

 KeyCite Red Flag - Severe Negative Treatment
Abrogated by [Obergefell v. Hodges](#), U.S., June 26, 2015

200 So.3d 495
Supreme Court of Alabama.

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.
(In re Alan L. King, in his official capacity as Judge
of Probate for Jefferson County, et al.).

1140460.
|
March 3, 2015.
|
Order Issued March 10, 2015.*
|
Order Issued March 4, 2016.

Synopsis

Background: Public-interest groups, in name of state, filed emergency petition for writ of mandamus to prohibit all probate judges in state from issuing marriage licenses to same-sex couples.

Holdings: The Supreme Court held that:

- ^[1] statutes prohibiting issuance of marriage licenses to same-sex couples did not discriminate on basis of gender and thus were not subject to heightened scrutiny;
- ^[2] statutes did not violate equal-protection principles;
- ^[3] statutes did not violate due-process principles;
- ^[4] statutes were not based solely on animus against homosexuals; and, on judge's motion for extension of time to respond,
- ^[5] extension of time was not warranted, and
- ^[6] judge was subject to order directing probate judges not to issue marriage licenses to same-sex couples.

Petition granted; writ issued.

[Main](#), J., filed an opinion that concurred in part and concurred in the result.

[Shaw](#), J., filed a dissenting opinion, and dissented from order of March 10, 2015.

[Moore](#), C.J., filed a statement of nonrecusal and a specially concurring opinion to order of March 4, 2016, dismissing pending motions and petitions.

[Stuart](#), J., filed a specially concurring opinion, in which [Bolin](#) and [Main](#), JJ., concurred, to order of March 4, 2016, dismissing pending motions and petitions.

[Bolin](#), [Parker](#), and [Murdock](#), JJ., filed specially concurring opinions to order of March 4, 2016, dismissing pending motions and petitions.

[Shaw](#), J., filed a specially concurring opinion, in which [Bolin](#), J., concurred in part, to order of March 4, 2016, dismissing of pending motions and petitions.

West Headnotes (22)

^[1] **Mandamus**
 Public officers

Probate judge would be realigned as an additional relator, in proceedings on emergency petition in Supreme Court seeking writ of mandamus to prohibit probate judges from issuing marriage licenses to same-sex couples, even though judge had been initially named as a respondent, where judge filed response specifically requesting that the relief sought in the petition be granted.

[Cases that cite this headnote](#)

^[2] **Constitutional Law**
 Marriage and divorce

Marriage and Cohabitation

Marriage and Cohabitation

Marriage and Cohabitation

Marital Rights, Duties, and Liabilities in General

Marriage is not a contract within the meaning of the clause of the constitution which prohibits impairing the obligation of contracts; it is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[Cases that cite this headnote](#)

[3]

Courts

Courts, judges, and judicial officers, acts and proceedings of

Supreme Court had subject-matter jurisdiction, pursuant to its power of general supervision and control of inferior courts, to hear emergency petition for writ of mandamus to prohibit probate judges from issuing marriage licenses to same-sex couples; probate judges functioned as courts of inferior jurisdiction with responsibility to administer law in many types of cases, there was a need for immediate, uniform relief among all of state's probate judges, and no circuit court had jurisdiction over any probate judge outside its territorial jurisdiction. Const. Art. 6, § 140(b); Code 1975, § 12-2-7.

[1 Cases that cite this headnote](#)

[4]

Mandamus

Use of name of state

A mandamus proceeding to compel a public officer to perform a legal duty in which the public has an interest, as distinguished from an official duty affecting a private interest merely, is properly brought in the name of the state on the relation of one or more persons interested in the performance of such duty to the public.

[2 Cases that cite this headnote](#)

[5]

Mandamus

Use of name of state

Petition in Supreme Court seeking writ of mandamus to prohibit probate judges from issuing marriage licenses to same-sex couples was not required to be brought by attorney general, but could be brought by private parties in name of state, since petition did not concern a duty owed to the government as such; duty to issue marriage licenses in accordance with state law was a duty owed to the public for its benefit.

[1 Cases that cite this headnote](#)

[6]

Mandamus

Interest in Subject-Matter

Probate judge had standing to litigate emergency petition in Supreme Court seeking writ of mandamus to prohibit probate judges from issuing marriage licenses to same-sex couples; in his official capacity, judge had interest in discharging his ministerial duty in a manner consistent with law, and judge would be required to confront question of validity of same-sex marriages licensed by other probate judges and to address unavoidable derivative questions.

[Cases that cite this headnote](#)

[7]

Courts

Construction of federal Constitution, statutes, and treaties

Courts

Courts, judges, and judicial officers, acts and proceedings of

Decision of federal district court, determining that statutes prohibiting issuance of marriage licenses to same-sex couples violated equal-protection principles, was not controlling authority on state Supreme Court and did not preclude Supreme Court from issuing writ of mandamus prohibiting state probate judges from issuing marriage licenses to same-sex couples. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 36.03; Code 1975, § 30–1–19.

4 Cases that cite this headnote

nonparties.

Cases that cite this headnote

[10]

Courts

Decisions of United States Courts as Authority in State Courts

In determining federal common law, the Alabama Supreme Court defers only to the holdings of the United States Supreme Court and its own interpretations of federal law; legal principles and holdings from inferior federal courts have no controlling effect, although they can serve as persuasive authority.

2 Cases that cite this headnote

[8]

Courts

Decisions of United States Courts as Authority in Other United States Courts

A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.

Cases that cite this headnote

[11]

Courts

Nature of judicial determination

Courts

Construction of federal Constitution, statutes, and treaties

In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy, for both sets of courts are governed by the same reviewing authority of the United States Supreme Court.

Cases that cite this headnote

[9]

Courts

Decisions of United States Courts as Authority in Other United States Courts

Courts

Decisions of United States Courts as Authority in State Courts

Federal district court decisions cannot clearly establish the law because, while they bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and therefore do not establish the duties of

[12]

Courts

Decisions of United States Courts as Authority in Other United States Courts

Although consistency between state and federal courts is desirable in that it promotes respect for the law and prevents litigants from

forum-shopping, there is nothing inherently offensive about two sovereigns reaching different legal conclusions; indeed, such results were contemplated by the federal system, and neither sovereign is required to, nor expected to, yield to the other.

Cases that cite this headnote

- [13] **Constitutional Law**
 Equal protection
Constitutional Law
 Statutes and other written regulations and rules

For purposes of an equal-protection challenge to a statute, the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *U.S.C.A. Const.Amend. 14*.

Cases that cite this headnote

- [14] **Constitutional Law**
 Equal protection
Constitutional Law
 Economic or social regulation in general

When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the constitution presumes that even improvident decisions will eventually be rectified by the democratic processes. *U.S.C.A. Const.Amend. 14*.

