 18, 2015.

(Parker, J., statement of nonrecusal). Even when issues are difficult and controversial, a judge must decide. "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants." Pierson v. Ray, 386 U.S. 547, 554 (1967). See also Federated Guar. Life Ins. Co. v. Bragg, 393 So. 2d 1386, 1389 (Ala. 1981) (stating that "'it is the duty of the judge to adjudicate the decisive issues involved in the controversy ... and to make binding declarations concerning such issues, thus putting the controversy to rest'" (quoting 26 C.J.S. Declaratory Judgments § 161 (1956))); McGough v. McGough, 47 Ala. App. 223, 226, 252 So. 2d 646, 648-49 (Ala. Civ. App. 1970) ("If a judge is not disqualified or incompetent under statute, constitution or common law, it is his duty to sit, a duty which he cannot delegate or repudiate.").

Because it is a judge's duty to decide cases, a judge may participate in a case after initially not sitting if the issues that prompted that abstention have changed. A recent case illustrates the application of this procedure. The petition for a writ of certiorari in American Broadcasting

Cos. v. Aereo, Inc., 573 U.S. ___, 134 S. Ct. 2498 (2014), according to the Supreme Court docket sheet, was filed October 11, 2013. The Court granted the petition on January 10, 2014. The docket sheet contains a notation that Justice Alito did not participate in the decision to grant certiorari. On March 3, 2014, the Court denied a motion to intervene. The docket sheet shows that Justice Alito did not participate in that decision either. Under the date of April 16, 2014, however, the docket sheet states: "Justice Alito is no longer recused in this case." Justice Alito participated in the oral argument on April 22 and dissented when the opinion was released on June 25. Thus, in Aereo, Justice Alito recused himself and then unrecused himself. The same scenario played out in Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008). Chief Justice Roberts, who did not vote on the decision to grant certiorari on March 26, 2007, "unrecused" himself on September 20 in time to participate in the oral argument on October 9 and in the final decision.[2]

[2]The docket sheets for Aereo (No. 13-461) and Scientific-Atlanta (No. 06-43) can be found on the Supreme Court Web site. See http://www.supremecourt.gov. Copies of those docket sheets printed from the Web site are available in the case file of the clerk of the Alabama Supreme Court.

As explained above, I abstained from voting in this case to avoid sitting in review of my own administrative order. Because that order is no longer at issue in this case, I may appropriately sit on the case to review a different issue. A federal court noted that in certain instances a trial judge who had disqualified himself "could resume direction or even decide the issues. ... But the reason for resuming control should be more than a second reflection on the same facts which the trial judge considered originally disqualified him." Stringer v. United States, 233 F.2d 947, 948 n.2 (9th Cir. 1956). The relevant facts in this case are not the same because my administrative order is no longer at issue, having been superseded by orders of the entire Court.

MOORE, Chief Justice (concurring specially).

On June 26, 2015, by a bare 5-4 majority, the United States Supreme Court declared that all states must now recognize a fundamental right to "same-sex marriage." Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015). Because the Alabama Supreme Court had previously issued orders in this case directing the probate judges of this State not to issue marriage licenses to couples of the same sex, the Court requested briefing on the effect of Obergefell on those orders. See Ex parte State ex rel. Alabama Policy Inst., [Ms. 1140460, March 3, March 10, & March 12, 2015] ___ So. 3d ___ (Ala. 2015). Today this Court by order dismisses all pending motions and petitions and issues the certificate of judgment in this case. That action does not disturb the existing March orders in this case or the Court's holding therein that the Sanctity of Marriage Amendment, art. I, § 36.03, Ala. Const. 1901, and the Alabama Marriage Protection Act, § 30-1-9, Ala. Code 1975, are constitutional. Therefore, and for the reasons stated below, I concur with the order.

In particular, I agree with the Chief Justice of the United States Supreme Court, John Roberts, and with Associate

Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, that the majority opinion in Obergefell has no basis in the law, history, or tradition of this country. Obergefell is an unconstitutional exercise of judicial authority that usurps the legislative prerogative of the states to regulate their own domestic policy. Additionally, Obergefell seriously jeopardizes the religious liberty guaranteed by the First Amendment to the United States Constitution.

I. Amending the United States Constitution by Judicial Fiat

Based upon arguments of "love," "commitment," and "equal dignity" for same-sex couples, five lawyers, as Chief Justice Roberts so aptly describes the Obergefell majority, have declared a new social policy for the entire country. As the Chief Justice and Associate Justices Scalia, Thomas, and Alito eloquently and accurately demonstrate in their dissents, the majority opinion in Obergefell is an act of raw power with no ascertainable foundation in the Constitution itself. The majority presumed to legislate for the entire country under the guise of interpreting the Constitution.

A. Amending the Constitution in Violation of Article V

In reality, the Obergefell majority presumes to amend the

United States Constitution to create a right stated nowhere therein. That is a lawless act. The Constitution in Article V provides the only means for amending its provisions:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof ...."

U.S. Const., art. V (emphasis added). The amendment process requires the ratification of three-quarters of the states, not a mere 5 out of 9 Justices on the Supreme Court. The Obergefell majority states that the Founders anticipated that the Constitution might require alteration. Employing Justice Anthony Kennedy's signature rhetoric, the opinion states:

> "The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."

576 U.S. at ___, 135 S. Ct. at 2598. I submit that our Founders knew a lot more about freedom than this passage

indicates. They secured the freedoms we enjoy, not in judicial decrees of newly discovered rights, but in the Constitution and amendments thereto. That a majority of the Court may identify an "injustice" that merits constitutional correction does not dispense with the means the Constitution has provided in Article V for its own amendment.

Although the Court could suggest that the Constitution would benefit from a particular amendment, the Court does not possess the authority to insert the amendment into the Constitution by the vehicle of a Court opinion and then to demand compliance with it. In 1965 Justice Hugo Black, in a critique of such judicial activism, commented on the Court's discovery of a heretofore unknown constitutional right for married couples to use contraception -- a right supposedly found in the "penumbra" of the Bill of Rights. He stated:

> "The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me."

Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting). In 1983, Brevard Hand, the Chief Judge of the

United States District Court for the Southern District of Alabama, stated: "Amendment through judicial fiat is both unconstitutional and illegal. Amendment through judicial fiat breeds disrespect for the law, and it undermines the very basic notion that this country is governed by laws and not by men." Jaffree v. Board of Sch. Comm'rs of Mobile Cty., 554 F. Supp. 1104, 1126 (S.D. Ala. 1983), rev'd Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983). George Washington warned against attempts to usurp the Article V revision process:

> "If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way, which the constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

Farewell Address (September 17, 1796), 12 The Writings of George Washington 226 (Jared Sparks ed., 1838) (emphasis added).

Novel departures from the text of the Constitution by the Court are customarily accompanied by pretentious language employed to conceal the illegitimacy of its actions. Justice Scalia in his Obergefell dissent refers to this abandonment of "disciplined legal reasoning" as a descent into "the mystical

aphorisms of the fortune cookie." 576 U.S. at ___ n.22, 135 S. Ct. at 2630 n.22. Among some of the more ostentatious phrases used in the majority opinion that might be more suitable to a romance novel are the following:

- "Marriage responds to the universal fear that a lonely person might call out only to find no one there." 576 U.S. at ___, 135 S. Ct. at 2600.
- The "hope [of homosexuals] is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions." 576 U.S. at ___, 135 S. Ct. at 2608.
- "A truthful statement by same-sex couples of what was in their hearts had to remain unspoken." 576 U.S. at ___, 135 S. Ct. at 2596.

The opinion appeals more to emotion than law, reminding one of the 1974 song "Feelings" by Morris Albert, which begins: "Feelings, nothing more than feelings ...." The Court's opinion speaks repeatedly of homosexuals being humiliated, demeaned, and denied "equal dignity" by a state's refusal to issue them marriage licenses. The majority seeks to invoke the grief, sorrow, and compassion associated with a Greek tragedy. Riding a tidal wave of emotion, the ensuing tears and pathos then suffice to fertilize a new constitutional right nowhere mentioned in the Constitution itself.

Abandoning the role of interpreting the written Constitution, the majority has instead decided to become the supposed "voice" of the people, discerning the people's sentiments and updating the document accordingly. The function of keeping the Constitution up with the times, however, has not been delegated to the Court -- or to Congress or the President; that function is reserved to the states under Article V. Alexander Hamilton stated: "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act." The Federalist No. 78, at 527-28 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Obergefell is a clear example of such "presumption." Consider the following quotations from the majority opinion:

- "When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." 576 U.S. at ___, 135 S. Ct. at 2598 (emphasis added).

- "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its

> inconsistency with the central meaning of the fundamental right to marry is now manifest." 576 U.S. at ___, 135 S. Ct. at 2602 (emphasis added).

- "[Rights] rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." 576 U.S. at ___, 135 S. Ct. at 2602 (emphasis added).

- "[N]ew insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." 576 U.S. at ___, 135 S. Ct. at 2603 (emphasis added).

- "The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment ... entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." 576 U.S. at ___, 135 S. Ct. at 2598 (emphasis added).

An updating of the Constitution based on new insights and better informed societal understandings that are now manifest as we learn its meaning must arise solely from a "solemn and authoritative act" of the people pursuant to Article V, not from judicial innovation based on a "presumption, or even knowledge, of their sentiments." The Federalist No. 78.

B. The True Meaning of Liberty

The Obergefell majority's theory of constitutional law also overlooks the reality that the purpose of law is to restrain behavior for the public good.

> "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."

Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

Throughout the majority opinion Justice Kennedy speaks of the "dignity" of marriage and blatantly asserts that "[t]here is dignity in the bond between two men or two women who seek to marry." 576 U.S. at ___, 135 S. Ct. at 2599. Historically, consummation of a marriage always involved an act of sexual intimacy that was dignified in the eyes of the law. An act of sexual intimacy between two men or two women, by contrast, was considered "an infamous crime against nature" and a "disgrace to human nature." 4 William Blackstone, Commentaries on the Laws of England *215. Homosexuals who seek the dignity of marriage must first forsake the sexual habits that disqualify them from admission to that hallowed institution. Surely more dignity attaches to participation in a fundamental institution on the terms it prescribes than to an attempt to wrest its definition to serve inordinate lusts that demean its historic dignity. A "disgrace to human nature" cannot be cured by

stripping the institution of holy matrimony of its inherent dignity and redefining it to give social approval to behaviors unsuited to its high station. Sodomy has never been and never will be an act by which a marriage can be consummated.

The Declaration of Independence identifies the source of "liberty" under the American system of government:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ...."

The Declaration of Independence para. 2 (U.S. 1776).[3] "Liberty," an unalienable right, is an endowment of the Creator. "The God who gave us life gave us liberty at the same time ...." Thomas Jefferson, A Summary View of the Rights of British America, at 23 (1774). Government exists to secure that right. Because liberty is a gift of God, it must be exercised in conformity with the laws of nature and of

[3]The United States Code, "the official codification of the general and permanent laws of the United States," includes the Declaration of Independence in the section entitled "The Organic Laws of the United States of America." See Black's Law Dictionary 1274 (10th ed. 2014) (defining "organic law" as "[t]he body of laws (as in a constitution) that define and establish a government").

nature's God. "[T]he natural liberty of mankind ... consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature ...." 1 Blackstone, Commentaries *121 (emphasis added).

Liberty in the American system of government is not the right to define one's own reality in defiance of the Creator. The libertarian creed of unbridled self-definition is capsulized in Justice Kennedy's oft-quoted statement: "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." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992). But the human being, as a dependent creature, is not at liberty to redefine reality; instead, as the Declaration of Independence states, a human being is bound to recognize that the rights to life, liberty, and the pursuit of happiness are endowed by God. Those rights are not subject to a redefinition that rejects the natural order God has created.

"Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being." 1 Blackstone, Commentaries *39. Part of that

natural order is the institution of marriage as the union of a man and a woman. "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." Genesis 2:24. The Obergefell majority's false definition of marriage arises, in great part, from its false definition of liberty. Separating man from his Creator, the majority plunges the human soul into a wasteland of meaninglessness where every man defines his own anarchic reality. In that godless world nothing has meaning or consequence except as the human being desires. Man then becomes the creator of his own reality rather than a subject of the Creator of the Declaration. See Romans 1:25 (identifying those "[w]ho changed the truth of God into a lie, and worshipped and served the creature more than the Creator").

This false notion of liberty, which permeates the majority opinion in Obergefell, is the ultimate fallacy upon which it rests. In a world with God left out, the moral boundaries of Scripture disappear, and man's corrupt desires are given full rein. The end of this experiment in anarchic liberty is yet to be seen. The great sufferers will be the

children -- deprived of either a paternal or a maternal presence -- who are raised in unnatural families that contradict the created order. A political scientist states: "'[T]he traditional family, the embodiment and expression of the "laws of nature and of nature's God," as the foundation of a free society, has become merely one of many "alternative lifestyles." ... A free people who succumbs to such a teaching cannot long endure.'" Samuel H. Dresner, Can Families Survive in Pagan America? 99 (1995) (quoting Harry V. Jaffa, Homosexuality and the Natural Law 38 (1990)). As Thomas Jefferson stated:

> "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever ...."

"Notes on the State of Virginia" (1787), in 8 The Writings of Thomas Jefferson 404 (H.A. Washington ed., 1854).

C. Abuse of the Fourteenth Amendment

The invocation of "equal dignity" to justify the invention of a heretofore unknown constitutional right is just another judicial mantra to rationalize the invalidation of

state laws that offend the policy preferences of a five-person majority. The notion of "equal dignity," as this Court recently stated, "is a legal proxy for invalidating laws federal judges do not like, even though no actual constitutional infirmity exists." Ex parte State ex rel. Alabama Policy Institute [Ms. 1140460, March 3, 2015] ___ So. 3d ___, ___ (Ala. 2015) ("API"). Justice Black once stated: "There is ... no express constitutional language granting judicial power to invalidate every state law of every kind deemed 'unreasonable' or contrary to the Court's notion of civilized decencies ...." Rochin v. California, 342 U.S. 165, 176 (1952) (Black, J., concurring). In 1930, in the waning days of his judicial career, Justice Oliver Wendell Holmes expressed his alarm at the elastic qualities the Supreme Court had ascribed to the Fourteenth Amendment to satisfy the Court's desire to exercise plenary supervision over state legislation: "I cannot believe that the [Fourteenth] Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

As late as 1986, the United States Supreme Court

specifically declared:

> "There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance."

Bowers v. Hardwick, 478 U.S. 186, 195 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003). The "claimed right" of which the Court spoke in Bowers was the "right" to commit sodomy. Although the Court in 1986 adamantly refused to recognize any such right in the United States Constitution, the Lawrence v. Texas opinion did just that 17 years later. Nevertheless, the Supreme Court's admonition in 1986 that expanding the substantive reach of the Fifth and Fourteenth Amendments to redefine fundamental rights like marriage would give the Court "further authority to govern the country without express constitutional authority," 478 U.S. at 195, is still true and can clearly be seen in Obergefell.

The "fundamental right" to marriage the Supreme Court has invoked in previous cases always involved the right of a man and a woman to marry. Loving v. Virginia, 388 U.S. 1 (1967),

cited as a precedent for constitutional review of state marriage laws by the Obergefell majority, 576 U.S. at ___, 135 S. Ct. at 2598-99, did not change this fact, but only removed a race-based barrier to participation in that institution. No one doubts that the Fourteenth Amendment was designed to remove such civil disabilities. Equally indisputable is that the states that ratified the Fourteenth Amendment in 1868 did not remotely intend to empower the federal courts to redefine marriage to include same-sex marriage.

The majority opinion in Obergefell represents the culmination of a change in our form of government from one of three separate-but-equal branches to one in which the judicial branch now exercises the power of the legislative branch.[4] President George Washington asserted that this "spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism." Farewell Address, at 226. And thus by the weapon of judicial usurpation, free government is destroyed.

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[4]Sir William Blackstone described as an "aristocracy" that form of government in which the sovereign power "is lodged in a council, composed of select members." 1 Commentaries *49.

The Constitution limits the power of the federal government in order to protect the right of the people to govern themselves. See U.S. Const. amends. IX & X.[5] In his criticism of the Court's invention of a constitutional right to bring contraceptive devices into the marital chamber, Justice Potter Stewart stated:

> "If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books."

Griswold, 381 U.S. at 531 (Stewart, J., dissenting). The Obergefell majority, presuming to know better than the people themselves how to order the fundamental domestic institution of society, has usurped the legislative prerogatives of the people contrary to the Ninth and Tenth Amendments.

II. The Dissenters' Critique

The four dissenters in Obergefell convincingly detail the illegitimacy of the majority opinion.

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[5]"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend IX. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X.

A. Chief Justice Roberts

The Chief Justice describes the pretended judicial acts of the majority as a form of theft. "Five lawyers have ... enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage ...." 576 U.S. at ___, 135 S. Ct. at 2612 (emphasis added). He states flatly: "The right [the majority] announces has no basis in the Constitution or this Court's precedent." Id. He accuses the majority of "order[ing] the transformation of a social institution that has formed the basis of human society for millennia" based on "its desire to remake society according to its own 'new insight' into 'the nature of injustice.'" Id. In short, the majority acts not as a court of law but as a band of social revolutionaries. The Chief Justice, amazed at this presumption, exclaims: "Just who do we think we are?" Id.

The Chief Justice underscores the serious consequences of acquiescence to the majority's assumption of illegitimate power. The majority, he states, "seizes for itself a question the Constitution leaves to the people." 576 U.S. at ___, 135 S. Ct. at 2612. The real issue, he explains, "is about

whether, in our democratic republic, that decision [regarding the definition of marriage] should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law." Id. He also points out that all previous decisions of the Supreme Court that treated marriage as a fundamental right rested on "the core structure of marriage as the union between a man and a woman." 576 U.S. at ___, 135 S. Ct. at 2614.

"[T]he majority's approach," states the Chief Justice, "has no basis in principle or tradition except for the unprincipled tradition of judicial policymaking." 576 U.S. at ___, 135 S. Ct. at 2616. Thus, "the majority's position [is] indefensible as a matter of constitutional law." Id. In support of this point, the Chief Justice draws on Justice Benjamin Curtis's dissent in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Remonstrating against the Dred Scott majority's novel effort at enforcing a pax judicatus on the slavery issue, Justice Curtis warned that, when the "'fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to

control'" the meaning of the Constitution, "'we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.'" 576 U.S. at ___, 135 S. Ct. at 2617 (quoting Dred Scott, 60 U.S. (19 How.) at 621).