Cases that cite this headnote

- [15] **Constitutional Law**
 Alien status
Constitutional Law

Key Race, national origin, or ethnicity

When a statute classifies by race, alienage, or national origin, these factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy, a view that those in the burdened class are not as worthy or deserving as others; for these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny in an equal-protection challenge and will be sustained only if they are suitably tailored to serve a compelling state interest. *U.S.C.A. Const.Amend. 14*.

Cases that cite this headnote

- [16] **Constitutional Law**
 Marriage and civil unions
Marriage and Cohabitation
 Sex or Gender; Same-Sex Marriage

Statutes prohibiting issuance of marriage licenses to same-sex couples did not discriminate on basis of gender, and thus were not subject to heightened scrutiny for purposes of determining whether statutes violated equal-protection guarantees; all men and all women were equally restricted to marriage between the opposite sexes. *U.S.C.A. Const.Amend. 14*; *Const. Art. 1, § 36.03*; *Code 1975, § 30-1-19*.

Cases that cite this headnote

- [17] **Constitutional Law**
 Marriage and civil unions
Marriage and Cohabitation
 Sex or Gender; Same-Sex Marriage

Rational basis existed for statutes prohibiting issuance of marriage licenses to same-sex

couples, and thus statutes did not violate equal-protection guarantees; statutes were rationally related to legitimate government interest in recognizing and encouraging the ties between children and their biological parents.

U.S.C.A. Const.Amend. 14;  Const. Art. 1, § 36.03;  Code 1975, § 30–1–19.

Cases that cite this headnote

[18]

Constitutional Law

 Same-sex marriage

Marriage and Cohabitation

 Sex or Gender; Same-Sex Marriage

Statutes prohibiting issuance of marriage licenses to same-sex couples did not violate due-process principles, since statutes did not interfere with any fundamental rights; fundamental right to marry was limited to traditional opposite-sex marriage since same-sex marriage was not a deeply rooted tradition, there was no fundamental right to obtain state approval of one's sexual relationships, there was no fundamental right to marry a person one loved regardless of the gender of that person, and there was no fundamental right to enjoy the dignity of having the status of a married person.

U.S.C.A. Const.Amend. 14;  Const. Art. 1, § 36.03;  Code 1975, § 30–1–19.

Cases that cite this headnote

[19]

Constitutional Law

 Same-sex marriage

Marriage and Cohabitation

 Sex or Gender; Same-Sex Marriage

Statutes prohibiting issuance of marriage licenses to same-sex couples were not based solely on animus against homosexuals, and thus did not violate due-process principles; statutes were not intended to single out same-sex

partners for disfavored status, but served legitimate purposes including protecting children produced in opposite-sex relationships, fashioning a system for parental legal responsibilities, encouraging family structure, and enabling formative education and socialization of children. U.S.C.A.

Const.Amend. 14;  Const. Art. 1, § 36.03;  Code 1975, § 30–1–19.

Cases that cite this headnote

[20]

Courts

 In issuance of writs

Marriage and Cohabitation

 Sex or Gender; Same-Sex Marriage

Marriage and Cohabitation

 Duties of officers in general

Extension of time was not warranted for probate judge to comply with Alabama Supreme Court's order, on grant of emergency petition by public-interest groups for writ of mandamus to prohibit all probate judges in state from issuing marriage licenses to same-sex couples, directing probate judge to advise Court as to whether he was bound by any existing federal court orders regarding issuance of same-sex marriage licenses other than the four same-sex marriage licenses probate judge was ordered to issue in prior federal court case, even though probate judge had asked for a ruling as to that question from Judicial Inquiry Commission (JIC) and requested that federal court stay its order enjoining probate judge from refusing to issue the four marriage licenses; inquiry regarding whether probate judge was bound by any existing federal court orders was a factual one, task of reading order enjoining probate judge from issuing licenses was task for the Court, not the JIC, and there was no showing that federal court order for which probate judge sought stay was one that had not already been executed.

Const. Arts. 1, § 36.03, 6, § 156;  Code 1975, § 30–1–9.

3 Cases that cite this headnote

[21]

Courts

🔑 Courts, judges, and judicial officers, acts and proceedings of

Courts

🔑 Restraining Particular Proceedings

Marriage and Cohabitation

🔑 Sex or Gender; Same-Sex Marriage

Marriage and Cohabitation

🔑 Duties of officers in general

Probate judge, who was enjoined by federal court order from refusing to issue marriage licenses to four same-sex couples involved in federal case, was subject to Alabama Supreme Court's order granting emergency petition by public-interest groups for writ of mandamus to prohibit all probate judges in state from issuing marriage licenses to same-sex couples; federal court order granted injunctive relief against probate judge only as to same-sex couples who were plaintiffs in federal case, couples in federal case sought relief only on their own behalf, and inclusion of probate judge in Supreme Court's order was necessary and appropriate to the end of achieving order and uniformity in the application of state marriage laws.  [Const. Art. 1, § 36.03](#);  [Code 1975, § 30-1-9](#).

2 Cases that cite this headnote

[22]

Federal Courts

🔑 Nature of dispute; concreteness

Judgment

🔑 Mutuality of estoppel in general

Federal jurisprudence contemplates that federal court decides only the case before it, in turn binding parties before the court only with respect to other parties in the case.

Cases that cite this headnote

Attorneys and Law Firms

***499** [A. Eric Johnston](#), Birmingham; Samuel J. McLure of The Adoption Law Firm, Montgomery; and [Mathew D. Staver](#), [Horatio G. Mihet](#), and [Roger K. Gannam](#) of Liberty Counsel, Orlando, Florida, for petitioner State ex rel. Alabama Policy Institute and Alabama Citizens Action Program.

John E. Enslen, Probate Judge of Elmore County, as petitioner.

[Lee L. Hale](#), Mobile; and [J. Michael Druhan, Jr.](#), and [Harry V. Satterwhite](#), Mobile, for respondent Judge Don Davis, Probate Judge of Mobile County.

[Gregory H. Hawley](#), [Christopher J. Nicholson](#), and [G. Douglas Jones](#) of Jones & Hawley, PC, Birmingham; and Jeffrey Sewell and French McMillan of Sewell, Sewell, McMillan, LLC, Jasper, for respondent Alan L. King, Probate Judge of Jefferson County.

[George W. Royer, Jr.](#), and [Brad A. Chynoweth](#) of Lanier Ford Shaver & Payne, P.C., Huntsville, for respondent Tommy Ragland, Probate Judge of Madison County.