The Chief Justice's quotation of Justice Curtis's Dred Scott dissent merits serious consideration. If acquiescence to Obergefell indicates that "we have no longer a Constitution," then the legitimacy of Obergefell is subject to grave doubt. If five Justices of the Supreme Court may at will redefine the Constitution according to their own policy preferences, the mechanism of judicial review, designed originally to protect the rights of the people from runaway legislatures, has morphed into the right of five lawyers to rule the people without their consent.

By employing the Constitution as a license to create social policy for the nation, the Court, states the Chief Justice, becomes "a legislative chamber." 576 U.S. at ___, 135 S. Ct. at 2617 (quoting Learned Hand, The Bill of Rights, The Oliver Wendell Holmes Lectures, 1958 42 (1977)). Are the true

legislative bodies of this country obligated to respect such a usurpation of their own prerogatives? The Chief Justice quotes Justice Byron White as follows: "'The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.'" 576 U.S. at ___, 135 S. Ct. at 2618 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting)).[6] Such is the reality of the majority opinion in Obergefell.

Other concerns, states Chief Justice Roberts, appear in the wake of the majority's "freewheeling notion of individual autonomy." 576 U.S. at ___, 135 S. Ct. at 2621. If the opinion reflects no more than "naked policy preferences," id., with no basis in the Constitution, what is to restrain the Court from inventing other new "liberties" the majority may imagine? The Chief Justice sees nothing in the majority opinion that would be incompatible with the declaration of a constitutional right to polygamy. The majority, he states, "offers no reason at all

[6]This warning was quoted virtually verbatim in Justice White's majority opinion in Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

why the two-person element of the core definition of marriage may be preserved while the man-woman element may not." 576 U.S. at ___, 135 S. Ct. at 2621. Polygamy, he notes, has more of a tradition in the world's cultures than same-sex marriage. "If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one." Id. Indeed, as the Chief Justice warns, the plenary power the majority asserts to redefine the fundamental institutions of society offers no assurance that it will not give birth to yet further attacks on the social order.

The majority ostensibly relies on the Due Process Clause of the Fourteenth Amendment to justify its mandate for an unprecedented social revolution. But, as the Chief Justice states: "The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can?" 576 U.S. at ___, 135 S. Ct. at 2622. Noting that the majority's actions are "dangerous for the rule of law," id., the Chief Justice states that by undermining respect for the Court's judgments, the majority draws into question the

Court's legitimacy. Decrying "the majority's extravagant conception of judicial supremacy," 576 U.S. at ___, 135 S. Ct. at 2624, he notes its absence of humility or restraint. "Over and over," he states, "the majority exalts the role of the judiciary in delivering social change." Id.

> "Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges."

Id.

If, as the Chief Justice demonstrates, a governing majority of the Supreme Court has departed from the vision of the Founders, are the rest of us also required to depart from the founding principles of this republic? Or should we adhere to the principles of representative government -- government by the people -- and repudiate the judicial majority that orders otherwise? The Chief Justice emphasizes that the majority's actions have no basis in law: "Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right [to same-sex marriage]. None exists ...." 576 U.S. at ___, 135 S. Ct.

at 2619. Contemplating the role of the Constitution in the opinion of the majority, he concludes: "It had nothing to do with it." 576 U.S. at ___, 135 S. Ct. at 2626. If, as the Chief Justice asserts, the opinion of the majority is not based on the Constitution, do state judges have any obligation to obey that ruling? Does not their first duty lie to the Constitution? Otherwise, as Justice Curtis stated in his Dred Scott dissent, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." 60 U.S. (19 How.) at 621.

B. Justice Scalia

Justice Scalia, who joined in full the dissent of Chief Justice Roberts, echoes the theme of a threat to our republican form of government. He notes the demise of constitutional government in the ashes of the majority's opinion razing the institution of marriage. "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." 576 U.S. at ___, 135 S. Ct. at 2627. Justice Scalia underscores this point: "This practice of

constitutional revision by an unelected committee of nine ... robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves." 576 U.S. at ___, 135 S. Ct. at 2627 (emphasis added).

The opinion of the majority, he further states, "lacks even a thin veneer of law." 576 U.S. at ___, 135 S. Ct. at 2628. Thus, "[t]he naked judicial claim to legislative -- indeed, super-legislative -- power [is] fundamentally at odds with our system of government," and "makes the People subordinate to a committee of nine unelected lawyers." 576 U.S. at ___, 135 S. Ct. at 2629. Contending that the majority opinion lacks legal legitimacy, he terms it "a social upheaval," i.e., a social revolution. Id. The right to change the form of government in this country belongs to the people themselves through the amendment process, not to judicial oligarchs. Justice Scalia describes the majority's ruling as a "judicial Putsch." Id. A "putsch" is "a secretly plotted and suddenly executed attempt to overthrow a government." Merriam-Webster's Collegiate Dictionary 1013 (11th ed. 2009). The word is most commonly associated with Adolf Hitler's 1923 attempt

to seize power in Germany. Justice Scalia's use of this term underscores the revolutionary nature of the majority's presumptive exercise of judicial power to remake the social order.

Justice Scalia concludes that "to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation." 576 U.S. at ___, 135 S. Ct. at 2629 (emphasis added). Justice Scalia's estimation that the majority's social revolution is a more outrageous abuse of power than the events that immediately triggered the American Revolution is very sobering. The judiciary, he states, "'must ultimately depend upon the aid of the executive arm' and the States, 'even for the efficacy of its judgments.'" 576 U.S. at ___, 135 S. Ct. at 2631 (quoting The Federalist No. 78, at 522-23 (Alexander Hamilton) (J. Cooke ed., 1961)). He thus intimates that the refusal of the states to recognize the legitimacy of the Obergefell decision, "one that is unabashedly based not on law," would be a healthy reminder of the Court's "impotence"

in the face of a refusal to acquiesce to its systematic destruction of popular government. 576 U.S. at ___, 135 S. Ct. at 2631.[7]

C. Justice Thomas

Justice Thomas adds his analysis to the fusillade of criticism of the majority opinion. He attacks in particular the invocation of the doctrine of "substantive due process" that allows the Court to invent new rights out of the word "liberty" in the Due Process Clause. Like Chief Justice Roberts and Justice Scalia, he sounds the alarm at this rending of the fabric of our country: "By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority." 576 U.S. at ___, 135 S. Ct. at 2631. He

[7]In a concurring opinion Justice Shaw states that a judge who "cannot abide by a controlling decision of a higher court" should resign. ___ So. 3d at ___. In support of this assertion, he quotes from an article in which Justice Scalia criticized Justices on the Supreme Court who let their personal views of the morality of the death penalty override constitutional and state law to the contrary. Antonin Scalia, God's Justice and Ours, 2002 First Things 123 (May 2002). In Obergefell, a majority of five Justices supplanted state marriage laws with no authority whatsoever in the Constitution. Under Justice Scalia's logic, the Justices who elevated Obergefell above the Constitution they swore to uphold should themselves resign, and not state judges who uphold that sacred document.

notes that this expansive and "imaginary" use of the Due Process Clause "wip[es] out with a stroke of the keyboard the results of the political process in over 30 States." 576 U.S. at ___, 135 S. Ct. at 2632 and n.1. The entitlement to a marriage license with the accompanying government benefits, he notes, is inconsistent with the historic meaning of "liberty" as a "freedom from physical restraint." 576 U.S. at ___, 135 S. Ct. at 2633. Neither the Founders nor the authors of the Fourteenth Amendment considered that the right not to be deprived of liberty without due process of law encompassed a positive entitlement to governmental benefits. "In the American legal tradition, liberty has long been understood as individual freedom from governmental action, not as a right to a particular governmental entitlement." 576 U.S. at ___, 135 S. Ct. at 2634. Thus, "receiving governmental recognition and benefits has nothing to do with any understanding of 'liberty' that the Framers would have recognized." 576 U.S. at ___, 135 S. Ct. at 2636.

D. Justice Alito

Justice Alito notes that the majority's definition of "liberty" has "a distinctively postmodern meaning" in which

"five unelected Justices ... impos[e] their personal vision of liberty upon the American people." 576 U.S. at ___, 135 S. Ct. at 2640. He recognizes that the fundamental purpose of marriage historically has been to provide for the welfare of children and not merely to contribute to the well-being of adults. The rising rate of out-of-wedlock pregnancy has contributed to the decay of marriage by fraying the tie between marriage and procreation.[8] 576 U.S. at ___, 135 S. Ct. at 2641. Many states legitimately worry that abandoning the traditional definition "may contribute to marriage's further decay." 576 U.S. at ___, 135 S. Ct. at 2642. Thus, "[it] is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed ... all around the globe." Id.

Justice Alito, like the other dissenters, points out that the majority has created a constitutional right out of thin air:

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[8]By constitutionalizing attacks on the procreative core of marriage, the Supreme Court has greatly contributed to the erosion of this institution. See Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (abortion).

> "'[T]he Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.'"

576 U.S. at ___, 135 S. Ct. at 2642 (quoting United States v. Windsor, 570 U.S. ___, ___, 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting)). In harmony with his dissenting colleagues, Justice Alito asserts that "[t]oday's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage." 576 U.S. at ___, 135 S. Ct. at 2642.

> "If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. ...
>
> "Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. ... What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation."

576 U.S. at ___, 135 S. Ct. at 2643

E. Summing Up Obergefell: An Unlawful and Illegitimate Decision

The dissenting Justices have accurately described in

detail the illegitimacy of the majority's decision in Obergefell. Their criticisms go far beyond mere disagreement with the philosophical and public-policy arguments upon which the majority opinion relies. Instead, the dissenting Justices employ strong language and vivid metaphors to portray the seriousness of the majority's bold attack on the foundations of representative government and the collateral damage to religious liberty.

Their language is stirring and forthright:

Chief Justice Roberts portrays the majority as thieves who are "stealing" the marriage issue from the people. Justice Scalia uses a similar metaphor, stating that the majority "robs the People of ... the freedom to govern themselves." These metaphors identify the essence of the majority's actions: an illegal displacement and usurpation of the democratic process. Chief Justice Roberts accuses the majority of imposing "naked policy preferences" that have "no basis in the Constitution." Accordingly, the majority's "extravagant conception of judicial supremacy" is "dangerous for the rule of law." The unmistakable theme that emerges from these critiques is lawlessness. A body whose reason for being is to

apply the law has instead forsaken the law for a lawless imposition of the latest postmodern assault on the natural order. The majority are judges in name only, having in fact forsaken the judicial role to engage in "remaking society" and transforming -- without legal authority -- the most fundamental social institution.

Justice Scalia also emphasizes the revolutionary character of the majority's assault on the social order -- elevating the "crime against nature" into the equivalent of holy matrimony.[9] This decision, "unabashedly not based on law," represents a "social upheaval" and a "judicial Putsch." Justice Alito sounds the same themes. The Court has not unwittingly tread into forbidden territory; instead, it has acted "far beyond the outer reaches" of its authority, boldly trampling the right of the people "to control their own destiny."

III. The Precursors to Obergefell

For the last 50 years, the Supreme Court has consistently misused the Fourteenth Amendment to destroy state laws that

[9]The Bible likens marriage to the relationship between Christ and the church. Ephesians 5:22-27. The Obergefell majority creates an unnatural form of marriage whose participants delight in "vile affections." Romans 1:26.

protect the marital relation and its offspring. Obergefell is the latest fruit of this corrupt tree. Matthew 7:17-18.

In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court found in "penumbras, formed by emanations" from the "specific guarantees in the Bill of Rights," a right of "privacy" for married couples to use contraceptives. Id. at 484. That opinion, explained a dissenter, "prevents state legislatures from passing any law deemed by this Court to interfere with 'privacy.'" Id. at 510 n.1 (Black, J. dissenting). By holding unconstitutional a law that was not forbidden by a specific provision of the Constitution, the Court quietly assumed the power to negate any state legislation of which it disapproved. As Justice Black stated:

> "[N]o provision of the Constitution ... either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the

> separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have."

381 U.S. at 520-21 (Black, J., dissenting) (emphasis added).

Speaking 50 years before the issuance of the majority opinion in Obergefell, Justice Black presciently anticipated its reasoning:

> "I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes."

381 U.S. at 522.[10] Assuredly, Justice Black would not have agreed with Justice Kennedy's grandiloquent "nature-of-injustice" passage and his invocation of the right of the Court to draw limitless new rights out of the bottomless depths of the Due Process Clause "as we learn its meaning."[11]

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[10]Justice Black is describing this philosophy, not agreeing with it. "For myself, I must with all deference reject that philosophy." Griswold, 381 U.S. at 522 (Black, J., dissenting).

[11]Justice Holmes referred to this tendency of the Court to discover constitutional novelties in the Fourteenth Amendment as "evoking a constitutional prohibition from the void of 'due process of law.'" Baldwin v. Missouri, 281 U.S. 586, 596 (1930) (Holmes, J., dissenting).

Truly, the less basis the majority has for its innovations upon the Constitution, the grander is the language employed to justify them, as if high-blown rhetoric could compensate for the absence of constitutional substance.

Griswold was the first car on the illicit and unconstitutional train that led from contraception to abortion and then on to sodomy and same-sex marriage. In 1972, the Court extended the penumbral right of contraception to the unmarried, deconstructing the union of husband and wife that infused Griswold into merely "an association of two individuals." 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." 405 U.S. at 453. Venturing beyond "the sacred precincts of marital bedrooms," Griswold, 381 U.S. at 485, the Court anointed with constitutional protection the use of contraceptive devices by the unmarried, setting its seal of approval upon fornication. And if anyone found the extension of Griswold to the unmarried to be less than convincing, the

Court had ready at hand an additional rationale: Allowing the use of such devices by the married, but not the unmarried, violated the Equal Protection Clause. The married and the unmarried, the Court amazingly held, were "similarly situated" in regard to contraceptive use. Thus, "the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons." Eisenstadt, 405 U.S. at 454. See John Hart Ely, The Wages of Crying Wolf, A Comment on Roe v. Wade, 82 Yale L.J. 920, 929 n.68 (1973) (commenting on "the Eisenstadt Court's obviously strained performance respecting the Equal Protection Clause").[12]

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[12]One may reasonably surmise that in the era of fears about a population explosion, the Court felt that its duty to limit the reproduction of the masses superseded any fealty to the text of the Constitution. Eisenstadt represented the Court's first sustained assault on sexual morality and laid the groundwork for future decisions that were consistent with a policy of reducing population growth, either through abortion (killing the conceived) or homosexuality (promoting nonreproductive sexuality). In a 2009 interview, Justice Ruth Bader Ginsburg stated: "Frankly I had thought that at the time Roe was decided, there was concern about population growth and particularly growth in populations that we don't want to have too many of." Emily Bazelon, The Place of Women on the Court, New York Times Magazine (July 7, 2009).

Chief Justice Warren Burger dissented. Seeing nothing in the Fourteenth Amendment that prohibited a state from regulating the distribution of contraceptives, he noted that the Court had "seriously invade[d] the constitutional prerogatives of the States" and "passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections." 405 U.S. at 467, 472 (Burger, C.J., dissenting).

In Carey v. Population Services International, 431 U.S. 678 (1977), the Court took a further step down the road of immorality by crowning with constitutional dignity not only the general provision of contraceptives to minors but also the requirement that they be available over the counter. Thus saith the Due Process Clause. Justice William Rehnquist mused on the likely reaction of those who fought the Revolutionary War to establish the Bill of Rights and the Civil War to enact the Fourteenth Amendment:

> "If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New

> York Legislature to the contrary, it is not difficult to imagine their reaction."

431 U.S. at 717 (Rehnquist, J., dissenting). Declining to engage in detailed analysis of the majority's patently "indefensible result," Justice Rehnquist explained that "no logic chopping can possibly make the fallacy of the result more obvious." 431 U.S. at 718.

Having served the sexual revolution in the area of contraception, the Court then made constitutional the taking of the life of an unborn child. In Roe v. Wade, 410 U.S. 113 (1973), as it did in Griswold and Eisenstadt, and later in Carey, the Court tackled the difficulty of rationalizing the creation of a new constitutional right that had no colorable basis in the Constitution. The Court ultimately asserted that the right to privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty ... or ... in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Roe, 410 U.S. at 153.

Justice Stewart, concurring, 410 U.S. at 167-71, suggested abandoning the effort to cobble together "right-of-privacy" emanations from the Bill of Rights and instead urged

sole reliance on the word "liberty" in the Due Process Clause, an infinitely malleable term that has enabled the Court to generate custom-designed constitutional rights. Justice Rehnquist in dissent stated that Roe "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." 410 U.S. at 174. "To reach its result," he added, "the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." Id. Justice White, writing in the companion case to Roe, agreed: "I find nothing in the language or history of the Constitution to support the Court's judgment." Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting). As one commentator observed: "What is frightening about Roe is that this super-protected right is not inferable from the language of the Constitution," Ely, Wages, at 935, and "is not constitutional law and gives almost no sense of an obligation to try to be." Id. at 947.

Obergefell is but the latest example of the Court's creation of constitutional rights out of thin air in service of the immorality of the sexual revolution. Like Roe,

Obergefell is no more than "an exercise of raw judicial power ... an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court." Doe, 410 U.S. at 222 (White, J., dissenting).

The incorporation of the sexual revolution into the Constitution continued in Lawrence v. Texas, 539 U.S. 558 (2003), which used the Fourteenth Amendment to find a right to commit sodomy that the high court had specifically rejected only 17 years earlier in Bowers v. Hardwick, 478 U.S. 186 (1986). Citing as "authority" Griswold, Eisenstadt, Roe, and Carey -- a gallery of constitutional absurdities -- the Court stated that "our laws and traditions in the past half century" "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Lawrence, 539 U.S. at 571-72.[13] Thus, the Court relied on a series of

[13]"By placing a premium on 'recent cases' rather than the language of the Constitution, the Court makes it dangerously simple for future Courts, using the technique of interpretation, to operate as a 'continuing Constitutional convention.'" Coleman v. Alabama, 399 U.S. 1, 22-23 (1970) (Burger, C.J., dissenting). As two scholars have noted, "[E]stablishing a tradition through reliance on Supreme Court cases is bootstrapping." Nelson Lund & John O. McGinnis, Lawrence v. Texas and Judicial Hubris, 102 Mich. L. Rev. 1555, 1610 (2004).

malformed decisions to justify yet another bizarre departure from moral sanity -- and all in defiance of the right of the people to govern themselves.

In language similar to that used in Obergefell, Justice Kennedy, the author of the majority opinion in Lawrence, stated:

> "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

Lawrence, 539 U.S. at 578-79. Justice Kennedy unfortunately omitted the key consideration highlighted by Justice Black in his Griswold dissent: Amendments to the Constitution are the business of the people pursuant to Article V; they are not the business of the Court under Article III. Truth may not always be clearly seen, but the majority's reasoning should not blind us to the reality that the Court seems determined to alter this nation's organic law.

Justice Scalia, dissenting in Lawrence, criticized the

Court's discovery of yet another sexual-freedom right in the Constitution: "What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change." 539 U.S. at 603 (Scalia, J., dissenting). He also exposed the fallacy in Justice Kennedy's "search-for-greater freedom" passage:

> "It is indeed true that 'later generations can see that laws once thought necessary and proper in fact serve only to oppress' ...; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best."

539 U.S. at 603-04 (emphasis added).

The Obergefell case is but the latest in "a history of repeated injuries and usurpations." Declaration of Independence para. 2. Among the "long train of abuses and usurpations" cited in the Declaration of Independence was Parliament "declaring themselves invested with power to legislate for us in all cases whatsoever." Id. Obergefell is the culmination, beginning with Griswold in 1965, of 50 years of judicial usurpation of the right of the people to govern

themselves and, in particular, of the states to protect from attack "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

IV. The Unavoidable Collision with Religious Liberty

Religious liberty is the gift of God. The Virginia Act for Establishing Religious Freedom (1786), authored by Thomas Jefferson and considered one of his more notable achievements, begins:

> "Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do ...."

12 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619, at 84 (Richmond 1823) ("12 Hening, Statutes"). The Virginia Act then explains that to allow a "civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation

of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty." 12 Hening, Statutes, at 85 (emphasis added).

The definition of marriage as the union of one man and one woman has existed for millennia and has never been considered an "ill tendency." By contrast, the Court's attempt to redefine marriage is "a dangerous fallacy which at once destroys all religious liberty." As Justice Thomas explained in his dissent in Obergefell: "The Court's decision today is at odds not only with the Constitution but with the principles upon which our Nation was built." 576 U.S. at ___, 135 S. Ct. at 2631. Further, "the majority's decision threatens the religious liberty our Nation has long sought to protect." 576 U.S. at ___, 135 S. Ct. at 2638.

In former times, the Court showed greater respect for God's gift of religious freedom and deliberated more seriously on the subject. Upholding the denial of an application for citizenship based on conscientious objection to military service, Justice George Sutherland, writing for the Court, stated: "We are a Christian people according to one another the equal right of religious freedom, and acknowledging with

reverence the duty of obedience to the will of God." United States v. Macintosh, 283 U.S. 605, 625 (1931). In a dissent joined by three of his brethren, Chief Justice Charles Evans Hughes noted that the oath to uphold the Constitution administered to legislators and "all executive and judicial Officers," U.S. Const., art. VI, ¶ 3, was similar to the naturalization oath. Yet the constitutional oath had not been regarded "as requiring one to promise to put allegiance to temporal power above what is sincerely believed to be one's duty of obedience to God." Macintosh, 283 U.S. at 630 (Hughes, C.J., dissenting).

Chief Justice Hughes recognized the serious issues presented when governmental power clashes with individual conscience:

> "[W]ith many of our worthy citizens it would be a most heart-searching question if they were asked whether they would promise to obey a law believed to be in conflict with religious duty. Many of their most honored exemplars in the past have been willing to suffer imprisonment or even death rather than to make such a promise."

283 U.S. at 631. Chief Justice Hughes further explained:

> "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. ... One cannot speak of religious liberty, with proper appreciation of its

> essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God."

Macintosh, 283 U.S. at 633-34. The Obergefell majority, conspicuously overlooking the "essential and historic significance" of the connection between religious liberty and "supreme allegiance to the will of God," failed to appreciate the seriousness of imposing a new sexual-revolution mandate that requires Alabama public officials to disobey the will of God.

Fifteen years after Macintosh was decided, the Court adopted the reasoning of Chief Justice Hughes in his Macintosh dissent. Justice William O. Douglas, writing for the Court, stated:

> "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."

Girouard v. United States, 328 U.S. 61, 68 (1946). The Obergefell majority gives scant consideration to these concerns, even though they were presented by amici curiae. See, e.g., brief of amicus curiae Agudath Israel of America,

at 17 ("The recognition of same-sex marriage poses a threat to the liberty of religious organizations and individuals whose faith prevents them from acting in accordance with that recognition."); brief of amici curiae the General Conference of Seventh-Day Adventists and the Becket Fund for Religious Liberty, at 36 (stating that "adopting same-sex marriage will have significant negative effects on the ability of religious conscientious objectors to participate fully in society").

In the following passage the Obergefell majority vainly attempts to deflect attention from its egregious assault on religious liberty:

> "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment insures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."

576 U.S. at ___, 135 S. Ct. at 2607 (emphasis added). Religious liberty, however, is about more than just "teaching" and "advocating" views of marriage. The majority condescendingly approves religious speech against same-sex

marriage but not religious practice in conformity with those beliefs. As Chief Justice Roberts states in his dissent: "The First Amendment guarantees ... the freedom to 'exercise' religion. Ominously, this is not a word the majority uses." 576 U.S. at ___, 135 S. Ct. at 2625. Justice Thomas similarly notes that religious liberty "is about freedom of action in matters of religion generally," not merely a right to speak and teach. 576 U.S. at ___, 135 S. Ct. at 2638.

The seemingly unnecessary affirmation of a right to speak and teach one's faith conceals an unstated implication that such speech is to have no practical effect on public policy. As Justice Alito comments: "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." 576 U.S. at ___, 135 S. Ct. at 2642-43. Chief Justice Roberts states:

> "Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage -- when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. ... Unfortunately, people of faith can take no comfort

> in the treatment they receive from the majority today."

576 U.S. at ___, 135 S. Ct. at 2625-26. Justice Alito concludes: "By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas." 576 U.S. at ___, 135 S. Ct. at 2643.

Significantly, Obergefell is a more serious threat to religious liberty than the contraception and abortion decisions. Although Roe granted the mother immunity from prosecution for hiring an abortionist to kill her unborn child, Roe did not compel any medical professional, who conscientiously opposed the practice, to participate in an abortion. In 1973, in the wake of Roe, Congress passed the Church Amendments, which protect individuals and entities who receive certain federal funding from participating in abortion or sterilization procedures contrary to their "religious beliefs or moral convictions." 42 U.S.C. § 300a-7. Subsequent federal laws confirmed or expanded this protection. See Jody Feder, Cong. Research Serv., RS21428, The History and Effect of Abortion Conscience Laws (2005). Most states have adopted similar conscience-clause legislation. "[Forty-five] states

allow some health care providers to refuse to provide abortion services." Guttmacher Institute, State Policies in Brief: Refusing to Provide Health Services (July 1, 2015).[14]

Obergefell promises to breach the legal protections that have shielded believers from participating in acts hostile to their faith. As Chief Justice Roberts points out, the Obergefell majority piously declaims that people of faith may believe what they want and seek to persuade others, but it says nary a word about them practicing or exercising their faith as the Free Exercise Clause provides. A leading scholar of the Religion Clause states: "A right to believe a religion, but no right to act on its teachings, would be a hollow right indeed. Belief without practice was the conception of religious liberty that Oliver Cromwell offered to the Catholics of Ireland." Douglas Laycock, Religious Liberty and the Culture Wars, 2014 U. Ill. L. Rev. 839, 841 (2014). Cromwell stated that he would "'meddle not with any man's conscience,'" but that Catholics would not be permitted to say the mass. Id. at 841 n.3 (quoting Christopher Hill, God's

[14]http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf. (On the date this special writing was released, this information could be found at the preceding Web address.)

Englishmen: Oliver Cromwell and the English Revolution 121 (1970)).

Because the issuance of marriage licenses is a state function, the individuals in this State whose conscience rights are implicated by Obergefell and any implementing orders are the probate judges and their staffs. The "must issue" order of the federal district court in Mobile potentially requires those probate judges who conscientiously object to issuing faux marriage licenses to violate their consciences or suffer civil penalties of fines and contempt. See Strawser v. Strange, 105 F. Supp. 3d 1323 (S.D. Ala. 2015). Justice Thomas in his dissent spoke of these looming enforcement measures as "civil restraints" with "potentially ruinous consequences." 576 U.S. at ___, 135 S. Ct. at 2638-39. In his "Emergency Petition for Declaratory Judgment and/or Protective Order," Probate Judge Nick Williams echoed that concern, stating: "This Court must act to prevent the imprisonment and financial ruin of this state's probate judges who maintain fidelity to their oath of office and their faith."

Probate Judge John E. Enslen, realigned as a relator,

adopted in full Judge Williams's emergency filing and requested from this Court a forthright statement that Obergefell will not be allowed to impair his First Amendment rights under the Free Exercise Clause. He stated:

> "I, the undersigned, possess the following sincere religious beliefs which I hold sacred. I seek from this Court a pronouncement of the full range of available legal protections for my First Amendment Rights relating to my following sincerely held religious beliefs:
>
> "I believe that marriage was created by the Divine Creator of all mankind to be the sanctuary for the procreative act, regardless of whether or not said act results in the birth of children.
>
> "I believe that our Divine Creator, by revelations to his chosen prophets throughout the ages, has instructed and commanded mankind, who are his spiritual offspring, to abstain from procreative activities and pseudo-procreative activities of any type outside of the bounds of a natural marriage between a man and a woman. I believe that the complementary anatomy of the male and female body is a tactical revelation of that truth from our Divine Creator.
>
> "I believe that authentic marriage is a natural child-creating and natural child-rearing institution. I believe that as an institution, marriage should not be, and never has been, about satisfying the emotional needs of adults, and that marriage should not be reduced to a mere symbol of social inclusion.
>
> "I believe that over time the adverse ramifications and consequences of ignoring the foregoing Divine mandate will be irreversibly

> profound. I believe that children are this nation's most important asset, and that our laws should foster the ideal family life where biological parents rear their children, and our laws should make exceptions only where absolutely necessary due to unavoidable circumstances.
>
> "I believe that homosexuality is not an immutable physical or biological character trait disconnected from one's moral agency or ability to choose one's course of personal conduct and behavior.
>
> "I respectfully request this court to uphold my First Amendment Rights and thereby protect me from diversified litigious attacks against my rights to believe, teach, practice, share, and live my sincere religious beliefs, both in the public square and elsewhere. Unlike the new right of sodomy-based marriage, those First Amendment Rights were foundational to the original establishment of this nation, indeed conditional to the original establishment of this nation, and have priority over other rights newly created by federal judicial fiat."

As Judge Enslen explains, the Free Exercise Clause, an express constitutional provision, logically takes precedence over a pretended constitutional right formulated from whole cloth by "five lawyers," as Chief Justice Roberts termed them, Obergefell, 576 U.S. at ___, 135 S. Ct. at 2612, 2624 (Roberts, C.J., dissenting), who have embarked on an unauthorized frolic in the field of public policy.

The Virginia Act for Establishing Religious Freedom

further explained:

> "[T]he proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right ...."

12 Hening, Statutes, at 85. If the natural tendency of Obergefell is to mandate that no citizen with religious scruples against same-sex marriage can hold the office of probate judge in Alabama, then that citizen has been deprived of "those privileges and advantages to which in common with his fellow-citizens he has a natural right."

After the ruling in Obergefell was announced, the entire staff of a Tennessee County Clerk's Office resigned to avoid violating their Christian convictions. A county clerk in Mississippi likewise resigned rather than issue marriage licenses to same-sex couples. Nicole Hensley, Entire Tennessee County Clerk Staff Resigns over Supreme Court's Gay Marriage Decision, N.Y. Daily News, July 4, 2015.[15] Here in Alabama some probate judges stopped issuing all marriage licenses. In

[15]http://www.nydailynews.com/news/national/tenn-county-clerk-staff-resigns-gay-marriage-ruling-article-1.2281567. (On the date this special writing was released, this information could be found at the preceding Web address.)

Kentucky a county clerk, who decided in the wake of Obergefell to cease issuing all marriage licenses, was ordered by a federal district judge to issue marriage licenses to same-sex couples in violation of her religious principles. Miller v. Davis (No. 15-44-DLB, Aug 12, 2015) (E.D. Ky. 2015). A chaplain at a Kentucky Juvenile Detention Center, after 12 years of ministering to juveniles, was banned from the facility because he would not agree to abide by a regulation that prohibits mentioning that homosexuality is a sin. Todd Starnes, The Christian Purge has Begun: Chaplains Banned from Preaching that Homosexuality is a Sin, FoxNews.com, Aug. 11. 2015.[16]

> As James Madison stated in 1785:
>
> > "[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle."

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[16]http: //www.foxnews.com/opinion/2015/08/11/chaplains-banned-from-preaching-that-homosexuality-is-sin.html. (On the date this special writing was released, this information could be found at the preceding Web address.)

"A Memorial and Remonstrance," in 1 Letters and Other Writings of James Madison 163 (1865) ("Letters and Writings"). Joining a decision to repudiate the Fugitive Slave Act, Justice Abram Smith of the Wisconsin Supreme Court expressed similar sentiments: "It is much safer to resist unauthorized and unconstitutional power, at its very commencement, when it can be done by constitutional means, than to wait until the evil is so deeply and firmly rooted that the only remedy is revolution." In re Booth, 3 Wis. 157, 201 n.a1 (1854) (Smith, J., concurring), rev'd sub nom. Abelman v. Booth, 62 U.S. 506 (1858).[17]

Foreseeing the dire consequences for religious freedom in the principle that same-sex marriage must be given equal stature with holy matrimony and foreseeing the inevitable pressure to compel religious institutions, businesses, and practitioners of professions to conform to that unreality, it would be imprudent to wait for the onset of these persecutions, to stand idle until Obergefell's "usurped power had strengthened itself by exercise, and entangled the

[17]Booth was an abolitionist whom federal authorities charged with assisting in the escape of a captured fugitive slave. The Wisconsin Supreme Court affirmed the issuance of a writ of habeas corpus to release Booth from federal custody.

question in precedents." Rather "the axe [must be] laid unto the root of the trees," Matthew 3:10, and the consequence avoided by denying the principle. To allow a simple majority of the United States Supreme Court to "create" a constitutional right that destroys the religious liberty guaranteed by the First Amendment violates not only common sense but also our duty to the Constitution.

V. The Supreme Law of the Land

Less than two weeks after Obergefell was released, the Louisiana Supreme Court relied on it to determine that the Louisiana law defining marriage as the union of a man and a woman could no longer be enforced. Costanza v. Caldwell, 167 So. 3d 619 (La. 2015). The Louisiana court stated that United States Supreme Court opinions "'must be obeyed in order to maintain the law in its majesty of final decision.'" Id. at 621 (quoting State v. Nichols, 216 La. 622, 633, 44 So. 2d 318, 321 (1950)). One Justice concurred but only because "I am constrained to follow the rule of law set forth by a majority of the nine lawyers appointed to the United States Supreme Court." 167 So. 3d at 622 (Knoll, J., additionally concurring) (emphasis added). That Justice vigorously expressed her

disagreement:

> "This is not a constitutionally-mandated decision, but a super-legislative imposition of the majority's will over the solemn expression of the people evidenced in their state constitutional definitions of marriage.
>
> "Moreover, the five unelected judges' declaration that the right to marry whomever one chooses is a fundamental right is a mockery of those rights explicitly enumerated in our Bill of Rights. Simply stated, it is a legal fiction imposed upon the entirety of this nation because these five people think it should be. ...
>
> "It is a sad day in America when five lawyers beholden to none and appointed for life can rob the people of their democratic process .... I wholeheartedly disagree and find that, rather than a triumph of constitutionalism, the opinion of these five lawyers is an utter travesty as is my constrained adherence to their 'law of the land' enacted not by the will of the American people but by five judicial activists."

Id. (emphasis added).

I appreciate this Justice's critique of Obergefell, which parallels those of its four dissenters. Although this critique is devastating, I disagree with the conclusion that the "rule of law" requires judges to follow as the "law of the land" a precedent that is "a super-legislative imposition," "a mockery," "a legal fiction," and "an utter travesty."[18]

[18]One Justice indeed dissented outright and stated: "Marriage is not only for the parties. Its purpose is to

A. Do Supreme Court Decisions Automatically Become the "Law of the Land"?

Does an opinion of the United States Supreme Court, like Obergefell, which blatantly affronts the Constitution, automatically become the "rule of law" and the "law of the land?" Sir William Blackstone's Commentaries on the Laws of England became the "manual of almost every student of law in the United States"[19] during this nation's formative years. Blackstone stated that "the law, and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law." 1 Commentaries *71. Blackstone understood that judges may make mistakes, but in Obergefell, according to the forceful dissents, the majority did not merely make a mistake of law, but instead judged not by the law, but by their own will. As Alexander Hamilton stated: "[I]f [the courts] should be disposed to exercise WILL instead of JUDGMENT, the

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provide children with a safe and stable environment in which to grow. It is the epitome of civilization. Its definition cannot be changed by legalisms." Costanza, 167 So. 3d at 624 (Hughes, J., dissenting).

[19]James Iredell's Charge to the Grand Jury, Case of Fries, 9 Fed. Cas. 826, no. 5, 126 (C.C.D. Pa. 1799). Iredell served as a Justice of the United States Supreme Court from 1790 to 1799.

consequence would equally be the substitution of their pleasure to that of the legislative body." The Federalist No. 78, at 526.

Article VI, ¶ 2, of the United States Constitution defines "the supreme law of the land."

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding."

By the plain language of Article VI, state judges are bound to obedience to the Constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, not to the opinions of the United States Supreme Court.[20] Justice Joseph Story stated: "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws." Swift v. Tyson, 41

[20]"Senators and Representatives [of the United States], and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution." U.S. Const., art. VI, ¶ 3 (emphasis added).