[Robert D. Segall](#) of Copeland, Franco, Screws & Gill, P.A., Montgomery; [Thomas T. Gallion](#) and [Constance C. Walker](#) of Haskell Slaughter & Gallion, LLC, Montgomery; [Samuel H. Heldman](#) of The Gardner Firm, PC, Washington, D.C.; [Tyrone C. Means](#), [H. Lewis Gillis](#), and [Kristen Gillis](#) of Means Gillis Law, LLC, Montgomery; and [John Mark Englehart](#), Montgomery, for respondent Steven L. Reed, Probate Judge of Montgomery County.

[Kendrick E. Webb](#), [Jamie Helen Kidd](#), and [Fred L. Clements, Jr.](#), of Webb & Eley, P.C., Montgomery, for respondent Robert M. Martin, Probate Judge of Chilton County.

[L. Dean Johnson](#), Huntsville, for amici curiae Eagle Forum of Alabama Education Foundation and Eagle Forum Education & Legal Defense Fund, in support of the petitioner State ex rel. Alabama Policy Institute and Alabama Citizens Action Program.

J. Richard Cohen and David Dinielli, Southern Poverty Law Center, Montgomery; Ayesha Khan, Americans United for Separation of Church and State, Washington, D.C.; Shannon P. Minter and Christopher F. Stoll, National Center for Lesbian Rights, San Francisco, California; and Randall C. Marshall, ACLU of Alabama Foundation, Montgomery, for amicus curiae Equality Alabama, in support of the respondents.

J. Stanton Glasscox of Glasscox Law Firm, LLC, Birmingham, for amicus curiae J. Stanton Glasscox, in support of the respondents.

Opinion

PER CURIAM.

****1** The State of Alabama, on relation of the Alabama Policy Institute (“API”), the Alabama Citizens Action Program (“ACAP”), and John E. Enslen, in his official capacity as Judge of Probate for Elmore County, seeks emergency and other relief from this Court relating to the issuance of marriage licenses to same-sex couples. Named as respondents are Alabama Probate Judges Alan L. King (Jefferson County), Robert M. Martin (Chilton County), Tommy Ragland (Madison County), Steven L. Reed (Montgomery County), and “Judge Does 1–63, each in his or her official capacity as an Alabama Judge of Probate.” API and ACAP ask on behalf of the State for “a clear judicial pronouncement that Alabama law prohibits the issuance of marriage licenses to same-sex couples.” To the same end, Judge Enslen “requests that this Supreme Court of Alabama, by any and all lawful means available to it, protect ***500** and defend the sovereign will of the people of the State of Alabama.”

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 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. The petitioner here, the State of Alabama, by and through the relators, contends that the respondent Alabama probate judges are flouting a duty imposed upon them by the Amendment and the Act and that we should direct the respondent probate judges to perform that duty.¹

****2** The circumstances giving rise to this action are the result of decisions and orders recently issued by the United States District Court for the Southern District of Alabama (“the federal district court”) in *Searcy v. Strange*, 81 F.Supp.3d 1285 (S.D.Ala.2015) (“*Searcy I*”), and *Strawser v. Strange* (Civil Action No. 14–0424–CG–C, Jan. 26, 2015), and a subsequent order by that court, in each of those cases, refusing to extend a stay of its initial order pending an appeal.

In its initial decision in *Searcy I*, the federal district court issued a “Memorandum Opinion and Order” in which that court came to the conclusion that the “prohibition and non-recognition of same-sex marriage” in the Amendment and the Act violate the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In *Searcy I*, the federal district court enjoined Alabama Attorney General ***501** Luther Strange—the only remaining defendant in that action—from enforcing the Amendment and the Act.

On January 26, the federal district court entered a preliminary injunction in *Strawser*, a case in which a same-sex couple had been denied a marriage license in Mobile. The federal district court, relying on the reasons it provided in *Searcy I* for the unconstitutionality of the Amendment and the Act, enjoined Attorney General Strange and “all his officers, agents, servants and employees, and others in active concert or participation with any of them” from enforcing “the marriage laws of Alabama which prohibit same-sex marriage.”

In the wake of the federal district court’s orders, Attorney General Strange has refrained from fulfilling what would otherwise have been his customary role of providing advice and guidance to public officials, including probate judges, as to whether or how their duties under the law may have been altered by the federal district court’s decision. Similarly, consistent with the federal district

court's order, Attorney General Strange has refrained from taking any other official acts in conflict with those orders.

****3** On January 28, 2015, the federal district court issued an "Order Clarifying Judgment" in *Searcy I*, in which it responded to "statements made to the press by the Alabama Probate Judges Association" that indicated that, "despite [the federal district court's] ruling, [probate judges] must follow Alabama law and cannot issue marriage licenses to same-sex couples." In that order, the federal district court observed that

" '[r]easonable people can debate whether the ruling in this case was correct and who it binds. There should be no debate, however, on the question whether a clerk of court *may follow the ruling*, even for marriage-license applicants who are not parties to this case. And a clerk who chooses not to follow the ruling should take note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees.... The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, the Constitution requires the Clerk to issue such licenses. As in any other instance involving parties not now before the court, the Clerk's obligation to follow the law arises from sources other than the preliminary injunction.' "

(Quoting *Brenner v. Scott* (No. 4:14cv107, Jan. 1, 2015)

(N.D.Fla.) (emphasis added).)

The federal district court entered stays of the execution of its injunctions in *Searcy I* and *Strawser* until February 9, 2015, in order to allow Attorney General Strange to seek a further stay, pending appeal, from the United States Court of Appeals for the Eleventh Circuit. On February 3, 2015, the Eleventh Circuit declined Attorney General Strange's request for a stay. Thereafter, Attorney General Strange sought a stay from the United States Supreme Court. On February 9, 2015, the United States Supreme Court also declined to enter a stay over a strongly worded dissent from Justice Clarence Thomas that was joined by Justice Antonin Scalia. *Strange v. Searcy*, —U.S.—, 135 S.Ct. 940, 191 L.Ed.2d 149 (2015).

On February 8, 2015, the Chief Justice of this Court entered an administrative order stating that the injunctions issued by the federal district court in *Searcy I* and *Strawser* were not binding on any Alabama ***502** probate judge and prohibiting any probate judge from issuing or recognizing a marriage license that violates the Amendment or the Act.

On February 9, 2015, the stays of the injunctions in *Searcy I* and *Strawser* were lifted. It is undisputed that at that time respondent probate Judges King, Martin, Ragland, and Reed began issuing marriage licenses to same-sex couples in their respective counties. Probate judges in some other counties refused to issue any marriage licenses pending some further clarification concerning their duty under the law. Still other probate judges continued to issue marriage licenses to opposite-sex couples and refused to issue marriage licenses to same-sex couples.

****4** Also on February 9, 2015, the plaintiffs in *Searcy I* filed a motion seeking to hold Mobile Probate Judge Don Davis in contempt for "fail[ing] to comply with [the federal district court's] January 23, 2015 Order." The federal district court denied the motion, stating:

"Probate Judge Don Davis is not a party in this case and the Order of January 23, 2015, did not directly order [Judge] Davis to do anything. Judge Davis's obligation to follow the Constitution does not arise from

this court's Order. The Clarification Order noted that actions against Judge Davis or others who fail to follow the Constitution could be initiated by persons who are harmed by their failure to follow the law. However, no such action is before the Court at this time."

(Footnote omitted.)

On February 10, 2015, the federal court granted the plaintiffs' motion in *Strawser* to amend their complaint to add three additional same-sex couples as plaintiffs and to add Judge Davis as a defendant. On February 12, 2015, the federal district court entered an order requiring Judge Davis to issue marriage licenses to each of the four couples named as plaintiffs in that case.

As noted, on February 11, 2015, API and ACAP filed their petition. On February 13, 2015, this Court ordered answers and briefs in response to the petition, "as to the issues raised by the petition, including, but not limited to, any issue relating to standing or otherwise relating to this Court's subject-matter jurisdiction, and any issue relating to the showing necessary for temporary relief as requested in the petition." On February 18, 2015, the named respondent probate judges and Probate Judges Don Davis and John E. Enslen filed their respective responses to the petition.

In his response, Judge Davis "moved this ... Court to enter an Order that the Emergency Petition for Writ of Mandamus filed on February 11, 2015, with this Court does not apply to [him] due to changing circumstances that are not reflected in the Mandamus Petition." He states that the petition does not apply to him because he is a defendant, in his official capacity as probate judge, in *Strawser*, and he has been "enjoined from refusing to issue marriage licenses to the plaintiffs [in that case] due to the Alabama laws which prohibit same-sex marriage."

^[1] For his part, Judge Enslen stated in his response that he "has thus far refused to issue same sex marriage licenses." Judge Enslen expressly requested that this Court "by any and all lawful means available to it, protect and defend the sovereign will of the people of the State of Alabama as expressed in the Constitution of the State of Alabama, as amended." We treat Judge Enslen's response as a

motion to join this proceeding in the place of one of the "Judge Doe" respondents, and we grant that motion.

***503 **5** Also, in light of the fact that the legal positions of API, ACAP, and respondent Judge Enslen are clearly aligned, we hereby modify the record to reflect that alignment.² Judge Enslen has been realigned as an additional relator seeking an order from this Court requiring, among other things, that Alabama probate judges continue to perform their duty in accordance with Alabama law. API, ACAP, and Enslen are hereinafter collectively referred to as "the relators."

The relators assert that Alabama's probate judges have a ministerial duty to follow Alabama law limiting marriage to a union of one man and one woman. In contrast, the respondents contend that granting the relief the relators request necessarily would require this Court to determine the validity of that law when tested against the United States Constitution because there would be no ministerial duty of the nature asserted if the law is unconstitutional.

The ministerial duty of probate judges in Alabama is, of course, a function of Alabama law, which probate judges swear by oath to support, except to the extent that that duty may be altered or overridden by the United States Constitution, to which they likewise swear an oath. Before the federal district court issued its decisions in *Searcy I* and *Strawser*, the named respondents and all other probate judges in this State were performing their ministerial duty in accordance with the express provisions of the Act and the Amendment. They did so even though numerous federal courts had already declared other states' laws limiting marriage to opposite-sex couples to be unconstitutional. See, e.g., [Bostic v. Schaefer](#), 760 F.3d 352 (4th Cir.2014); [Baskin v. Bogan](#), 766 F.3d 648 (7th Cir.2014); [Latta v. Otter](#), 771 F.3d 456 (9th Cir.2014); and ***504** [Kitchen v. Herbert](#), 755 F.3d 1193 (10th Cir.2014). The respondents stopped following Alabama law, however, following the *Searcy I* and *Strawser* decisions. Clearly, the respondents, who were not bound by the federal district court's decision, assumed a new position as to the nature of their duty in accordance with the position taken by the federal district court. Therefore, in order to determine whether the respondents are correct to now treat their ministerial duty as being altered or overridden by the United States Constitution, we must examine the reasoning of the federal district court's decision in *Searcy I*, which triggered their change of position. Absent our doing so, we cannot resolve the

dispute that exists in this adversarial proceeding; we cannot provide the relators the relief that they request and that the respondents oppose. It would not be enough for this Court merely to order that the respondents “follow their ministerial duty.” Such an order would beg the question whether they are or are not doing so at the present time, the very question the parties contest. Accordingly, in order to resolve the dispute before us and to discharge the supervisory duties and responsibilities imposed upon this Court by law, we must address that question.

I. The Significance and Meaning of Marriage

****6** ^[2] The family is the fundamental unit of society. Marriage is the foundation of the family. There is no institution in a civilized society in which the public has any greater interest.

“The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society.”

Joseph Story, *Commentaries on the Conflict of Laws Foreign and Domestic* § 109 (3d ed. 1846).

“[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”

L.Ed. 654 (1888). It “creat[es] the most important relation in life, ... having more to do with the morals and civilization of a people than any other institution.”  *Id.* at 205.

“ ‘[Marriage] is not then a contract within the meaning of the clause of the constitution which prohibits the impairing the obligation of contracts. It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.’ ”

 *Id.* at 211–12 (quoting *Adams v. Palmer*, 51 Me. 480, 484–85 (1863)).

“[M]arriage is a contract *sui generis*, and the rights, duties, and obligations which arise out of it, are matters of so much importance to the well-being of the State, that they are regulated, not by private contract, but by the public laws of the State, which are imperative on all, who are domiciled within its territory.”

Story, *supra*, at § 111.

According to one observer, marriage is a “prepolitical” “natural institution” “not created by law,” but nonetheless recognized and regulated by law in every culture and, properly understood, an institution that must be preserved as a public institution based on the following rationale: “The family is the fundamental unit of society.... [F]amilies ... produce something *505 that governments need but, on their own, they could not possibly produce: upright, decent people who make honest law-abiding, public-spirited citizens. And marriage is the indispensable foundation of the family.” Robert P. George, *Law and Moral Purpose*, First Things, Jan. 2008; see also Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 Harv. J.L. & Pub. Pol’y 245, 270 (2011)

 *Maynard v. Hill*, 125 U.S. 190, 211, 8 S.Ct. 723, 31

(discussing the bases for laws supporting “conjugal” or “traditional” marriage and noting that “[m]arriages ... are a matter of urgent public interest, as the record of almost every culture attests—worth legally recognizing and regulating. Societies rely on families, built on strong marriages, to produce what they need but cannot form on their own: upright, decent people who make for reasonably conscientious, law-abiding citizens. As they mature, children benefit from the love and care of both mother and father, and from the committed and exclusive love of their parents for each other.... In the absence of a flourishing marriage culture, families often fail to form, or to achieve and maintain stability.”).