U.S. (16 Pet.) 1, 18 (1842), overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

Alexander Hamilton, surely an authority on the Constitution, responding to arguments that the Supremacy Clause would allow the new national government to trample on the rights of the states, put the matter very plainly: "If a number of political societies enter into a larger political society," he wrote, "the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed." The Federalist No. 33, at 207 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added). But if those powers were abused, the corresponding laws were not supreme.

> "But it will not follow from this doctrine that acts of the large society which are not pursuant to its constitutional powers but which are invasions of the residuary authorities of the smaller societies will become the supreme law of the land. These will be merely acts of usurpation and will deserve to be treated as such."

Id. Hamilton emphasized: "It will not, I presume, have escaped observation, that [the Supremacy Clause] expressly confines this supremacy to laws made pursuant to the constitution ...."

Id. Thus, in the plainest terms and employing emphasis, Hamilton declared that acts of the federal government that invade the reserved rights of the states are "acts of usurpation" that deserve to be treated as such. Such acts "would not be the supreme law of the land, but an usurpation of power not granted by the Constitution." The Federalist No. 33, at 208.

The Supremacy Clause, quite obviously, by this chain of reasoning, does not give the United States Supreme Court or any other agency of the federal government the authority to make its every declaration by that very fact the supreme law of the land. If the Court's edicts do not arise from powers delegated to the federal government in the Constitution, they are to be treated not as the supreme law of the land but as mere usurpation. Hamilton offered an example of an invasion of the reserved powers of the states that is very close to the pretense of authority set forth in the opinion of the Obergefell majority.

> "Suppose by some forced constructions of its authority (which indeed cannot easily be imagined) the Federal Legislature should attempt to vary the law of descent in any State; would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?"

The Federalist No. 33, at 206. The laws of inheritance are inseparable from those laws that define the family and in particular the marital relationship. Writing in 1788, over two centuries before Obergefell, Hamilton understandably could not easily imagine the "forced constructions" of federal authority in that case that altered the very definition of marriage. But his example from the law of descent, intended to illustrate an absurdity, makes it clear that Obergefell is an act of usurpation that "will deserve to be treated as such."

Nevertheless, so as not to be misunderstood, I emphasize that judges are ordinarily obligated to regard the opinions of the high court as valid precedent that should be followed. Blackstone eloquently stated the general rule that judges are to follow precedent:

> "For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, has now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine not according to his own private judgments, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."

1 Commentaries *69. But he also stated a vital exception to that rule.

> "Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law ...."

Id. *69-70 (some emphasis added). Thus, if precedents are "manifestly absurd or unjust," "contrary to reason," or "contrary to the divine law," they are not to be followed.

Applying Blackstone's analysis, which is compatible with that of Hamilton, one must conclude that the Obergefell opinion is manifestly absurd and unjust, as demonstrated convincingly by the four dissenting Justices in Obergefell and the writings of two Justices of the Louisiana Supreme Court in Costanza. Basing its opinion upon a supposed fundamental right that has no history or tradition in our country,[21] the opinion of the Obergefell majority is "contrary to reason" as well as "contrary to the divine law." See Murphy v. Ramsey, 114 U.S.

[21]See Windsor v. United States, 699 F.3d 169, 188 (2d Cir. 2012), aff'd, 570 U.S. ___, 133 S. Ct. 2675 (2013) (noting that "same-sex marriage is unknown to history and tradition").

at 45 (defining "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony" (emphasis added)); Smith v. Smith, 141 Ala. 590, 592, 37 So. 638, 638 (1904) (describing marriage as a "sacred relation"); Goodrich v. Goodrich, 44 Ala. 670, 675 (1870) (quoting a treatise for the proposition that "'"[t]he relation of marriage is founded on the will of God, and the nature of man"'" (quoted in API, ___ So. 3d at ___)).[22] The Obergefell opinion, being manifestly absurd and unjust and contrary to reason and divine law, is not entitled to precedential value.

B. The Military Analogy: The Duty to Disregard Illegal Orders

I took my first oath to support the Constitution of the United States in 1965 at the United States Military Academy on the banks of the Hudson River at West Point, New York. On this very site General George Washington defended the northwest territory against British invasion during the Revolutionary War. I repeated that oath many times during my military

[22]"Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." Genesis 2:24. "Marriage is honourable in all, and the bed undefiled: but whoremongers and adulterers God will judge." Hebrews 13:4.

service in Western Europe, Vietnam, and locations in the continental United States. Following my military service and upon graduation from the University of Alabama School of Law, I again took an oath to "uphold and support" the United States Constitution. As a private practitioner, deputy district attorney, circuit judge, and Chief Justice of the Alabama Supreme Court on two separate occasions, I took that oath and have administered it to other Judges, Justices, Governors, and State and local officials. In both civilian and military life the oath of loyalty to the Constitution is of paramount importance.

Although the United States military depends for its effectiveness on obedience to the chain of command, the principle that a subordinate has a duty to resist illegal orders is also well established. The duty to obey the orders of a superior is absolute "unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful." United States Manual for Courts-Martial, Part II Rules for Courts-Martial, Chapter IX, Rule 916(d) ("Obedience to orders"). The oath I took as a cadet at the United States Military Academy at West

Point stated, in part, "that I will at all times obey the legal orders of my superior officers, and the Uniform Code of Military Justice." 57 Bugle Notes, at 5 (1965) (emphasis added). Later, as a company commander in Vietnam, I knew the importance of following orders. The success or failure of a mission and the lives of others depended on strict adherence to the chain of command. The principle of obedience to superior orders is also crucial to the proper functioning of a court system. Nevertheless, the principle of obedience to superior officers is based on the premise that the order given is a lawful one.

At his court-martial, Lt. William Calley, a unit commander at My Lai in Vietnam who was convicted of killing 22 innocent civilians, defended himself by claiming that he was following the orders of his superior, Captain Ernest Medina. The military tribunal that considered Lt. Calley's appeal rejected his superior-order defense on the ground that the order he claimed to be following was clearly unlawful. Even if Lt. Calley had acted in obedience to orders, "he would nevertheless not automatically be entitled to acquittal. Not every order is exonerating". United States v. Calley, 46

C.M.R. 1131, 1183 (1973). "Military effectiveness depends upon obedience to orders. On the other hand the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person." United States v. Calley, 48 C.M.R. 19, 26 (1973) (emphasis added).

> "'[T]he only exceptions recognized to the rule of obedience are cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness ....
>
> "'Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly ....'"

Calley, 48 C.M.R. at 28 (quoting William Winthrop, Military Law and Precedents 296-97 (2d ed. 1920 Reprint) (emphasis added)).

The same principle, engraved on a plaque at Constitution Corner at West Point, states: "Our American Code of Military Obedience requires that, should orders and the law ever conflict, our officers must obey the law. Many other nations have adopted our principle of loyalty to the basic law." Lt. Calley's conviction confirmed that the basic law remained

intact. The same plaque in Constitution Corner reiterates this point even more emphatically: "The United States boldly broke with the ancient military custom of swearing loyalty to a leader. Article VI required that American Officers thereafter swear loyalty to our basic law, the Constitution."

Over 150 years ago, Justice Abram Smith of the Wisconsin Supreme Court, addressing the Fugitive Slave Act, 9 Stat. 462, expressed the same sentiment. Acknowledging his oath of loyalty under Article VI to uphold the Constitution, Justice Smith stated that "the duty of the [states] to watch closely and resist firmly every encroachment of the [federal government] becomes every day more and more imperative, and the official oath of the functionaries of the states becomes more and more significant." In re Booth, 3 Wis. 1, 24 (Smith, J.). Justice Smith recognized that state judges have a duty to resist unconstitutional federal usurpations of power:

> "But believing as I do, that every state officer who is required to take an oath to support the Constitution of the United States as well as of his own state, was designedly placed by the federal constitution itself as a sentinel to guard the outposts as well as the citadel of the great principles and rights which it was intended to declare, secure and perpetuate, I cannot shrink from the discharge of the duty now devolved upon me. I know well its consequences, and appreciate fully the

> criticism to which I may be subjected. But I believe most sincerely and solemnly that the last hope of free, representative and responsible government rests upon the state sovereignties and fidelity of state officers to their double allegiance, to the state and federal government; and so believing, I cannot hesitate in performing a clear, an indispensable duty."

In re Booth, 3 Wis. at 22-23. President Andrew Jackson made the same point: "Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others." "Veto Message, July 10, 1832," 3 A Compilation of the Messages & Papers of the Presidents 1145 (James D. Richardson ed., 1897).

If, as an individual who is sworn to uphold and support the United States Constitution, I were to place a court opinion that manifestly and palpably violates the United States Constitution above my loyalty to that Constitution, I would betray my oath and blatantly disregard the Constitution I am sworn to uphold. Acquiescence on my part to acts of "palpable illegality" would be an admission that we are governed by the rule of man and not by the rule of law. Simply put, the Justices of the Supreme Court, like every American soldier, are under the Constitution, not above it. James Madison warned that "the judicial department, also, may

exercise or sanction dangerous powers beyond the grant of the Constitution." Madison's Report on the Virginia Resolutions, in 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 549 (Jonathan Elliot ed., 1836) (hereinafter "Elliot's Debates"). As Chief Justice John Marshall explained in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179-80 (1803): "[T]he framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it?" One scholar plainly states: "The courts are constitutional agents, and as such occupy an inferior position to the Constitution itself." Edward J. Erler, Sowing the Wind: Judicial Oligarchy and the Legacy of Brown v. Board of Education, 8 Harv. J.L. & Pub. Pol'y 399, 408 (1985).

In the Dred Scott case, "the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied right of slaveholders." Obergefell, 576 U.S. at ___, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)). The Court's holding that blacks

could not be American citizens certainly was absurd and unjust, but no less so than the holding in Obergefell that "marriage" can now be defined as the union of two persons of the same gender.

C. Abraham Lincoln and the Limits of Judicial Power

In his First Inaugural Address, President Abraham Lincoln stated that the "evil effect" of an erroneous Supreme Court decision is bearable because the effects are limited to that one case:

> "I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice."

Letters and Addresses of Abraham Lincoln 195-96 (H.W. Bell ed., 1903) (emphasis added). The idea that Supreme Court decisions instantly become the "law of the land," however, he considered to be not only erroneous, but also dangerous to free government:

> "At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

Id. at 196 (emphasis added).

Unless, as Lincoln taught, the "evil effect" of Obergefell is limited to the parties in that case, the people "have ceased to be their own rulers," having surrendered their government into the hands of a majority on the United States Supreme Court. As Justice Scalia states: "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." 576 U.S. at ___, 135 S. Ct. at 2627. Justice Ruth Bader Ginsburg, one of that majority, was quoted in a subsequent interview as candidly admitting that the Supreme Court in Obergefell intended to make or "establish" the law. The report of the interview quotes her as stating: "The law that the Supreme Court establishes is the law that [judges, lawyers, and the public] must live by ...." Samantha Lachman & Ashley Alman, Ruth Bader Ginsburg Reflects on a Polarizing

Term One Month Out, HuffingtonPost.com (July 29, 2015).[23] But, as stated above, the Supreme Court does not make law. That power belongs to legislatures or to the formal processes for enacting and amending constitutions.

Indeed, the Supreme Court in recent history has emphasized Lincoln's observation that judicial power is the power to decide particular cases, not to make general law. As envisioned by the Constitution, "[t]he Judiciary would be, 'from the nature of its functions, ... the [department] least dangerous to the political rights of the constitution' ... because the binding effect of its acts was limited to particular cases and controversies." Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 223 (1995) (emphasis added) (quoting The Federalist No. 78, at 522). Indeed, Hamilton considered the judiciary to be the "least dangerous" branch and the damage caused by judicial overreaching to be inherently limited precisely because the impact of its decisions was confined to the case before it. "Thus, 'though individual oppression may now and then proceed from the courts of

[23]http://www.huffingtonpost.com/entry/ruth-bader-ginsburg-tk_55b97c68e4b0b8499b18536b. (On the date this special writing was released, this information could be found at the preceding Web address.)

justice, the general liberty of the people can never be endangered from that quarter: ... so long as the judiciary remains truly distinct from both the legislative and executive.'" Plaut, 514 U.S. at 223 (quoting The Federalist No. 78, at 523). The presumption of the Obergefell majority to legislate for the entire nation on a "vital question" by making a decision in a particular case is exactly the assumption of legislative power that Hamilton warned would endanger "the general liberty of the people" and Lincoln identified with the demise of self-government.

D. The Fallacy of Judicial Supremacy

The general principle of blind adherence to United States Supreme Court opinions as "the law of the land" is a dangerous fallacy that is inconsistent with the United States Constitution.[24] Labeling such opinions as "the rule of law"

[24]Justice Shaw's concurrence reflects his errant judicial philosophy of blind adherence to an unlawful, illegitimate, and unconstitutional decision of the United States Supreme Court. Because Justice Shaw was the only Justice in this case who declined to affirm the validity of the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act before the United States Supreme Court decision in Obergefell, and thereafter recommended to this Court that it take no further official action in this case, even after this Court requested further briefing from the parties, he is understandably upset that this Court now proceeds to act.

confuses the law itself -- the Constitution -- with an opinion that purports to interpret that document.

Article VI, by its plain terms, binds "the judges in every state" to obedience to the Constitution itself, not to unconstitutional and illegitimate opinions of the United States Supreme Court. Just as the little boy in Hans Christian Andersen's tale pointed out that the Emperor, contrary to the assertions of his courtiers, was actually stark naked,[25] so also the "judges in every state" are entitled to examine Supreme Court opinions to see if they are clothed in the majesty of the law of the Constitution itself rather than in naked propositions of men with no cognizable covering from that document. As one political scientist observed: "[N]o fiction, however noble, can forever cloak a philosopher king with moral respectability. Soon or late, it seems, his nakedness appears; then we must begin again the struggle for law -- for government by something more suitable than the will of those who for the moment hold high office." Wallace Mendelson, Sex and the Singular Constitution: What Remains of Roe v. Wade?, 26 PS: Political Science and Politics 206, 208

[25]"The Emperor's New Clothes," in The Annotated Hans Christian Andersen 3-16 (Maria Tatar ed., 2008).

(1993).

The proposition that judgments of the United States Supreme Court are to be obeyed unquestioningly by a lower court regardless of their nonadherence to the Constitution, is known as the doctrine of judicial supremacy. A Princeton professor explains: "Judicial supremacy largely consists of the ability of the Supreme Court to erase the distinction between its own opinions interpreting the Constitution and the actual Constitution itself." Keith E. Whittington, Political Foundations of Judicial Supremacy xi (2007). By this alchemy the Court becomes the Constitution, and the actual content of the written charter becomes irrelevant except as literary decoration for its opinions.[26] "The constitutional text itself often plays only a subordinate role [in deciding cases]." Henry Paul Monaghan, Supremacy Clause Textualism, 110 Columbia L. Rev. 731, 793 (2010). This miracle of transforming Court opinions into constitutional substance "supposes a kind of transubstantiation whereby the Court's opinion of the

[26]Justice Abe Fortas, for example, according to one of his clerks, viewed legal analysis as a "necessary form of packaging that had to be provided for things he wanted to do." Laura Kalman, Abe Fortas: A Biography 271 (1990). After revising one memorandum, Fortas returned it to his clerk with the brief order: "Decorate it." Id. at 271-72.

Constitution ... becomes the very body and blood of the Constitution." Edward S. Corwin, Court Over Constitution 68 (1938). A political science professor states: "A formal constitutional oath to uphold the Constitution amounts, then, to an oath to follow the Court. This mirrors the subversion of the written Constitution: what began as a written fundamental law visible to all is translated into the ancient equivalent of legal french for the schooled few." George Thomas, The Madisonian Constitution 37 (2008).

Opinions of the Supreme Court that interpret the Constitution are, as Lincoln said, "entitled to very high respect and consideration," but only insofar as they are faithful to that document. In a case like Obergefell, the "evil effects" Lincoln described should be confined to the unfortunate defendants in that case. We must protect the institution of marriage from judicial subversion and maintain loyalty to the principles upon which our nation was founded. Justice Sandra Day O'Connor, the first woman on the United States Supreme Court, stated: "A nation that docilely and unthinkingly approved every Supreme Court decision as infallible and immutable would, I believe, have severely

disappointed our founders." The Majesty of the Law: Reflections of a Supreme Court Justice 45 (2003).

Finally, we should reject the conversion of our republican form of government into an aristocracy of nine lawyers. Speaking at the North Carolina ratification convention in 1788, James Iredell, soon to be a Supreme Court Justice, explained that the Guarantee Clause[27] was placed in the Constitution so that "no state should have a right to establish an aristocracy or monarchy." 4 Elliot's Debates, at 195. If the Guarantee Clause is offended by a state's abandoning representative government, how much more is it offended by the judicial branch of the national government imposing an aristocratic form of government on every state in the union? The colonists, we should remember, charged King George III with "altering fundamentally the Forms of our Governments." Declaration of Independence para. 2.

E. Did Obergefell Automatically Abrogate the March 2015 Orders in this Case?

Lincoln taught that an order of the Supreme Court was limited to the parties in the case before the Court; beyond

[27]"The United States shall guarantee to every State in this Union a Republican Form of Government ...." U.S. Const., art. IV, § 4.

that it served merely as precedent. He agreed that Dred Scott as a judicial judgment bound the parties to that case, but cautioned against granting it any broader scope. Likewise, following Lincoln's admonition, the ruling in Obergefell bound only the parties before the Court in that case.[28]

Some contend, however, that Obergefell, by its mere existence, abrogates the March 2015 orders in this case. Those orders, of course, were not the subject of review in Obergefell. On October 20, 2015, a panel of the United States Court of Appeals for the Eleventh Circuit summarily affirmed the order of the United States District Court for the Southern District of Alabama "requiring the issuance of marriage licenses to same-sex couples." Strawser v. State (No. 15-12508-CC, Oct. 20, 2015) (11th Cir. 2015). "Since the filing

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[28]Justice Shaw terms my arguments about the scope of federal court decisions "silly" and "nonsensical." ___ So. 3d at ___. His comments demean the office he holds and diminish the dignity of this Court. He fails to distinguish between the scope of a federal court judgment and the precedential effect of a federal court opinion. The first is binding as to the parties; the latter is only precedent for future cases and is legitimately subject to skepticism if it lacks any basis in the Constitution. The doctrine of judicial supremacy, as propounded by Justice Shaw, would remove all moral responsibility from judges, whose sole duty would be to follow the orders of their superiors. Nuremberg has taught the perniciousness of such a doctrine.

of this appeal," the Eleventh Circuit stated, "the Alabama Supreme Court's order was abrogated by the Supreme Court's decision in Obergefell v. Hodges ...." Id. That conclusion is plainly wrong.