Thus it is for the stability and welfare of society, for the general good of the public, that a proper understanding and preservation of the institution of marriage is critical. It is the people themselves, not the government, who must go about the business of working, playing, worshiping, and raising children in whatever society, whatever culture, whatever community is facilitated by the framework of laws that these same people, directly and through their representatives, choose for themselves. It is they, who on a daily basis must interact with their fellow man and live out their lives within that framework, who are the real stakeholders in that framework and in the preservation and execution of the institutions and laws that form it. There is no institution more fundamental to that framework than that of marriage as properly understood throughout history.

****7** In 1885, the United States Supreme Court expressed the axiomatic nature of marriage as follows:

“[N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best

guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.”

 *Murphy v. Ramsey*, 114 U.S. 15, 45, 5 S.Ct. 747, 29 L.Ed. 47 (1885). See, also, *Smith v. Smith*, 141 Ala. 590, 592, 37 So. 638, 638–39 (1904), describing marriage as “the sacred relation.” Even in decisions suggesting that marriage is simply a “civil status,” courts have recognized “the fair point that same-sex marriage is unknown to history and tradition.”  *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir.2012). As the United States Supreme Court acknowledged in  *United States v. Windsor*, — U.S. —, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013):

“It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its ***506** role and function throughout the history of civilization.”

 — U.S. at —, 133 S.Ct. at 2689 (also noting that “[t]he limitation of lawful marriage to heterosexual couples ... for centuries had been deemed both necessary and fundamental,” *id.*).

“It is beyond dispute, as the Court of Appeal majority in this case persuasively indicated, that there is

no deeply rooted tradition of same-sex marriage, in the nation or in this state. Precisely the opposite is true. The concept of same-sex marriage was unknown in our distant past, and is novel in our recent history, because the universally understood definition of marriage has been the legal or religious union of a man and a woman.”

 *In re Marriage Cases*, 43 Cal.4th 757, 866, 183 P.3d 384, 460, 76 Cal.Rptr.3d 683, 773 (2008) (Baxter, J., concurring in part and dissenting in part) (footnote omitted).³

****8** From its earliest days, Alabama has recognized so-called common-law marriages. See, e.g., *Campbell's Adm'r v. Gullatt*, 43 Ala. 57, 69 (1869) (“[A] marriage good at the common law, is to be held a valid marriage in this State.”). Also from its earliest days, the State has by legislation provided a statutory scheme for the formal licensing and recognition of marriages by the State. H. Toulmin, *Digest of the Laws of Alabama*, tit. 42, ch. 1, § 1 (1823). The present statutorily prescribed scheme for the licensing and solemnization of marriages is found in Chapter 1 of Title 30, Ala.Code 1975. Further, both the caselaw and the statutory law of Alabama incorporate or contemplate the institution of marriage in many areas.

The meaning and significance of marriage as an institution, as prescribed or recognized throughout all of these statutes and all of Alabama’s decisional laws, reflects the truths described above: that marriage, as a union between one man and one woman, is the fundamental unit of society.

As the Alabama Supreme Court stated in 1870:

“Archbishop Rutherford, one of the most able and eminent of the commentators on Grotius, has placed marriage among the natural rights of men. He defines it in these words: ‘Marriage is a contract between a man and woman, in which, by their mutual consent, each acquires a right in the person of the other, for the purpose of their mutual happiness and for the production and education of children. Little, I suppose, need be said in support of this definition, as nothing is affirmed in it, but what all writers upon natural law

seem to agree in.’—Ruthf. Insts. of Nat. Law, p. 162; 1 Bish. on Mar. and Div. § 3, 29; 2 Kent, 74, 75; 6 Bac. Abr. Bouv. p. 454; 2 Bouv. Law Dict. 12th ed. p. 105.

“Mr. Parsons, referring to the same subject, in a late work of the highest *507 authority, uses like language. He declares that ‘the relation of marriage is founded on the will of God, and the nature of man; and it is the foundation of all moral improvement, and all true happiness. No legal topic surpasses this in importance; and some of the questions which it suggests are of great difficulty.’—2 Pars. on Contr. p. 74.”

Goodrich v. Goodrich, 44 Ala. 670, 672–75 (1870).

II. This Court’s Authority And Responsibility To Act

A. This Court Has Subject–Matter Jurisdiction

^[3] As discussed, the federal district court’s order in *Searcy I* enjoined Attorney General Strange from enforcing the Amendment and the Act, thus effectively preventing the Attorney General from giving much needed advice to Alabama’s probate judges as to their legal duties under the law. The federal district court’s order in *Strawser* specifically relied upon the legal reasoning set out in *Searcy I*. Neither order specifically discusses or analyzes the remainder of Chapter 1 of Title 30. Neither order analyzes the import of its approach to the term “marriage” for such related terms as “husband,” “wife,” “spouse,” “father,” and “mother” so entrenched in much of the caselaw and other statutory law of this State. See discussion *infra*. The probate judges of this State, in both their judicial and ministerial capacities, continue to be bound by that caselaw and by those statutes. Furthermore, 67 of this State’s 68 probate judges are not the subject of any restraint by the federal district court, including as to the interpretation and application of the Act and the Amendment.

Yet there is the federal district court decision. And, in the wake of that decision, the refusal of the federal district court to stay that decision and the unavailability of the Attorney General as a source of guidance, uncertainty has

become the order of the day. Confusion reigns. Many judges, including the respondents, are issuing marriage licenses to both same-sex couples and opposite-sex couples. Others are issuing no marriage licenses at all. Still others, like relator Judge Enslen, are issuing marriage licenses only to opposite-sex couples. There is no order or uniformity of practice.

****9** But the problems that lie before us are not limited to the confusion and disarray in the ministerial act of licensing marriages. If the same-sex marriage licenses being issued by respondents and other probate judges are given effect by those judges and their colleagues in other circuits throughout the State, this will work an expansive and overnight revolution in countless areas of caselaw and statutory law that incorporate or contemplate the traditional definition of marriage. To name but a few examples, there is caselaw and/or statutory law that presumes, accommodates, or contemplates man-woman marriage in such wide-ranging areas as the laws of inheritance and the distribution of estates, the administration of estates, postmarital support, custodial and other parental rights as to children, adoption of children,⁴ dissolution of marriages, testimonial ***508** privileges in both the civil and criminal law, certain defenses in the criminal law, interests in land, the conveyance and recording of such interests, compensation for the loss of consortium, and the right to statutory or contractual benefits of many types. Indeed, most of the matters falling within the jurisdiction of the probate courts involve rights that are affected by marital status because of the rights of a spouse or legal preferences given to a spouse or parent.

Section 12–13–1, Ala.Code 1975, states, in part:

“(b) The probate court shall have original and general jurisdiction over the following matters:

“(1) The probate of wills.

“(2) The granting of letters testamentary and of administration and the repeal or revocation of the same.

“(3) All controversies in relation to the right of executorship or of administration.

“(4) The settlement of accounts of executors and administrators.

“(5) The sale and disposition of the real and personal

property belonging to and the distribution of intestate’s estates.

“(6) The appointment and removal of guardians for minors and persons of unsound mind.

“(7) All controversies as to the right of guardianship and the settlement of guardians’ accounts.

“(8) The allotment of dower in land in the cases provided by law.”

Without a clear understanding as to whether a marriage exists, how is a probate court to know whether a same-sex partner must be served with process as a surviving spouse for purposes of a petition to probate a deceased partner’s will; how is the probate court to know whether a same-sex partner has a priority right, as a surviving spouse, to appointment as administrator of a deceased partner’s estate; how is the probate court to know whether a deceased partner has the right of a surviving spouse to an intestate share of the estate, or to homestead allowance, to exempt property, to family allowance, or to other rights of a surviving spouse; and how is the probate court to determine priority rights as to the appointment of guardians and conservators?

And the problems will not be confined to probate courts. Circuit courts must assess marital status in regard to whether to grant a petition for a legal separation or a divorce and in making property divisions ***509** and alimony awards. And marital status is part of our law concerning the legitimation of children and paternity, including presumptions as to married persons to whom a child is born, a matter that affects both circuit courts and juvenile courts. Likewise, circuit courts will be confronted with claims of loss of consortium and wrongful-death claims brought on behalf of the heirs of decedents, and all trial courts will have to assess the applicability of evidentiary privileges belonging to a spouse.

****10** The Governor of Alabama recently highlighted in an amicus brief to the United States Court of Appeals for the Eleventh Circuit (filed in support of Attorney General Strange’s request for a stay of the order in *Searcy I*) some of the laws and practices that potentially would be affected by a redefinition of marriage:

“[A]ll of the statutes governing marital and domestic relations, Ala.Code Title 30, and the judicial decisions interpreting them; the presumption of paternity,

Ala.Code § 26–17–204, and other rules for establishment of the parent-child relationship, Ala.Code § 26–17–201; laws governing consent to adopt, Ala.Code § 26–10A–7(3), and all other laws governing adoption, Ala.Code Title 26, Chapter 10A; termination of parental rights, Ala.Code § 12–15–319; all laws that presuppose different people occupying the positions of ‘father,’ ‘mother,’ ‘husband,’ and ‘wife,’ e.g., Ala.Code § 40–7–17; laws governing intestate distribution, the spousal share, Ala.Code § 43–8–41, and the share of pretermitted children, Ala.Code § 43–8–91; legal protections for non-marital children, Ala.Code § 26–17–202; registration of births, Ala.Code § 22–9A–7, *J.M.V. v. J.K.H.*, 149 So.3d 1100 (Ala.Civ.App.2014); conflict-of-interest rules and other ethical standards prohibiting marital relations, Ala.Code § 45–28–70(f)(1), *Cooner v. Alabama State*, 59 So.3d 29 (Ala.2010); and laws presupposing biological kin relations, Ala.Code § 38–12–2.

“This does not include laws governing forms issued by the State that identify mothers, fathers, husband, or wife; tax laws; education curricula; accreditation standards for educational institutions; licensing standards for professions; public accommodations rules; religious liberty protections; health care regulations; and many other areas of law. What are children to be taught in Alabama’s schools about the nature of marriage? How will it be defined in textbooks and other instructional materials? Will all private schools, colleges, and universities be required to go along with the new definition, whatever it is? Will there be moral or religious exemptions for those who perceive inherent differences between marital unions and non-marital unions?”

Every day, more and more purported “marriage licenses” are being issued to same-sex couples by some of the probate judges in this State. Every day, the recipients of those licenses and others with whom they interact may be, and presumably are, relying upon the validity of those licenses in their personal and business affairs. Every probate judge in this State, regardless of his or her own stance on the issuance of such licenses, will soon enough be faced, in his or her judicial capacity, with a universe of novel derivative questions unprecedented in their multiplicity, scope, and urgency. The circuit courts of this State will confront a similar experience.

****11** The probate judges of this State are members of the judicial branch of government. Accepting the position

suggested by all relators and respondents, that insofar as their execution of the authority to ***510** issue marriage licenses they function not as courts of inferior jurisdiction, but as executive ministers of the law, the fact remains that each probate judge in this State also functions as a “court of inferior jurisdiction” with responsibility to administer the law in many types of cases. Their ability to do so with any semblance of order and uniformity, with due regard for the lives their decisions impact, and with respect for the law and the constitutions of this State and of the United States, which they have sworn an oath to uphold, is in peril. Indeed, given the disparate views of the law held among these judges, and no doubt the circuit judges as well, we see no way for there to be uniform and even-handed application of the law among the circuits of this State unless and until this Court speaks.

Section 140(b), Ala. Const.1901, states that this Court “shall have original jurisdiction ... to issue such remedial writs or orders as may be necessary to give it general supervision and control of courts of inferior jurisdiction.” Section 12–2–7(3), Ala.Code 1975, echoes § 140, stating that “[t]he Supreme Court shall have authority ... [t]o issue writs of injunction, habeas corpus, and such other remedial and original writs as are necessary to give to it a general superintendence and control of courts of inferior jurisdiction.” A separate provision of § 12–2–7, subsection (2), provides the following jurisdiction to the Supreme Court: “To exercise original jurisdiction in the issue and determination of writs of quo warranto and mandamus in relation to matters in which no other court has jurisdiction.”