For example, the United States Court of Appeals for the Eighth Circuit recently ruled that Obergefell did not directly invalidate the marriage laws of states under its jurisdiction. Applying Obergefell as precedent, the Eighth Circuit rejected the Nebraska defendants' suggestion that Obergefell mooted the case. The Eighth Circuit stated: "The [Obergefell] Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee -- not Nebraska." Waters v. Ricketts, 798 F.3d 682, 685 (8th Cir. 2015) (emphasis added). In two other cases the Eighth Circuit repeated its statement that Obergefell directly invalidated the laws of only the four states in the Sixth Circuit. See Jernigan v. Crane, 796 F.3d 976, 979 (8th Cir. 2015) ("not Arkansas"); Rosenbrahn v. Daugaard, 799 F.3d 918, 922 (8th Cir. 2015) ("not South Dakota"). The United States District Court for the District of Kansas was even more explicit: "'While Obergefell is clearly controlling Supreme Court precedent,' it 'did not directly strike down the provisions of

the Kansas Constitution and statutes that bar the issuance of same-sex marriage licenses ....'" Marie v. Mosier, [No. 14-cv-02518-DDC-TJJ, August 10, 2015] ___ F. Supp. 3d ___ (D. Kan. 2015). Rejecting the Kansas defendants' claim that Obergefell mooted the case, the district court stated that "Obergefell did not rule on the Kansas plaintiffs' claims." Id.

The opinion of the Obergefell majority initially agreed with this analysis, holding that "the State laws challenged by Petitioners in these cases are now held invalid." 576 U.S. at ___, 135 S. Ct. at 2605 (emphasis added). Toward the end of its opinion, however, the majority presumed to make its edict apply to the entire nation. "The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States." 576 U.S. at ___, 135 S. Ct. at 2607 (emphasis added). But that holding is beyond its authority and should be regarded as dicta. As Lincoln observed in his first Inaugural Address and as Hamilton instructed in Federalist No. 78, a judicial decision is not a legislative enactment; it binds only the parties to the case. "Courts do not write legislation for members of the public at large; they frame

decrees and judgments binding on the parties before them." Additive Controls & Measurement Sys. v. Flowdata, Inc., 96 F.3d 1390, 1394 (Fed. Cir. 1996). The Court had no jurisdiction to order nonparties to Obergefell to obey its judgment for they have not had an opportunity to appear and defend. "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." Martin v. Wilks, 490 U.S. 755, 762 (1989). Judge Learned Hand stated:

> "[N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen,[29] and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court."

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930) (emphasis added).

Rule 65 of the Federal Rules of Civil Procedure, which governs the scope of the district court injunctions that were

[29]"Pro tanto brutum fulmen" means "to that extent," "an empty threat." Black's Law Dictionary 234, 1417 (10th ed. 2014).

under review in Obergefell, states, in part:

> "(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:
>
> "(A) the parties;
>
> "(B) the parties' officers, agents, servants, employees, and attorneys; and
>
> "(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)."

Rule 65(d)(2), Fed. R. Civ. P. (emphasis added). No Alabama probate judges were parties to Obergefell. Neither were they officers, agents, or servants of any of the defendants in those cases, or in active concert or participation with any of them. The Obergefell defendants were state officials in the four states in the jurisdiction of the United States Court of Appeals for the Sixth Circuit, namely Kentucky, Michigan, Ohio, and Tennessee. Needless to say, Alabama probate judges were not agents, servants, or employees of any of those state officials. Nor were they in "active concert or participation" with any of them. Thus, the judgment in Obergefell that reversed the Sixth Circuit's judgment does not constitute an order to Alabama probate judges.

Accordingly, the Eleventh Circuit was incorrect to hold

that Obergefell abrogated the March orders in this case. Furthermore, this Court is "'not bound by the decisions of the Eleventh Circuit.'" API, ___ So. 3d at ___ (quoting Ex parte Hale, 6 So. 3d 452, 458 n.5 (Ala. 2008)). "Legal principles and holdings from inferior federal courts have no controlling effect here ...." API, ___ So. 3d at ___ (quoting Glass v. Birmingham So. R.R., 905 So. 2d 789, 794 (Ala. 2004)). In a 1991 case, the United States Court of Appeals for the Ninth Circuit adopted a different position, holding that federal district court decisions did not bind state courts but that the decisions of the federal courts of appeal most likely did. "[T]here may be valid reasons not to bind the state courts to a decision of a single federal district judge -- which is not even binding on the same judge in a subsequent action -- that are inapplicable to decisions of the federal courts of appeals." Yniguez v. State of Ariz., 939 F.2d 727, 736-37 (9th Cir. 1991). On review, the United States Supreme Court termed this statement "a remarkable passage" and contrasted it with the following:

> "But cf. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ('state courts ... possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions

> that rest on their own interpretations of federal law'); Lockhart v. Fretwell, 506 U.S. 364, 375-376 (1993) (Thomas, J., concurring) (Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law)."

Arizonans for Official English v. Arizona, 520 U.S. 43, 58 n.11 (1997). The Chief Judge of the Eleventh Circuit noted this commentary. Citing Arizonans, he stated: "The Supreme Court has rejected and disparaged as 'remarkable' a passage from a Ninth Circuit opinion saying that state courts are bound to follow rulings of the federal court of appeals in the circuit in which they are located." Hittson v. GDCP Warden, 759 F.3d 1210, 1278 (11th Cir. 2014) (Carnes, J., concurring). Acknowledging that federal and state courts have independent and parallel obligations to interpret federal law, he stated: "[I]t is not the role of inferior federal courts, of which we are one, to sit in judgment of state courts on issues of federal law .... We have no more right to lecture state courts about federal law than they have to lecture us about it." Id. See also Powell v. Powell, 80 F.3d 464, 467 (11th Cir. 1996) (noting "the dual dignity of state and federal court decisions interpreting federal law"). As the United States Supreme Court explained in ASARCO v. Kadish, 490 U.S. 605, 617 (1989):

"Indeed, inferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that 'the Judges in every State shall be bound' by federal law. U.S. Const., art. VI, cl. 2." 490 U.S. at 617.

For the above reasons, the Eleventh Circuit is incorrect that Obergefell abrogated the March 2015 orders in this case. Additionally, a ruling of the Eleventh Circuit has no binding effect on this Court.

VI. Conclusion

The dissents of Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito provide ample justification to refuse to recognize Obergefell as a legitimate judicial judgment. Obergefell constitutes an unlawful purported amendment of the Constitution by a judicial body that possesses no such authority. As Chief Justice Roberts stated: "The right [Obergefell] announces has no basis in the Constitution or this Court's precedent." 576 U.S. at ___, 135 S. Ct. at 2612.

In 1785, James Madison, widely recognized as the chief architect of the Constitution and who would later become the fourth President of the United States, wrote to the Virginia

Assembly:

> "The preservation of a free Government requires, not merely that the metes and bounds which separate each department of power may be invariably maintained, but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The people who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves"

"A Memorial and Remonstrance," in 1 Letters and Other Writings of James Madison 163 (1865). In Obergefell, a bare majority of five Justices in the face of four vigorous and vehement dissents violated both requirements for "[t]he preservation of a free government." Rather than limiting themselves to the judicial function of applying existing law to the facts and parties before them, the Obergefell majority violated "the metes and bounds which separate each department of power" by purporting to rewrite the marriage laws of the several states to conform to their own view of marriage. Condemning this usurpation of the legislative function, Chief Justice Roberts in an adamant dissent explained that "this Court is not a legislature." 576 U.S. at ___, 135 S. Ct. at 2611. "Five lawyers," he lamented, "have closed the debate and enacted

their own vision of marriage as a matter of constitutional law." 576 U.S. at ___, 135 S. Ct. at 2612.

Even more injurious to the rule of law, the Obergefell majority "overleap[ed] the great Barrier which defends the rights of the people" as expressed in the Free Exercise Clause of the First Amendment. The majority thus has jeopardized the freedom to worship God according to the dictates of conscience and the right to acknowledge God as the author and guarantor of true liberty. Justice Thomas in his dissent explained: "Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect." 576 U.S. at ___, 135 S. Ct. at 2638. Justice Joseph Story further explained: "The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as of revealed religion." 2 Joseph Story, Commentaries on the Constitution § 1876 (2d ed. 1851).

A vivid example of the practical effect of the unwarranted trampling of rights of conscience by the

Obergefell majority is the jailing of a Kentucky county clerk for adhering to her religious conviction that God has ordained marriage as an institution that unites only a man and a woman. She stated: "To issue a marriage license which conflicts with God's definition of marriage, with my name affixed to the certificate, would violate my conscience." Statement of Kentucky Clerk Kim Davis, Sept. 1, 2015.[30]

By transgressing "the metes and bounds which separate each department of power" and "overleap[ing] the great Barrier" which protects the rights of conscience, the Obergefell majority "exceed[s] the commission from which they derive their authority" and are "tyrants." By submitting to that illegitimate authority, the people, as Madison stated, become slaves. Free government, rather than being preserved, is destroyed.

Obergefell itself is the corrupt descendant of the Court's lawless sexual-freedom opinions that hearken back to Griswold -- a "derelict in the stream of the law," State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451, 457 (1962). The

[30]http: //www.lc.org/newsroom/details/statement-of-kentucky-clerk-kim-davis-1. (On the date this special writing was released, this information could be found at the preceding Web address.)

great irony of the Supreme Court's embrace of the homosexual campaign to redefine marriage is that the homosexual movement has embraced marriage only for the purpose of destroying it. The ultimate goal of that movement is to drive the nation into a wasteland of sexual anarchy that consumes all moral values.

Obergefell is completely without constitutional authority, a usurpation of state sovereignty, and an effort to impose the will of "five lawyers," as Chief Justice Roberts stated, 576 U.S. at ___, ___, 135 S. Ct. 2612, 2624, on the people of this country. Indeed, the Obergefell majority even presumes to override the Federal Rules of Civil Procedure, which limit the applicability of injunctions to parties, their agents, and those acting in concert with them.

Our forefathers would not have stood idly by to watch our liberties destroyed and our Constitution violated. James Madison stated in 1785 that "it is proper to take alarm at the first experiment on our liberties. ... We revere this lesson too much, soon to forget it." "A Memorial and Remonstrance," in 1 Letters and Writings, at 163. I believe that in the Obergefell opinion and the response of many to it, we may have forgotten that lesson sooner than we ought.

In my legal opinion, Obergefell, like Dred Scott and Roe v. Wade that preceded it, is an immoral, unconstitutional, and tyrannical opinion. Its consequences for our society will be devastating, and its elevation of immorality to a special "right" enforced through civil penalties will be completely destructive of our religious liberty.

Why immoral?

> Because it elevates into a fundamental right that which was historically regarded by our law as "the infamous crime against nature," which fundamental right Justice Scalia ironically observes was "overlooked by every person alive at the time of ratification, and almost everyone else in the time since." 576 U.S. at ___, 135 S. Ct. at 2629.

Why unconstitutional?

> Because "the Constitution ... had nothing to do with it," 576 U.S. at ___, 135 S. Ct. at 2626 (Roberts, C.J., dissenting), and because it is a "distortion of our Constitution" that "ignores the text" of the Constitution. 576 U.S. at ___, 135 S. Ct. at 2631 (Thomas, J., dissenting).

Why tyrannical?

> Because the Obergefell opinion "shows that decades of attempts to restrain this Court's abuse of its authority have failed," 576 U.S. at ___, 135 S. Ct. at 2643 (Alito, J., dissenting), and because Obergefell "will be used to vilify Americans who are unwilling to assent to the new orthodoxy" and "exploited by those who are determined to stamp out every vestige of dissent." 576 U.S. at ___, 135 S. Ct. at 2642 (Alito, J., dissenting).

In addition, Obergefell contradicts "the Laws of Nature and of Nature's God" that were invoked in the organic law upon which our country is founded. Declaration of Independence para. 1. To invariably equate a Supreme Court decision that clearly contradicts the Constitution with "the rule of law" is to elevate the Supreme Court above the Constitution and to subject the American people to an autocracy foreign to our form of government. Supreme Court Justices are also subject to the Constitution. When "that eminent tribunal" unquestionably violates the limitations set forth in that document, lesser officials -- equally bound by oath to the Constitution -- have a duty to recognize that fact or become guilty of the same transgression.

> "'[T]he central principle of a free society [is] that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from ... the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.'"

State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 n.1 (Ala. 1999) (quoting United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 77 (1988)).

In face of the lawlessness of the Obergefell majority, I

agree with the dissenting opinion of Chief Justice Roberts: "If you are among the many Americans ... who favor expanding same-sex marriage, by all means celebrate today's decision. ... But do not celebrate the Constitution. It had nothing to do with it." 576 U.S. at ___, 135 S. Ct. at 2626 (emphasis added).

As stated at the beginning of this special concurrence, the certificate of judgment in this case does not disturb the March 2015 orders of this Court that uphold the constitutionality of the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act. For that reason, as explained above, I concur.

STUART, Justice (concurring specially).

Motions and petitions are dismissed without explanation by this Court for numerous reasons as a matter of routine. When a Justice issues a writing concurring in or dissenting from an order summarily dismissing a pending motion or petition the writing expresses the explanation for the vote of only the Justice who issues the writing and of any Justice who joins the writing. Attributing the reasoning and explanation in a special concurrence or a dissent to a Justice who did not issue or join the writing is erroneous and unjust.

Bolin and Main, JJ., concur.

BOLIN, Justice (concurring specially).

In light of the United States Supreme Court's decision of Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), in which a 5-4 majority declared, without any constitutional basis, that same-sex applicants have a fundamental constitutional right to marriage, I concur in dismissing the "Motion for Clarification and Reaffirmation of the Court's Orders Upholding and Enforcing Alabama's Marriage Laws." I do not agree with the majority opinion in Obergefell; however, I do concede that its holding is binding authority on this Court. See Howlett v. Rose, 496 U.S. 356, 371 (1990)("The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."). I am nevertheless bound by my conscience to write further to express my views concerning the Obergefell majority's lack of a legal basis for its opinion, as well as to recognize what I deem to be the possible effect of Obergefell upon Alabama's marriage-license laws left in its wake.

Moreover, as a preliminary matter, I would like to

emphasize the seemingly obvious--that this Court's order, dismissing all pending motions and petitions in this case, is not an opinion of this Court. Rather, the order is simply a plain vanilla order of dismissal, with no accompanying explanation. A "dismissal order" or "order of dismissal" is defined as an order "ending a lawsuit without a decision on the merits." Black's Law Dictionary 1271 (10th ed. 2014). Whereas, an order of "denial" is defined as "[a] refusal or rejection; esp., a court's refusal to grant a request presented in a motion or petition." Black's Law Dictionary 527 (10th ed. 2014). Although arguably the difference between "dismissed" and "denied" is sometimes as semantic (i.e., in this proceeding) as it is substantive, I would posit that the more appropriate judicial order in this proceeding would be "denied." However, because I agree this case must end, I concur in this Court's "dismissal." I note also that there are six special writings attendant to this order of "dismissal." A special writing and, more specifically, a "special concurrence," is defined as "[a] vote cast by a judge in favor of the result reached, but on grounds different from those expressed in the opinion [if such be present]

explaining the court's judgment or in order to state views not expressed by the court." Black's Law Dictionary 352 (10th ed. 2014)(brackets added). In other words, a special concurrence is nothing more than a writing containing additional thoughts and/or commentary of the author, unless, of course, another Justice or Justices join in that special concurrence. I reiterate that of all the special writings generated by this Court's order of dismissal, none of them, including this one, speaks the words of the Court. In this regard, I join Justice Stuart's special writing commenting upon the same.

I. Fourteenth Amendment

As Justice Scalia said in Obergefell:

> "When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. ...
>
> "... Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its 'reasoned judgment,' thinks the Fourteenth Amendment ought to protect. ...
>
> "... States are free to adopt whatever laws they like, even those that offend the esteemed Justices' 'reasoned judgment.' ..."

576 U.S. at ___, 135 S. Ct. at 2628-29 (Scalia, J.,

dissenting) (footnote omitted; some emphasis added). Apparently states are not always so free, because, as Justice Scalia further expressed:

> "They [the majority] have discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification, and almost everyone else in the time since."

576 U.S. at ___, 135 S. Ct. at 2629 (Scalia, J., dissenting).

The United States Supreme Court has stated that "the Due Process Clause specially protects those fundamental rights and liberties which are, 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.'" Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)(citations omitted). It is without dispute that the concept of same-sex marriage is not deeply rooted in either this Nation's or this State's history and tradition--or frankly anywhere. To the contrary, from its earliest days, circa 1800s, Alabama has, with little modification, provided a statutory scheme for the formal licensing and recognition of marriages as being between a man and a woman. In the decision previously issued by this Court

that is the subject of the motions disposed of today, the Court expounded on the genesis and historical framework of marriage:

> "Laws that include the concept of marriage as the union of one man and one woman, however, predate the inception of Alabama as a state in 1819. In 1805,--when Alabama was still a part of the Mississippi Territory--the legislature of the Mississippi Territory passed an act imbuing orphans' courts with the power to grant and issue marriage licenses. H. Toulmin, Digest of the Laws of Alabama, tit. 42, ch. 1, § 4 (1823). That act remained in force after the creation of Alabama as a state in 1819 and contained language referring to persons joined together as 'man and wife.' See H. Toulmin, Digest of the Laws of Alabama, tit. 42, ch. 1, § 6 (1823). Furthermore, in 1805, the plain, ordinary, and commonly understood meaning of the word 'marriage' was 'the act of joining: man and woman.' Webster, A Compendious Dictionary of the English Language, 185 (1806). Following Alabama's becoming a state in 1819, Alabama law continued to include the concept of marriage as the union of one man and one woman. See Hunter v. Whitworth, 9 Ala. 965, 968 (1846) ('Marriage is considered by all civilized nations as the source of legitimacy; the qualities of husband and wife must be possessed by the parents in order to make the offspring legitimate, where the municipal law does not otherwise provide.' (emphasis added)). In 1850, the Alabama Legislature conferred the power to issue marriage licenses to the newly created probate courts. 1850 Ala. Laws 26. This power was officially codified in 1852. See Ala. Code 1852, § 1949."