Alabama is not alone in its adoption of provisions such as those cited above. “Constitutional or statutory provisions expressly granting to various courts superintending control over inferior tribunals are common, although not universal, in the states of this country.” P.V. Smith, Annotation, *Superintending Control Over Inferior Tribunals*, 112 A.L.R. 1351, 1352 (1938). The language used by most states in granting courts this power is very similar to the language found in Alabama’s Constitution. Generally, concerning the origin of the superintending control over inferior tribunals, Smith states:

“The following conclusion was drawn by the annotator in 51 L.R.A. 33, loc. cit. p. 111: ‘The power of superintending control is an extraordinary power. *It is hampered by no specific rules or means for its exercise.* It is so general and comprehensive that its complete and full extent and use have practically hitherto not

been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur, it will be found able to cope with them. And, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted.’ ”

****12** 112 A.L.R. at 1356 (emphasis added). Further,

“[i]n  *Kelly v. Kemp* (1917) 63 Okla. 103, 162 P. 1079, in regard to the constitutional provision vesting the Supreme Court with a general superintending control over inferior tribunals, the court said: ‘This provision placed the Supreme Court in practically the same position with reference to the inferior courts of the State, as that occupied by the court of King’s Bench to the inferior courts of England under the common law, which court, as stated by Blackstone, was vested with power to keep all inferior courts within the bounds of their authority and, to do this, could remove their proceedings to be determined *511 by it, or prohibit their progress below (3 Bl. Com. 42), and that court was also possessed of authority to enforce in inferior tribunals the due exercise of those judicial or ministerial powers which had been vested in them, by restraining their excesses and quickening their negligence and obviating their denial of justice (2 Bl. Com. 111).’ ”

112 A.L.R. at 1356–57 (emphasis added).

“The power of superintending control is not limited by forms of procedure or by the writ used for its exercise.” 112 A.L.R. at 1357.

“Accordingly, in *State v. Long* (1911) 129 La. 777, 56 So. 884, where it was argued as to the conditions under which writs of certiorari, mandamus, and prohibition might issue, the Supreme Court said that, in the exercise of its supervisory powers, it was not tied down by the provisions of the Code of Practice regarding such writs.

“And in *Thomas v. Doughty* (1927) 163 La. 213, 111 So. 681, the Supreme Court said: ‘This court, in the exercise of its general supervision and control over inferior courts, is not tied down by forms of procedure, and will look at the substance of the right sought to be vindicated and the need for speedy relief, rather than to the form in which such relief is sought.’ ”

“In *Dinsmore v. Manchester* (1911) 76 N.H. 187, 81 A. 533, in answer to an objection to the scope of review by the Supreme Court on certiorari under its statutory general superintendence of all inferior tribunals, the court said that it was unimportant that the proceeding was called ‘certiorari,’ and that ‘the superintending power of the court over inferior tribunals does not depend upon, and is not limited by, technical accuracy of designation in legal forms of action.’ ”

“And in *Lowe v. District Ct.* (1921) 48 N.D. 1, 181 N.W. 92, the Supreme Court said that the nature and extent of its superintending control are ‘not reflected by the name of the writ that has been used for its exercise.’ ”

****13** 112 A.L.R. at 1357–58 (emphasis added). See also *Thompson v. Lea*, 28 Ala. 453, 463 (1856) (Rice, C.J.) (noting that this Court’s appellate jurisdiction and its superintending control over inferior tribunals are “distinct things, and must not be confounded” and stating that “[a] general superintendence and control of inferior jurisdictions” is, by the constitution, granted to this court unconditionally. ‘Appellate jurisdiction’ is, by the very terms of the grant, subjected to ‘such restrictions and regulations, not repugnant to this constitution, as may, from time to time, be prescribed by law.’ ” (emphasis added)).

“The generally accepted view is that a court will exercise its superintending control over inferior tribunals only in extreme cases and under unusual circumstances.” *Smith*, 112 A.L.R. at 1373. This sentiment is consistent with our Court’s precedent. In  *Ex parte Alabama Textile Products Corp.*, 242 Ala. 609, 613, 7 So.2d 303, 306 (1942), this Court exercised jurisdiction over an original action on the ground that the Montgomery Circuit Court could not provide the complete relief necessary, observing that

“the higher court will not take jurisdiction where the application can be made to a lower court, unless for special reasons complete justice cannot otherwise be done, as where the case is of more than ordinary magnitude and importance to prevent a denial of justice or

where no application can be made to the lower court in time to prevent the consummation of the alleged wrong.”

See also  *Roe v. Mobile Cnty. Appointment Bd.*, 676 So.2d 1206 (Ala.1995), overruled *512 on other grounds by  *Williamson v. Indianapolis Life Ins. Co.*, 741 So.2d 1057 (1999), in which this Court relied upon the unified nature of our court system and the supervisory authority granted to it under what is now § 140 of our constitution to “reach down” and “pull up” to it the record in a still pending lower court proceeding in order to create a framework for its assessment of a related matter.

The respondents’ briefs focus on *Alabama Textile* and make three arguments as to why the holding in that case does not support jurisdiction in this Court over the present matter. First, the respondents argue that *Alabama Textile* involved a petition for a writ of certiorari rather than a petition for a writ of mandamus. The respondents give no explanation, and cite no authority, as to how or why this makes a difference. We cannot see that it does.

Second, the respondents argue that the Court in *Alabama Textile* determined that it should exercise jurisdiction “because all parties consented to the jurisdiction of the Supreme Court.” This assertion is incorrect. Parties cannot vest this Court with jurisdiction by agreeing that it has jurisdiction.  242 Ala. at 612, 7 So.2d at 305 (“[T]his Court can only act within the jurisdiction conferred by law, and this cannot be enlarged by waiver or the consent of the parties.”). And the parties did not do so in *Alabama Textile*. What they did agree to do was to waive the necessity of a writ of certiorari calling up the case for review. But the issue of a formal writ of certiorari is irrelevant here because the present case comes to us as a petition for a writ of mandamus or similar relief. The case therefore is already before us without the necessity of our calling it up from some lower court.⁵

The third and final argument of the respondents—which they refer to as their “most important[] argument”—is as follows: The holding of *Alabama Textile* has been recognized in subsequent cases, but only as dicta. The fact that *Alabama Textile*, itself, held as it did, however, is in itself sufficient precedent for the action taken by this Court today. In any event, one would expect that extraordinary circumstances justifying this Court’s action,

rather than action by a circuit court, would be rare. In addition, as the respondents themselves note, the principle recognized by this Court in *Alabama Textile* has in fact been reiterated by this Court on several occasions, including in this Court’s decision in *Ex parte Tubbs*, 585 So.2d 1301, 1302 (Ala.1991). See also *Denson v. Board of Trustees of the University of Alabama*, 247 Ala. 257, 258, 23 So.2d 714, 715 (1945), and *Ex parte Barger*, 243 Ala. 627, 628, 11 So.2d 359, 360 (1942).

****14** An additional argument that might have been, but was not, made by the respondents is that the probate court, in exercising its authority to issue marriage licenses, acts not as a “court” or a “court of inferior jurisdiction” in relation to this Court, but as an executive minister. API and ACAP themselves cite authority for the proposition that “ ‘[t]he issuance of a marriage license by a judge of probate is a ministerial and not a judicial act.’ ” (Quoting *Ashley v. State*, 109 Ala. 48, 49, 19 So. 917, 918 (1896).)