Ex parte State ex rel. Alabama Policy Inst., [Ms. 1140460, March 3, 2015] ___ So. 3d ___, ___ n. 18 (Ala. 2015)("API").

Further, this Court made reference to

> "the provisions of Chapter 1 of Title 30 (and their predecessors dating back 200 years) by which the legislature has provided for the affirmative licensing and recognition of 'marriage,' including the provision in § 30-1-9 (and its predecessors) for the licensing of 'marriages' and the provisions in § 30-1-7 (and its predecessors) for the solemnization of 'marriages.' And it is clear that the term 'marriage' as used in all those laws always has been, and still is (unless the courts can conjure the ability to retroactively change the meaning of a word after it has been used by the legislature), a union between one man and one woman."

API, ___ So. 3d at ___ (emphasis added).

In Alabama, in 1998 and 2006, the legislature and the people of this State, respectively, recommitted expressly to the vital nature of the meaning of marriage in our present statutory scheme:

> "Chapter 1 of Title 30, Ala. Code 1975, provides, as has its predecessor provisions throughout this State's history, a comprehensive set of regulations governing what these statutes refer to as 'marriage.' See, e.g., § 30-1-7, Ala. Code 1975 (providing for the solemnization of 'marriages'), and § 30-1-9, Ala. Code 1975 (authorizing probate judges to issue 'marriage' licenses). In 1998, the Alabama Legislature added to this chapter the 'Alabama Marriage Protection Act,' codified at § 30-1-19, Ala. Code 1975 ('the Act'), expressly stating that '[m]arriage is inherently a unique relationship between a man and a woman' and that '[n]o marriage license shall be issued in the State of Alabama to parties of the same sex.' §

> 30-1-19(b) and (d), Ala. Code 1975. In 2006, the people of Alabama ratified [by 81 percent of the vote] an amendment to the Alabama Constitution known as the 'Sanctity of Marriage Amendment,' § 36.03, Ala. Const. 1901 ('the Amendment'), which contains identical language. § 36.03(b) and (d), Ala. Const. 1901."

API, ___ So. 3d at ___ (emphasis added).

Clearly, the State of Alabama has exercised its sovereign authority to define marriage as being inherently that relationship between a man and a woman by the authority that has exclusively been delegated to the states, including this State, to regulate, pursuant to the express language in the Ninth Amendment to the United States Constitution, part of the Bill of Rights (addressing the rights, retained by the people, that are not specifically enumerated in the Constitution) and the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Moreover, the people of Alabama have given voice to their sovereign state authority through ratification of the Sanctity of Marriage Amendment to the Alabama Constitution by an overwhelming 81 percent vote. Justice Kennedy, writing for the majority in United States v. Windsor, 570 U.S. ___, ___,

133 S. Ct. 2675, 2691 (2013), acknowledged the above-mentioned authority when he referred to the well settled authority of each state to regulate its own laws regarding marriage and the definition of "marriage":

> "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See Williams v. North Carolina, 317 U.S. 287, 298 (1942) ('Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders'). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' Ibid. '[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.' Haddock v. Haddock, 201 U.S. 562, 575 (1906); see also In re Burrus, 136 U.S. 586, 593–594 (1890) ('The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States')."

(Emphasis added.) Without comment concerning, or apology regarding, those words, only two years later the same Justice Kennedy, writing for the majority in Obergefell, reversed course and decreed that all states are now required by the Constitution to issue marriage licenses to same-sex couples. It bears repeating that this change of interpretation and

direction came only two years after Windsor and in the words of the same Justice who authored that opinion. Although Justice Kennedy cited Windsor on six different occasions in Obergefell, he nonetheless made no attempt to distinguish his statement in Windsor that "[b]y history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States." Windsor, 570 U.S. at ___, 133 S. Ct. at 2689-90. Rather, the Obergefell majority pulled from thin (legal) air a redefinition of marriage that is based not on any fundamental right deeply rooted in this Nation's history and tradition, but rather on its self-declared beliefs that same-sex couples should be allowed to marry because "[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality"; "[m]arriage responds to the universal fear that a lonely person might call out only to find no one there"; "[t]heir hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions"; "[t]hey ask for equal dignity in the eyes of the law"; and "[t]he Constitution grants them that right." 570 U.S. at ___,

135 S.Ct. at 2599, 2600, and 2608. Yielding to current social mores and temporal societal policy to recognize a fundamental constitutional right in a way not intended for the judicial branch of government, the majority in Obergefell, in the last phrase quoted above, is better understood to be saying: "We simply think that the Constitution should, and hereby does, grant them that right."

The above-stated beliefs and accompanying conclusion, properly excoriated by the four Obergefell dissenters, are legislative rather than judicial in tone and nature and, again, ignore Supreme Court precedent to reach a desired societal result, which, as noted by Justice Scalia, "diminish[es] [the] Court's reputation for clear thinking and sober analysis." 576 U.S. at ___, 135 S. Ct. at 2630 (Scalia, J., dissenting). Rather,

> "[f]or today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental."

576 U.S. at ___, 135 S. Ct. at 2640-41. (Alito, J., dissenting)(emphasis added).

> "Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer."

576 U.S. at ___, 135 S. Ct. at 2612 (Roberts, C.J., dissenting)(emphasis added).

Apparently the Constitution does leave doubt. Although I have many times not agreed with a decision of the United States Supreme Court, or a decision of the Alabama Supreme Court for that matter, I have never criticized an opinion from any court in the manner in which I regrettably do so today. I am, however, able to count to five--and I know that five votes trump four; and, although that does not make it right, it does make it a majority opinion. In my humble judgment, the 5-4 majority does not make the Obergefell decision well reasoned or even based upon sound principles of established constitutional law. Rather, it only makes it binding authority for today--subject to being properly, and lawfully, reexamined and reconsidered in the future. In the meantime, it seems to me to be an opinion that defines the phrase ipse dixit--

translated as meaning "he himself said it" or "[s]omething asserted but not proved." Black's Law Dictionary 956 (10th ed. 2014). My translation--it is because, without foundation, they say it is.

II. Alabama Licensing Scheme - Aftermath

The foregoing being said, I am further compelled to concur specially to express my concern, which remains to be determined in future cases, that the Obergefell decision may have emasculated this State's entire statutory licensing scheme governing "marriage" to the point of rendering it incapable of being enforced prospectively. See Chapter 1, titled "Marriage," of Title 30, Ala. Code 1975. My concern arises because when some aspect of a law has been held to be unconstitutional, or unenforceable, due to some unforeseen practical difficulty or impossibility, or, as in this case, a judicially quickened version of the deliberative democratic process, it must be determined whether what is left can be enforced without the ineffective portion. In API, this Court acknowledged that

> "the contemplated change in the definition (or 'application' if one insists, although this clearly misapprehends the true nature of what is occurring) of the term 'marriage' so as to make it mean (or

> apply to) something antithetical to that which was intended by the legislature and to the organic purpose of Title 30, Chapter 1, would appear to require nothing short of striking down that entire statutory scheme."

___ So. 3d at ___.

At this juncture, I express only my concern rather than my opinion because the issue of the future enforceability of Alabama's marriage-licensing statutes is not squarely before this Court. However, as it pertains to a state statute, the United States Supreme Court has, at least currently, observed that "[s]everability [of a portion of a state statute] is of course a matter of state law." Leavitt v. Jane L., 518 U.S. 137, 139 (1996) (emphasis added). This Court noted in API that to

> "allow the judiciary to declare by judicial fiat a new statutory scheme in place of the old, rather than leaving it to the legislative branch to decide what should take the place of the scheme being stricken, [is] contrary to well established state and federal principles of judicial review."

___ So. 3d at ___ n. 19.

The issue of severability involves a question of statutory construction, which primarily involves ascertaining and giving effect to the intent of the legislature.

> "This Court addressed the standard for

ascertaining severability in Newton v. City of Tuscaloosa, 251 Ala. 209, 217, 36 So. 2d 487, 493 (1948):

> "'A criterion to ascertain whether or not a statute is severable so that by rejecting the bad the valid may remain intact is: The act "ought not to be held wholly void unless the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part so held to be unconstitutional." A. Bertolla & Sons v. State, 247 Ala. 269, 271, 24 So. 2d 23, 25 [(1945)]; Union Bank & Trust Co. v. Blan, 229 Ala. 180, 155 So. 612 [(1934)]; 6 R.C.L. 125, § 123.'"

King v. Campbell, 988 So. 2d 969, 982 (Ala. 2007) (emphasis added in King). The fallout from Obergefell may present a classic example of an inability to sever the remains of our statutory licensing scheme following the imposition of the newly crafted definition of "marriage" announced by the Obergefell majority. Arguably, this result appears inescapable, because the new definitional fiat is completely contrary to what this State's legislature has historically intended and enacted. Stated differently, Alabama's marriage-license provisions, Chapter 1 of Title 30, Ala. Code 1975, titled "Marriage," being the very heart and soul of our

statutory licensing procedure, are dependent upon this State's historical definition of "marriage" as a union of a man and a woman. Under the circumstances with which we are left and upon proper challenge, neither the probate judges, nor this Court, nor the other courts of this State, may have the practical ability to enforce our State licensing laws concerning the institution of marriage in the manner contemplated by our legislature and our people.

III. Conclusion

The Obergefell majority declared that the constitutional authority and process for defining marriage is no longer a matter for the states; the Obergefell majority usurped both this authority and process, knowing what was best for us--an elitist view that is extrajudicial and condescending to the states under the 9th and 10th Amendments and to the citizenry and this country as a whole and, by the way, to the rule of law. With regard to this elitism and condescension, Justice Scalia succinctly noted that "[t]he opinion is couched in a style that is as pretentious as its content is egotistic." 576 U.S. at ___, 135 S. Ct. at 2630 (Scalia, J., dissenting), and that,

> "to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresented panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation. ...
>
> "But what really astounds is the hubris reflected in today's judicial Putsch."

576 U.S. at ___, 135 S. Ct. at 2629 (Scalia, J., dissenting).

As tempting as it would be to reenact the type defiance the State of Georgia and President Andrew Jackson espoused when Georgia refused to comply with a Supreme Court order and President Jackson, decrying the Supreme Court and defending Georgia, purportedly stated: "[Chief Justice] John Marshall has made his decision, now let him enforce it"[31]--I cannot and

[31]President Jackson's confrontation with the Supreme Court resulted from that court's holding unconstitutional a Georgia statute that allowed non-Indians to live among Indians only if they got a license to do so and swore an oath of loyalty to the State of Georgia. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 577-78 (1832). Samuel Worcester, a white northern missionary, was convicted because he refused to do either. The Supreme Court held the Georgia statute unconstitutional, overturned Worcester's conviction, and ordered Georgia to release him. Georgia refused to do so. Tradition has it that President Jackson declared: "John Marshall has made his decision, now let him enforce it." Amy Coney Barrett, Symposium Stare Decisis and Nonjudicial Actors, 83 Notre Dame L. Rev. 1147, 1154 (2008). "Jackson was saved from a direct collision with the Court by the fact that he appeared to lack the authority to act. Timing and a procedural quirk had prevented the Supreme Court from dispatching the federal marshal to execute the judgment, and a federal statute

will not go that far in defiance, because to do so would only placate the heart at the expense of the head; and, should anyone do so, our constitutional republic would begin to cease being a nation of laws and not of men; and, finally, to do so in this case could potentially render the licensing officials, i.e., the probate judges of the State, subject to personal civil liability for following their religious beliefs. And it is arguably not hyperbole to further contemplate that it could place those same licensing officials in the middle of an end-game stand-off with federal marshals and/or federalized national guardsmen on one side, with a contempt order from a federal court in hand, and state law-enforcement officers on the other, with a competing and conflicting state court order in hand. We have already had one war with kinsmen fighting kinsmen. We do not need another. Rather, we need to see that review of this wrong decision is done the right way--by constitutional means; otherwise, we would be in the same position as Chief Justice Roberts when he stated in the Obergefell decision: "Just who do we think we are?" 576 U.S. at ___, 135 S. Ct. at 2612 (Roberts, C.J., dissenting). In

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authorized the President to intervene only if the marshal failed." 83 Notre Dame L. Rev. at 1155.

this regard, I join that portion of Part II of Justice Shaw's well reasoned special writing concerning defiance.

As respectfully as I can, albeit reluctantly, I concur in dismissing the petitioners' motions, and I further concur specially to note that the process of licensing of marriages in Alabama as we have known it may have been irreparably broken.

PARKER, Justice (concurring specially).

I concur in the issuance of the certificate of judgment and in the dismissal of the pending motions and petitions. Dismissal, as distinct from denial, is not a decision on the merits. Thus, this Court is not denying on the merits matters of vital importance concerning the effect -- or lack thereof -- of Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), on such issues as the issue of religious-liberty rights of individuals.

I concur specially to state that Obergefell conclusively demonstrates that the rule of law is dead. "Five lawyers"[32] -- appointed to judgeships for life[33] and practically unaccountable[34] to the more than 320 million Americans they now arbitrarily govern -- enlightened by "new insights" into the true meaning of the word "liberty," determined that "liberty"

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[32]Chief Justice Roberts referred to the Obergefell majority three times as "five lawyers," 576 U.S. at ___, 135 S. Ct. at 2612, 2624 (Roberts, C.J., dissenting), instead of Justices, thus caustically pointing out that the five were not acting in a judicial role.

[33]The dissents in Obergefell refer eight times to "unelected" judges.

[34]The dissents in Obergefell refer twice to the "unaccountable" judges.

means that Americans have a new fundamental right only now discovered over 225 years since the Constitution was adopted. "Five lawyers," who have treated the Constitution as "a mere thing of wax ... which they may twist, and shape into any form they please,"[35] determined to impose their enlightenment on this nation in spite of the vast majority of the states having democratically refused again and again to redefine the divinely initiated institution of marriage. In marching this country "forward" to their moral ideal, the "five lawyers" composing the majority in Obergefell have trampled into the dust the last vestiges of the legitimacy of the United States Supreme Court.

Obergefell is not based on legal reasoning, history, tradition, the Court's own rules, or the rule of law, but upon the empathetic feelings of the "five lawyers" in the majority. What the late John Hart Ely said of another decision can be said of Obergefell: "It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."

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[35]Thomas Jefferson, Letter to Judge Spencer Roane, Sept. 6, 1819, 12 The Works of Thomas Jefferson 137 (Paul Leicester Ford ed., G.P. Putnam's Sons, 1905).

John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 947 (1973). The majority in Obergefell does not set forth authorities that lead to its conclusion; it sets forth only sentiments that support its whim in this case to create a fundamental constitutional right. In order to reach this conclusion, the majority in Obergefell, having ascended to a new understanding of human liberty, threw off the restraints of the rule of law and history. Having by judicial will set themselves free from those "shackles," the majority then ushered in a new era of "liberty": court-pronounced dignity. Justice Hugo Black, an Alabamian, provided an apt description of what the United States Supreme Court has done in Obergefell in his dissent in In re Winship, 397 U.S. 358, 384 (1970):

> "When this Court assumes for itself the power to declare any law -- state or federal -- unconstitutional because it offends the majority's own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the 'law of the land' and instead becomes one governed ultimately by the 'law of the judges.'"

In Cotting v. Godard, 183 U.S. 79, 84 (1901), the United States Supreme Court stated:

> "It has been wisely and aptly said that this is

> a government of laws, and not of men;[36] that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them."

See also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)("The government of the United States has been emphatically termed a government of laws, and not of men."). By rejecting the rule of law, history, and the viewpoint of most states, the majority's approach in Obergefell explicitly rejects the idea that America is a government of laws and not of men. Instead, the majority illegitimately imposed its will upon the American people. We now appear to be a government not of laws, but of "five lawyers."

In Planned Parenthood v. Casey, 505 U.S. 833, 865-66 (1992), a plurality of the United States Supreme Court stated:

> "The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are

[36]The historic phrase "a government of laws and not of men" was used by John Adams in the Massachusetts Declaration of Rights, pt. 1, art. 30. The State of Alabama adopted John Adams's provision almost verbatim in Art. III, § 43, Ala. Const. 1901, thus incorporating this phrase into our organic law.

> rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
>
> "The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."

(Emphasis added.) See also Michael H. v. Gerald D., 491 U.S. 110, 127 n. 6 (1989)("[A] rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."). Obergefell is "no judicial act at all" because it is "without principled justification." Casey, 505

U.S. at 865. In fact, it is without any legal justification at all. Accordingly, the United States Supreme Court's decision in Obergefell is without legitimacy. See Republican Party of Minnesota v. White, 536 U.S. 765, 793 (2002)(Kennedy, J., concurring)("Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.").

I also caution against the United States Supreme Court's inherent assertion in Obergefell that it is above the law, rather than being constrained to its constitutional function of interpreter of the law. "It is emphatically the province and duty of the judicial department to say what the law is," Marbury, 5 U.S. (1 Cranch) at 177 -- not to make it up as we go along. The majority in Obergefell was even so brash as to set aside the Supreme Court's own established rules in ignoring the requirement that, in order for a fundamental right to be recognized, it must be rooted in our nation's

history. History has shown a proclivity to ignore the rules when they get in the way of a desired goal. Justice Joseph Story warned of such a practice:

> "A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.
>
> "This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority."

Joseph Story, Commentaries on the Constitution of the United States 127 (1833). Justice Sutherland stated the following in his dissent in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 404 (1937):

> "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections."

One should not be so naive to think that Justice Sutherland was warning of an event that has not already come to pass. In

fact, Obergefell demonstratively evinces that the "mere moral reflections" of the judiciary's constitutional role no longer give any pause for reflection at all to a majority of the Justices on the United States Supreme Court. There appears to be no restraint on the judiciary, because "five lawyers" believe that they may simply decide, with no legal support whatsoever, that a particular fundamental right be created because they think it fair. This is not the rule of law, this is despotism[37] and tyranny.[38]

Despotism and tyranny were evils identified in the Declaration of Independence as necessitating the break with King George and Great Britain. In his dissent in Loan Association v. Topeka, 87 U.S. 655, 669 (1874), Justice Clifford defined judicial despotism as follows:

> "Courts cannot nullify an act of the State legislature on the vague ground that they think it

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[37]Despotism has been defined as "[a]bsolute power; authority unlimited and uncontrolled by men, constitution, or laws, and depending alone on the will of the prince ...." 1 N. Webster, An American Dictionary of the English Language 59 (1828)(emphasis added).

[38]Tyranny has been defined as "[a]rbitrary or despotic exercise of power; exercise of power over subjects and others with a rigor not authorized by law or justice, or not requisite for the purposes of government." 2 N. Webster, An American Dictionary of the English Language 99 (1828).

> opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism."

(Footnotes omitted; citing Walker v. City of Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24 (Ohio 1871).) Further, Montesquieu, in his enduring work "The Spirit of the Laws," stated:

> "In despotic governments there are no laws; the judge himself is his own rule. There are laws in monarchies; and where these are explicit, the judge conforms to them; where they are otherwise, he endeavours to investigate their spirit. In republics, the very nature of the constitution requires the judges to follow the letter of the law; otherwise the law might be explained to the prejudice of every citizen, in cases where their honour, property, or life is concerned."

Charles de Secondat, Baron de Montesquieu, The Spirit of Laws (Thomas Nugent trans. 1752)(Kitchener 2001)(emphasis added).[39]

[39]Montesquieu was the most frequently cited source in the establishment of the three branches of government. Matthew P. Bergman, Montesquieu's Theory of Government and the Framing of the American Constitution, 18 Pepp. L. Rev. 1, 24 (1990). "Among the delegates to the Convention, Montesquieu's writings were taken as 'political gospel.' Many such delegates read Montesquieu as preparatory material. Indeed, besides studying Montesquieu himself, Madison translated sections of The Spirit of the Laws for George Washington. Washington's notes reveal that he also studied Montesquieu in preparation for the

Obergefell is the latest example of judicial despotism. It is a decision not based on law, but on the bare majority's philosophy of life. For the states to honor such a decision as legitimate is to bow our knee to the self-established judicial despots of America. "[T]yranny is the exercise of power beyond right, which no body can have a right to." John Locke, Second Treatise of Government 101 (C.B. Macpherson ed., 1980)(1690). As Thomas Jefferson wrote, "experience hath shewn, that even under the best forms of government those entrusted with power have, in time, and by slow operations, perverted it into tyranny." Thomas Jefferson, A Bill for the More General Diffusion of Knowledge, June 18, 1778, 2 The Works of Thomas Jefferson 414 (Paul Leicester Ford ed., G.P. Putnam's Sons, 1904).

Edward S. Corwin, who popularized the term "judicial review," only settled on that wording for that phrase in 1909.[40] Corwin initially used the term "the doctrine of

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Convention." Id.

[40]Matthew J. Franck, "Introduction to the Transaction Edition," Edward S. Corwin, The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays, at xxi n. 46 (Transaction Publishers, 2014) (citing Edward S. Corwin, The Supreme Court and the Fourteenth Amendment, 7 Mich. L. Rev. 643 (1909)).

judicial paramountcy."[41] Corwin's original term captures the reality of judicial supremacy that has grown out of judicial review. But the version of judicial supremacy reflected in the majority's decision in Obergefell is far beyond earlier manifestations of judicial supremacy. As employed by the majority in Obergefell, it is the implicit claim to the supreme authority of the federal judiciary to decide any important political or social question confronting our country, whether the Constitution authentically addresses it or not (although the judges will contend that it does). Chief Justice Roberts refers to this as "the majority's extravagant conception of judicial supremacy." Obergefell, 576 U.S. at ___, 135 S. Ct. at 2624 (Roberts, C.J., dissenting). He describes the majority view of judicial supremacy as follows:

> "The role of the Court envisioned by the majority today ... is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making 'new dimensions of freedom ... apparent to new generations,' for providing 'formal discourse' on social issues, and for ensuring 'neutral discussions, without scornful or disparaging

[41]Franck, supra, at xxi n. 45 (citing Edward S. Corwin, The Supreme Court and Unconstitutional Acts of Congress, 7 Mich. L. Rev. 606 (1906)).

commentary.' Ante, at 2596-2597."

Id. Chief Justice Roberts then puts this self-aggrandizing claim of power in historical context: "Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges." 576 U.S. at ___, 135 S. Ct. at 2624. To use the term applied by Justice Scalia, this is an anti-constitutional "judicial Putsch." 576 U.S. at ___, 135 S. Ct. at 2629 (Scalia, J., dissenting).

As justices and judges on state courts around the nation, we have sworn an oath to uphold the United States Constitution. We have not sworn to blindly follow the unsubstantiated opinion of "five lawyers." As the Supreme Court of Utah boldly stated:

> "The United States Supreme Court, as at present constituted, has departed from the Constitution as it has been interpreted from its inception and has followed the urgings of social reformers in foisting upon this Nation laws which even Congress could not constitutionally pass. It has amended the Constitution in a manner unknown to the document itself. While it takes three fourths of the states of the Union to change the Constitution legally, yet as few as five men who have never been elected to

> office can by judicial fiat accomplish a change just as radical as could three fourths of the states of this Nation. As a result of the recent holdings of that Court, the sovereignty of the states is practically abolished, and the erst while free and independent states are now in effect and purpose merely closely supervised units in the federal system.
>
> "....
>
> "... We ... long for the return to the days when the Constitution was a document plain enough to be understood by all who read it, the meaning of which was set firmly like a jewel in the matrix of common sense and wise judicial decisions."

Dyett v. Turner, 20 Utah 2d 403, 405-06, 439 P.2d 266, 267-68 (1968). An illegitimate decision is due no allegiance; our allegiance as judges is to the United States Constitution.

The rule of law is of utmost importance to the sustainability of this nation and the foundation of American exceptionalism. Taking a line from the late Ronald Reagan, we as justices and judges have a crucial role to "preserve to our children this [constitutional republic based upon the rule of law], the last best hope of man on earth, or we'll sentence them to take the last step into a thousand years of darkness."[42]

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[42]Ronald Reagan speech "A Time for Choosing" (also known as "A Rendezvous with Destiny"), October 27, 1964.

MURDOCK, Justice (concurring specially).

I share many of the concerns expressed by my colleagues, not the least of which is the concern for religious liberty and the concern expressed by Justice Bolin in Part II of his writing. I write not to repeat those concerns, but to offer some related thoughts.

* * *

A group of judges can declare all it wants that two people of the same sex can "marry," but in the words of The Federalist No. 78,[43] they cannot change "the nature and reason of the thing" called marriage. In Brown v. Allen, 344 U.S. 443 (1953), Justice Jackson warned that "it is prudent to assume that the scope and reach of the Fourteenth Amendment will continue to be unknown and unknowable, that what seems established by one decision is apt to be unsettled by another, and that its interpretation will be more or less swayed by contemporary intellectual fashions and political currents." 344 U.S. at 534 (Jackson, J., concurring in the result)(emphasis added). He further observed that the Supreme

[43]The Federalist No. 78, at 404 (Alexander Hamilton) (George W. Carey and James McClellan eds., Liberty Fund, 2001).

Court "may look upon this unstable prospect complacently, but state judges cannot." Id.[44] Justice Jackson summarized the problem this way:

> "Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles."

344 U.S. at 535 (emphasis added). Justice Jackson's words were prescient.

Among other things, Justice Jackson's concerns bring to mind this colloquy:

> "'I don't know what you mean by "glory,"' Alice said.
>
> "Humpty Dumpty smiled contemptuously. 'Of course you

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[44]Indeed, state courts often, as here, are the ones left with the task of enforcing whatever is left of state law in the aftermath of a decision such as Obergefell v. Hodges, 576 U.S. ___, 135 S.Ct. 2584 (2015). See Ex parte State of Alabama ex rel. Alabama Policy Inst., [Ms. 1140460, March 4, 2016] ___ So. 3d ___, ___ (Ala. 2015)(Bolin, J., concurring specially, Part II); Ex parte State of Alabama ex rel. Alabama Policy Inst., [Ms. 1140460, March 3, 2015] ___ So. 3d ___, ___ n.19 and accompanying text (Ala. 2015); see also Ex parte Davis, [Ms. 1140456, Feb. 11, 2015] ___ So. 3d ___, ___ (Ala. 2015) (Murdock, J., concurring specially).

> don't -- till I tell you. I meant "there's a nice knock-down argument for you!"'
>
> "'But "glory" doesn't mean "a nice knock-down argument,"' Alice objected.
>
> "'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean -- neither more nor less.'
>
> "'The question is,' said Alice, 'whether you can make words mean different things.'
>
> "'The question is,' said Humpty Dumpty, 'which is to be master -- that's all.'"

Lewis Carroll, Through the Looking-Glass, and What Alice Found There (Macmillan and Co., London 1872).

At least Carroll's protagonist was undertaking only to declare contemporaneously the meanings of his own words, not proposing to change the meanings of words used by others at some time in the past. At best, the federal courts are applying a new meaning to words after they have been spoken and written by others, including the Supreme Court itself in earlier opinions, state legislatures, and the people themselves in organic state law. Even viewed in this manner, what the federal courts are doing has the gravest of consequences. If we cannot depend upon the meaning of words as understood at the time the words were chosen by their

speaker or writer, the ability to communicate any idea from one time to another is lost. The ability to communicate any truth from one time to another is lost. And therewith the rule of law.

In reality, however, the federal courts, including the Supreme Court, are doing something even more radical than "merely" changing the meaning of the word "marriage" after its use by others. They purport to engage in alchemy. To declare, as if they could do so, a change in the essential nature of the thing itself. That they purport to do so is appropriately met with the consternation expressed by Chief Justice Roberts when he exclaimed: "Just who do we think we are?" Obergefell v. Hodges, 576 U.S. ___, ___, 135 S.Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

Governments did not and do not create the institution of marriage. A civil government can choose to recognize that institution; it can choose to affirm it; and it can even take steps to encourage it. Governments throughout history have done so. But governments cannot change its essential nature. Marriage is what it is. No less so than any naturally

occurring element on the periodic table.[45]

Yet, here we are. The courts undertake to change -- or at least declare a change in -- the essential nature of the thing itself. It is not just that the existence of such an ability would make it impossible to communicate and maintain a rule of law (which it does) or even to communicate truths

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[45]Man can recognize, for example, the presence of oxygen in the atmosphere. He can affirm that oxygen is a good thing, and perhaps even maintain vegetation to encourage its production. But man can not change what oxygen is. Man might declare that henceforth oxygen atoms will have some different number or arrangement of protons, neutrons, and electrons, but that will not make it so. Nature has made oxygen as it is; it has made marriage as it is.

As John Finnis put it:

> "[L]aw is both secondary or even subordinate to, while regulating, other social institutions which it does not institute, whether they be reasonable and good (like proper forms of marriage and family, or less ambitious kinds of promising, not to mention religious communities and practices), or unreasonable, vicious, and harmful (like prostitution, slavery, or the vendetta). We should not imagine that market institutions or marriages or corporations await the emergence of 'power-conferring' rules of law. Legal rules are often ratificatory and regulative rather than truly constitutive, whatever their legal form and their role in creating the law's versions of the social practices and institutions upon which it, so to speak, supervenes."

John Finnis, Philosophy of Law: Collected Essays: Vol. IV 118 (Oxford Univ. Press 2011).

from one person or time to another (which it also does). To assume the ability to declare such a change presumes there is no objectively ascertainable, universally applicable and immutable -- "unalienable" in the words of the Declaration of Independence -- truth about the thing.

The postmodern philosophy of truth this represents is that each individual can decide for himself or herself what is true. In contrast, the Declaration of Independence and the United States Constitution reflect, and the drafters of the one and framers and ratifiers of the other believed in, a philosophy of objectively ascertainable truth. Truth that is external to each of us. Truth that informs a common value system against which to consider one another's ideas and conduct. Only out of such a universal truth can there arise "certain rights" that can themselves be universal -- and unalienable.

So, in the end, perhaps the real question is this: Can the United States Supreme Court decide upon some philosophy of truth different from that assumed by the framers of the Constitution and by the Constitution itself -- the same Constitution that gives that Court its very existence and its

authority to make decisions? And impose this different philosophy of truth upon the people of this country? Where is the authority for that?

SHAW, Justice (concurring specially).

I concur with this Court's dismissal of the various postjudgment motions and requests in this case that ask this Court to enter an order defying the decision of the Supreme Court of the United States in Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015). As discussed below, this Court's decision, Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] ___ So. 3d ___ (Ala. 2015) ("API"), no longer has a field of operation or any legal effect.

I. The procedural background of today's ruling

API ordered the probate court judges of this State who were not subject to a contrary federal court injunction to continue to follow Alabama's marriage laws.[46] As I stated in

[46]This Court's decision applied only where probate court judges were not under a federal court injunction. Specifically, this Court noted that the decision did not apply to Judge Don Davis, who was under a federal court order:

> "The final procedural issue we consider is whether the federal court's order prevents this Court from acting with respect to probate judges of this State who, unlike Judge Davis in his ministerial capacity, are not bound by the order of the federal district court in Strawser[v. Strange (Civil Action No. 14-0424-CG-C, Jan. 26, 2015)]."

___ So. 3d at ___ (emphasis added). Although this Court could

my dissent to that opinion, I am of the view that this Court never had jurisdiction in this case under Ala. Const. 1901, Art. VI, § 140(b), or Ala. Code 1975, §§ 12-2-7(2) and (3). API, ___ So. 3d at ___ (Shaw, J., dissenting). Furthermore, I am also of the view that the petitioners had no right under Alabama law to pursue the petition in their own names or in the name of the State. I further objected to addressing issues no party had raised. Id. In short, I concluded that the petition was never properly before this Court and should have been dismissed at the outset. I continue to adhere to those views and that conclusion.

Subsequent to, and perhaps as a result of, this Court's decision in API, all of Alabama's probate court judges were sued in the United States District Court for the Southern District of Alabama. Strawser v. Strange, 307 F.R.D. 604 (S.D. Ala. 2015). All are now subject to a federal class action and an injunction forbidding them from enforcing Alabama's ban on the issuance of same-sex government-marriage licenses. Strawser v. Strange, 105 F. Supp. 3d 1323 (S.D.

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have purported to order Judge Davis to disregard the federal court injunction, it did not do so.

Ala. 2015).[47] Because of that federal court injunction, this Court's decision in API, by its own terms, no longer applies to them. See note 46, supra.

After the decisions in Strawser, one of the parties in this case filed in this Court a request to clarify and "reaffirm" the decision in API "despite" the contrary injunctions issued by the federal district court in Strawser. The Supreme Court of the United States later issued its opinion in Obergefell and held that the United States Constitution barred restrictions on the issuance of same-sex government-marriage licenses. This Court "invited" the parties to submit motions or briefs to address the impact of Obergefell. I did not concur with that invitation. In response, several parties in this case and others have now requested this Court to address the impact of Obergefell on API. Among the suggestions are that this Court can ignore Obergefell and that, essentially, this Court can and should order all probate court judges to ignore it too. As a result, we are urged to order our probate court judges to defy the federal court injunction against them. I initially found

[47]At this time, the issue of how much the taxpayers will have to pay as a result of this litigation is undetermined.

these post-decision requests to be extraordinary in nature: As explained below, this Court does not ordinarily entertain motions to clarify past cases in light of new Supreme Court decisions, and the law is well settled that this Court can do nothing to allow the probate court judges of this State to ignore a federal court injunction and a Supreme Court decision.

When the Supreme Court of the United States issues a decision calling into question prior decisions of state courts, those prior state court decisions generally are not reopened. The same is true if this Court issues a decision calling into question its own past judgments or past judgments of lower courts. Any new issues are resolved in new litigation, if that is allowed under law. Post-decision filings, other than an application for rehearing, do not demand the use of time and judicial resources by this Court. Cases must end, even if the law later changes. Our decision today refuses to grant the relief requested and should not be construed to mean anything else.[48]

[48]For purposes of this Court's order, no material distinction exists between the "dismissal," as opposed to the "denial," of the postjudgment motions and requests. Whether cast as a substantive rebuke on the merits or as the rejection

Those requests--whether so intended--opened the door for additional opinions to be issued by any Justice of this Court wishing to expound on Obergefell. For the reasons explained above, I saw no need for this Court to respond to the resulting requests, and this Court correctly took no action.

However, on January 6, 2016, Chief Justice Moore, who until now has not voted in this case, issued an "administrative order" directing probate court judges to take a course of action contrary to the federal court injunction

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of a request to further consider a concluded case, this Court's order expresses a clear refusal to enter an order defying Obergefell.

Furthermore, the issuance of a certificate of judgment, which is also dictated by the order issued today, is a routine administrative task that is normally accomplished automatically by the clerk of the Court and is not voted upon by the Justices. A certificate of judgment in a mandamus matter is generally issued after the application for rehearing has been overruled, which occurred on March 20, 2015. However, because this case was not an appeal, the usual procedures for issuing a certificate of judgment under the Alabama Rules of Appellate Procedure, Rule 41, were not utilized. It is not clear to me that this Court has a procedure for issuing a certificate of judgment in this type of case--an original petition for mandamus relief--or that, because this Court was sitting as a trial court, one is even needed. The issuance of a certificate of judgment is a rote entry. Further, as explained below, it does not, and cannot, mean that the parties in this case may defy Obergefell or any federal court injunction against them.

against them.[49] This action on his part, which I view as unauthorized,[50] now requires a response by this Court to the

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[49]Chief Justice Moore's order stated that in API this Court "issued a lengthy opinion upholding the constitutionality of Article I, Section 36.03(b), Ala. Const. 1901 ('the Sanctity of Marriage Amendment'), and Section 30-1-19(b), Ala. Code 1975 ('the Marriage Protection Act')." He further noted that in API this Court stated that "'Alabama probate judges have a ministerial duty not to issue any marriage license contrary to [the Sanctity of Marriage Amendment or the Marriage Protection Act].'" In Strawser, the federal court declared § 36.03 and § 30-1-19 unconstitutional, declared that the probate court judges were enjoined from enforcing them, and declared that the probate court judges could not deny a license "because it is prohibited by the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act or by ... any injunction issued by the Alabama Supreme Court [i.e., API,] pertaining to same-sex marriage." Strawser, 105 F. Supp. 3d at 1330. The January 6 order "ordered and directed" that "the existing orders of the Alabama Supreme Court [i.e., API,] that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect." Ordering and directing that Alabama probate court judges had a "duty not to issue any marriage license contrary to the Sanctity of Marriage Amendment or the Marriage Protection Act" is contrary to the federal district court injunction, which said that the probate court judges could not enforce those provisions. The order did more than address the hypothetical impact of Obergefell on API; it ordered and directed that the probate court judges continue to follow API, a course of action that would be contrary to the federal court injunction. The failure of the order to mention the federal court injunction did not negate that reality.

[50]Although the Chief Justice of the Supreme Court has certain authority to perform "administrative tasks," Ala. Const. 1901, art. VI, § 149, it is this Court that possesses the authority to "govern[] the administration of all courts."

petitioners' requests for clarification.

II. This Court cannot stop a federal court action

A decision by this Court cannot stop the issuance of federally mandated same-sex government-marriage licenses; as I have previously expressed, this Court has never been in a position definitively to rule on whether Alabama's laws prohibiting same-sex government-marriage licenses were constitutional. Ex parte State ex rel. Alabama Policy Inst., (No. 1140460, February 13, 2015) (order calling for answers and briefs) (Shaw, J., dissenting),[51] and API, ___ So. 3d at ___ (Shaw, J., dissenting). As is now demonstrated, Alabama's

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Ala. Const. 1901, art. VI, § 150. The Chief Justice does not have the authority, on his or her own, to interpret the substantive legal effect of a decision of this Court and then to seek to enforce that decision against the parties in that action; in this case, it is this Court that possesses the "authority to interpret, clarify, and enforce its own final judgments." State Pers. Bd. v. Akers, 797 So. 2d 422, 424 (Ala. 2000).

[51]I stated:

> "In order to grant relief to the petitioners, this Court will have to conclude that a probate court is forbidden from following an Alabama federal district court's ruling ..., which ruling both a federal appellate court and the Supreme Court of the United States have refused to stay pending appeal. In my view, the petition does not provide an adequate foundation for reaching such a conclusion."

probate court judges have always been subject to a federal court action, and the rulings of the federal district court have always had the potential of being underpinned by the decision in Obergefell, which the federal courts would have certainly enforced over the protestations of this Court.

We have now been invited to order Alabama's probate court judges to violate a federal court injunction. Even if this Court had the authority or the inclination to issue such an order, which it does not, the order would accomplish nothing because, if our probate court judges actually followed such an order, their defiance of the federal court injunction would subject them to punitive fines, fees, and sanctions by the federal government, the price of which would have to be paid--at least in part--by the taxpayers and would not stop the enforcement of the federal court decisions. Further, such a course of action would damage the institution of the Alabama Supreme Court and the rule of law, and it would not stop the issuance of federally mandated same-sex government-marriage licenses.

A. All courts follow United States Supreme Court decisions

It has long been understood in American jurisprudence

that the decisions of the Supreme Court of the United States are to be followed by lower courts. Obergefell has been decided, and, as this Court has previously acknowledged: "Under Article VI of the United States Constitution, we are bound by the decisions of the United States Supreme Court." Ingram v. American Chambers Life Ins. Co., 643 So. 2d 575, 577 (Ala. 1994). It is the accepted legal doctrine and the historic legal practice in the United States to follow the decisions of the Supreme Court as authoritative on the meaning of federal law and the federal Constitution. Arguments have been put forth suggesting that this doctrine and this practice are incorrect. Those arguments generally have not been accepted by the courts in this country. For example, in Cooper v. Aaron, 358 U.S. 1 (1958), the Supreme Court of the United States rejected the argument by certain state officials that they were not bound by that Court's decisions.[52]

The idea that decisions of the Supreme Court of the

[52]President Abraham Lincoln may have believed that he, as the head of a branch of the federal government, had the right to disavow a decision of the head of another coordinate branch of the federal government. President Lincoln was not a lower court judge. Further, I would be hesitant to cite President Lincoln as an authority for the idea that the states can rebel against the federal government.

United States are to be followed is not something new or strange. Thus, the members of this Court who would follow the Obergefell decision would not, as either Chief Justice Moore or Justice Parker suggests, be "bow[ing their] knee[s] to the self-established judicial despots of America," "blindly follow[ing] the unsubstantiated opinion of 'five lawyers,'" "'shrink[ing] from the discharge'" of duty, "betray[ing]" their oaths, "blatantly disregard[ing] the Constitution," standing "idly by to watch our liberties destroyed and our Constitution violated," participating in the "conversion of our republican form of government into an aristocracy of nine lawyers," or be adhering to a perceived "evil." ___ So. 3d at ___, ___. They would, quite frankly, be doing what the vast majority of past and present judges and lawyers in this country have always assumed the Constitution requires, notwithstanding the unconvincing arguments found in the requests before us and in the specially concurring opinion of Chief Justice Moore. I charitably say the arguments are "unconvincing" because virtually no one has ever agreed with their rationales.

I would further suggest that the idea that a decision of

the Supreme Court does not have application outside the parties to that particular case or outside the federal circuit from which it originated[53] is, to be blunt, just silly.[54] A statement by a high court as to how that court would rule in every case is one of the very basic definitions of "law": lower courts follow higher court decisions because they know they will be reversed by the higher court if they do not. The people, judges, and lawyers, in turn, rely on those decisions as statements of the "law." People do not need to have the Supreme Court of the United States rule against them individually to know what that Court considers legal or

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[53]To the extent it is suggested that various federal courts have held that Obergefell applied to only certain states, I disagree. In Waters v Ricketts, 798 F.3d 682, 685 (8th Cir. 2015), Rosenbrahn v. Daugaard, 799 F.3d 918 (8th Cir. 2015), Jernigan v. Crane, 796 F.3d 976 (8th Cir. 2015), and Marie v. Mosier, [No. 14-cv-02518-DDC-TJJ, Aug. 10, 2015] ___ F. Supp. 3d ___ (D. Kan. 2015), the courts stated that Obergefell explicitly applied to the laws of other states only to note that it did not moot the litigation in those underlying cases; nevertheless, those courts specifically held that Obergefell rendered unconstitutional the same-sex government-marriage-license prohibitions they were addressing. To say that these cases somehow indicate that Obergefell does not impact Alabama has no basis.

[54]Although Alabama's probate judges are not parties in Obergefell, as noted above, they are parties to a lawsuit pending in a federal court that will enforce Obergefell. I find the suggestion that Obergefell somehow does not impact them strange.

constitutional. It is, to say the least, rather nonsensical judicial hairsplitting to suggest that the law has no application to people because they never had a court specifically render a judgment against them on that particular issue. Do we really think that it makes a difference that Obergefell did not originate in Alabama or that Alabama probate court judges were not parties to it? This peculiar argument, raised in the context of such strong opposition to Obergefell, simply looks like an excuse to avoid a court decision because one disagrees with it.

Conjuring up specious arguments to contend that the courts of this State suddenly do not have to follow the Supreme Court--despite doing so for nearly 200 years--is embarrassing. It does nothing but injure public confidence in the integrity and impartiality of the judiciary.

I further reject any implication that the dissenting Justices in Obergefell have "intimate[d]" or implied that the decision should be defied. I note that in Davis v. Miller (No. 15-A250, August 31, 2015), a Kentucky state official, Kim Davis, applied in the Supreme Court of the United States for a stay of an injunction that required her to issue federally

mandated same-sex government-marriage licenses. The application was denied without any written dissents. If the dissenting Justices in Obergefell were sending coded messages to invite state officials to defy Obergefell, then would they have not at least issued dissents to denying relief to Davis, who was such a state official?[55]

At least one Justice who dissented in Obergefell has previously suggested that when a judge disagrees with the law, defiance is not an option. Justice Antonin Scalia, in an article titled "God's Justice and Ours," First Things (May 2002), discussed the options of a judge morally opposed to the

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[55]Recently, the Supreme Court issued a decision with no dissents in James v. City of Boise, ___ U.S. ___, 136 S. Ct. 685 (2016), stating:

> "As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, 'the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.' Martin v. Hunter's Lessee, 1 Wheat. 304, 348 (1816).
>
> "The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."

(Emphasis added.)

death penalty but called upon to rule in such a case:

> "I pause here to emphasize the point that in my view the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted, constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own. Of course if he feels strongly enough he can go beyond mere resignation and lead a political campaign to abolish the death penalty--and if that fails, lead a revolution. But rewrite the laws he cannot do."

If a judge finds that he or she cannot abide by a controlling decision of a higher court, then that judge should resign from office. He or she should not indulge in the pretense that rebelling against a superior court's decision is an accepted judicial response. Such conduct does not show respect for or comply with the law; it does not promote public confidence in the integrity or impartiality of the judiciary. Instead, I believe that defiance would bring the judicial office into disrepute.

Additionally, I find curious this idea put forth by Chief Justice Moore that "'the judges in every state'" may personally weigh the correctness of any Supreme Court decision and, if they disagree with it, then they may ignore it. ___ So. 3d at ___. If this were indeed the case, the Constitution

would in no way be protected; instead, it would mean that there would be a different Constitution for every judge based on varying legal opinions. In McDonald v. Chicago, 561 U.S. 742 (2010), a mere "five Justices" of the Supreme Court held that the restriction in the Second Amendment on the federal government's infringing on the right to keep and bear arms also, through the Fourteenth Amendment, restricted the states. I obey that decision, and not simply because I happen to agree with it. If I did not agree with it, I would still reject the argument that such disagreement would give me the license to ignore it.[56] Further, this Court recently held that an Alabama Code section that banned the possession of a pistol on the property of another violated the Constitution. Ex parte Tulley, [Ms. 1140049, September 4, 2015] ___ So. 3d ___ (Ala. 2015). If the lower court judge, in his "legal opinion," disagrees with the "five lawyers" who concurred with this Court's "opinion that purports to interpret" the Constitution, may he ignore it, lest he "betray" his "oath and blatantly disregard the Constitution"? ___ So. 3d at ___. I think that

[56]McDonald was not a decision originating from Alabama. I could not ignore it based on the argument that it did not apply to Alabama parties or that I remained ignorant of how the Supreme Court would rule on the issue.

this Court's reaction to such defiance would swiftly squash any such notion.

B. This Court's opinion of the correctness of Obergefell is not material to our probate court judges

Whether this Court defies the Supreme Court does not matter, of course, because it is not Obergefell that truly controls the probate court judges of this State. Instead, those probate court judges are bound by a federal court injunction that was issued pursuant to a federal statute, 42 U.S.C. § 1983, before Obergefell was even decided. Article VI of the Constitution, the "Supremacy Clause," states that "the laws of the United States" trump state law: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." So, even if one believes the notion that a Supreme Court decision is not a "law" the Supremacy Clause requires state judges to obey, the federal statute pursuant to which the federal court injunction was issued against Alabama probate court judges still trumps a

contrary order by this State Court. When our probate court judges are faced with conflicting federal and state court orders--here a federal injunction issued pursuant to § 1983, and directed to parties in that case, versus this Court's writ of mandamus--the federal court's order controls. This is why no probate court in this State is currently complying with API or the Chief Justice's January 6 administrative order and issuing government-marriage licenses to opposite-sex couples but not to same-sex couples. Is it seriously to be suggested that a decision by the Supreme Court of Alabama issued on its own volition can override the decision in a federal court action where the parties are under the jurisdiction of the federal court? Perhaps it distracts too much from the rhetorical points about defying Obergefell to admit that the probate court judges still have to comply with the federal court injunction, no matter what we do in this case. Even if this Court were to right now reject the Supreme Court's longstanding role as the final arbiter of the meaning of the Constitution and purport to defy its decision in Obergefell, Alabama's probate court judges are still subject to a lawsuit in a federal district court that would not give a whit about

this Court's actions. In any event, if anyone believes that this Court can issue a ruling on these requests that would allow our probate court judges to legally continue Alabama's prohibition on the issuance of same-sex government-marriage licenses, such belief is refuted by 200 years of law and practice. We can express our well founded frustration at the unprecedented nature of Obergefell, but we cannot stop its effect. Judges should not lead the people of this State to believe otherwise.

III. Challenges to Obergefell cannot come from this Court

The debate over the legal and moral propriety of same-sex government marriage will certainly continue; but that debate has necessarily shifted to the court of public opinion. The issue, for all practical purposes, is now a political one. The genius of our Founding Fathers is reflected in our constitutional form of government, which dictates that whether Obergefell stands the test of time or ultimately finds itself cast upon the trash heap of history depends upon the people of the United States, who serve as the ultimate repository of political power and whose collective voices can be heard through their elected representatives at both the federal and

state levels. See U.S. Const., art. V (setting out the procedure for amending the Constitution). If there is to be a showdown with respect to this issue, it could never have been led by this Court. Such a showdown must pit the judicial will of the highest court in the land against the greater political will of the people of this country.

"To every thing there is a season, and a time to every purpose under the heaven ... a time to keep silence, and a time to speak ...." Ecclesiastes 3:1-7. In accordance with my views concerning this Court's lack of jurisdiction, I believe that this Court should have dismissed this case at the outset; however, it is now time for the people to speak their conscience on the issue of same-sex government marriage, if they so choose.

Chief Justice Moore and Justice Parker have assumed for themselves the mantle of authority to declare a decision of the Supreme Court of the United States an illegitimate nullity. Justice Parker goes further to declare that the rule of law is dead. These are bold declarations from "two lawyers" sitting on a court subject to the decisions of that higher court. To me, the irony of doing this while failing to

address this Court's own lack of jurisdiction and its failure to follow its own well established rules of review is inescapable.

Equally troubling to me are the veiled criticisms directed toward other Justices of this Court--quoted above--who, despite principled reservations to the contrary, might follow well recognized, uncontroversial precedents that require the acknowledgment of the binding impact of Obergefell on lower courts. I cannot speak for all judges who understand that the rule of law expressed by a court of competent jurisdiction, and not the contrary opinion of a lower court judge, is the bedrock upon which our legal system was established and upon which its stability depends. I can say, however, that I have proudly fulfilled my oath of office since the day the people of Alabama first honored me in 2001 with the title "Judge" and placed on me the great responsibilities that go along with that title and that I have spent over 31 years in the service of my State striving to vindicate the rule of law and not to legislate from the bench. I am certainly no apologist for the Supreme Court of the United States, whose decisions have sometimes confounded me

over the years.[57] But there is a right way and a wrong way under Alabama law and the United States Constitution for that Court's decisions to be questioned and addressed. Judges should act like judges, not frustrated policymakers, or, as Justice Scalia has suggested, they should resign on principle. Failure to do either, in my opinion, degrades public confidence in the judiciary.

IV. Chief Justice Moore's statement of nonrecusal

Normally, the Justices of this Court would not comment on another Justice's reasons for declining to recuse himself or

[57]To this day, I have expressed no opinion with respect to Obergefell or the legality of same-sex government-marriage licenses because, given my previously expressed views on this Court's lack of jurisdiction in this case, the law will not let me. I have made no public comment on a proceeding pending before this Court, which is barred by Canon 3.A.(6), Alabama Canons of Judicial Ethics ("A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control."), and the Commentary to Canon 2, Alabama Canons of Judicial Ethics ("Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. ... He must, therefore, accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."). Further, I have not conducted myself in a manner that calls into question my integrity and impartiality, and I have avoided conduct prejudicial to the administration of justice that would bring the judicial office into disrepute, which are barred by Canon 2.

herself in a case. That is a matter for the recusing Justice's conscience, and unlike the federal courts,[58] this Court has no mechanism for disqualifying one of its own members. However, Chief Justice Moore has used my name and my rationale in Ex parte Hinton, 172 So. 3d 348 (Ala. 2012), as support for the position he takes in his statement of nonrecusal. I am thus compelled to take the unusual step of disassociating my prior words from his current position.

Chief Justice Moore notes that he issued an administrative order on February 8, 2015, instructing the probate court judges that they were not required to comply with certain federal court injunctions in cases in which they were not named parties. In this case, one of the prior issues raised was whether the probate court judges were required to adhere to that administrative order.

In Hinton, I noted that there exists a reasonable basis to question a judge's impartiality when he sits in appellate review of his decision as a lower court judge. Chief Justice Moore states that, for an analogous reason, he declined to vote in the previous orders in this case because his February

[58]See 28 U.S.C. §§ 351-364.

8, 2015, order "addressed the issue whether probate judges in Alabama were bound by" certain federal court injunctions, which was one of the issues raised in the case. ___ So. 3d at ___.

I noted in Hinton that the requirement to recuse one's self did not apply when the issues in the new case were not the same as the issues in the prior case the judge had addressed. Chief Justice Moore states that the issue addressed in his February 8 order--whether the probate court judges were bound by certain federal court orders--was "mooted" by this Court's decision in API. The Chief Justice states that there now exists a "new" issue: "[T]he effect of Obergefell on this Court's mandamus order [the API decision] that the probate judges are bound to issue marriage licenses in conformity with Alabama law." The "issue now before the Court," he says, "'does not involve a determination of the correctness, propriety, or appropriateness'" of his February 8 order. ___ So. 3d at ___.

The February 8, 2015, administrative order is not the only order Chief Justice Moore has issued. On January 6, 2016, he issued a second administrative order. While stating

in that order that he was "not at liberty to provide any guidance to Alabama probate judges on the effect of Obergefell on the existing orders of the Alabama Supreme Court," he went on to make the same arguments he makes in his special writing to explain that Obergefell did not impact this Court's prior decision. He then ordered the probate court judges to continue to apply API. These are the very things the motions before us argue and call upon the Court to address. Whether it can be claimed that the January 6 order did not actually address the same issues is not material; the focus should be on the appearance of impropriety, even if disqualification is not required by law. See Canon 3.C.(1)("A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned ...." (emphasis added)); Hinton, 172 So. 3d at 354 ("'[A] reasonable person has a reasonable basis to question the impartiality of a judge who sits ... to review his own decision ....'" (quoting Rice v. McKenzie, 581 F.2d 1114, 1117 (4th Cir. 1978) (emphasis added))). The ethical considerations here involve judicial prudence and discretion, not technicalities. My statement in Hinton in no way provides

Chief Justice Moore with justification to participate or vote in this case. Whether any participation or vote by him violates the Canons of Judicial Ethics is an issue I do not address.

Bolin, J., concurs as to Part II.A.