There are several problems with attempting to conclude that this Court lacks *513 jurisdiction on the basis of such a purported distinction in *Alabama Textile*. First, the respondent in *Alabama Textile* was not a “court” either. It was the Alabama Department of Industrial Relations, an agency of the executive branch of government. Although its internal procedures for decision-making might have been quasi-judicial in nature, its eventual action or inaction was that of an executive agency, not a court.

It would further appear that the exact nature of the party before the Court in *Alabama Textile* was of no moment to the Court, and would have been of no moment even if examined more closely, given the provisions of § 12–2–7(2). As noted, that section states simply that the Supreme Court “shall have authority ... [t]o exercise original jurisdiction in the issue and determination of writs of quo warranto and mandamus in relation to matters in which no other court has jurisdiction.” The text refers not to writs directed to lower “courts” but to “matters in which no ... court” (other than the Supreme Court) would have jurisdiction. In addition, of course, there is the fact that the writ of quo warranto authorized thereby is not a writ issued only to courts acting as courts, but is in the normal course a writ issued to individuals purporting to hold (or exercise the authority of) offices of all sorts in all three branches of government. In fact, this Court recently exercised its original jurisdiction under § 12–2–7(2) to issue a writ of mandamus to a probate judge in his administrative capacity where no circuit court had the ability to do so.⁶

It is clear that no other court in this State has the jurisdiction to provide the relief necessary in this most unusual of cases. There is a need for immediate, uniform relief among all the probate judges of this State, and no circuit court has jurisdiction over any probate judge outside its territorial jurisdiction. See *Brogden v. Employees' Ret. Sys.*, 336 So.2d 1376 (Ala.Civ.App.1976) (explaining that the Constitution authorized the Legislature to divide the state into judicial circuits with geographical or territorial boundaries, that within such boundaries each circuit court exercises the authority granted it exclusive of other circuit courts, and therefore the statutory grant to a circuit court of supervisory power over inferior jurisdictions could be applied only to such inferior judicial bodies that sat or acted within the territorial limits of the circuit), cert. denied sub nom., *Ex parte State ex rel. Baxley*, 336 So.2d 1381 (1976).

****15** *Alabama Textile* offers a helpful framework for assessing the necessity of action by this Court under § 12-2-7(2) in this case:

“The necessity is not wholly dependent upon whether some court inferior to this has the legal power by certiorari to review the order in question. See *Ex parte Boynton*, 44 Ala. 261 [(1870)]. But the rule observed elsewhere with a similar provision of the constitution seems to be that the higher court will not take jurisdiction where the application can be made to a lower court, unless for special reasons complete justice cannot otherwise be done, as where the case is of more than ordinary magnitude and importance to prevent a denial of justice or where no application can be made to the lower court in time to prevent the consummation of the alleged wrong. 14 Corpus Juris Secundum, Certiorari, p. 204, § 57. That authority cites *Halliday v. Jacksonville [& Alligator] Plank Road Co.*, 6 Fla. 304 [(1855)]. The report of that case quotes the constitution of Florida in identical language as our section 140, supra, as here material, and observes: ‘It is not doubted, but that under the latitude given by the said proviso, a writ of certiorari will lie from this Court to any of the inferior jurisdictions, whenever an appropriate case may be presented, or it shall become necessary for the attainment of justice.’ [6 Fla. at 304.]

“We do not think that the requirement of the Constitution that we shall issue such writs only when necessary to give us a general superintendence fixes an iron-clad rule that we cannot do so when another court

inferior in grade to us has a like power.

“While we hold that the Circuit Court of Montgomery County may review by appropriate remedial writs the boards and commissions of the State sitting in Montgomery, we also think that *this Court may do so when in our judgment it is necessary to afford full relief and do complete justice*. An exercise of such discretion will receive more favorable consideration when the interested parties appear and virtually agree that there is such necessity by submitting the cause without making the objection that there is an absence of it. *We have the right to determine whether a necessity exists, influenced by the magnitude and importance of the question involved, and the convenience of the parties in presenting it, rather than in first going to the Circuit Court of the county where the board sits.*

“On account of the importance of the question here involved, its state-wide application, the need of an early decision, the territorially restricted jurisdiction of the circuit court and the consent of the parties, we have concluded in the exercise of our power and discretion to give consideration to the merits of the question and make decision of it.”

****16**  242 Ala. at 613–14, 7 So.2d at 306 (emphasis added).

The “magnitude and importance” of the issue before us is unparalleled. And the “special reasons” that compel us to act are unlike any other in the history of our jurisprudence. Given the textual grant of authority described above, the *sui generis* nature of this matter, the unprecedented existing and potential confusion and disarray among the probate and other judges of this State, the multiplicity and magnitude of the substantive issues presented, the resulting need for an immediate resolution of this matter, the unavailability in any other court of the immediate statewide relief that is needed, and this Court’s ultimate responsibility for the orderly administration of justice in this State, we are clear to the conclusion that this Court has the authority to act in this matter to maintain and restore order in the administration of our laws by the probate judges and the courts of this State.

B. This Proceeding Is Between Adverse Parties with

Standing

The respondents argue that the relators lack “standing” to bring this action because, *515 they say, the relators have no *private interest or private right* in the performance by Alabama’s probate judges of their duty to issue marriage licenses only in accordance with Alabama law. The respondents fail to allow for the fact, however, that the present petition is filed in the name of the State for the purpose of securing performance by public officials of *a duty owed to the public*, not in the name of a private party to enforce a private right or duty.

^[4] The rule of public-interest standing, sometimes referred to as the public-interest exception, has been widely and long-recognized. Consistent with this principle, this Court has stated that a relator has standing to bring a petition for mandamus or comparable relief, in the name of the State, *seeking to uphold a State statute and to secure performance by respondents of a duty owed to the public.*

“It is now the settled rule in Alabama that a mandamus proceeding to compel a public officer to perform a legal duty in which the public has an interest, as distinguished from an official duty affecting a private interest merely, is properly brought in the name of the State on the relation of one or more persons interested in the performance of such duty to the public....”

Kendrick v. State ex rel. Shoemaker, 256 Ala. 206, 213, 54 So.2d 442, 447 (1951); see also *Morrison v. Morris*, 273 Ala. 390, 392, 141 So.2d 169, 170 (1962) (same); *Homan v. State ex rel. Smith*, 265 Ala. 17, 19, 89 So.2d 184, 186 (1956) (same). Indeed, this has been well settled in Alabama for over 100 years: “There is no doubt that, where the writ is sued out to require the performance of a definite duty to the public, the proceeding must proceed in the name of the state as plaintiff.” *Bryce v. Burke*, 172 Ala. 219, 230, 55 So. 635, 638 (1911) (opinion on rehearing).

This Court did not fundamentally change the law of standing in Alabama in 2003 when it adopted the federal formulation of the general standing rule focusing on injury. See *Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, L.L.C.*, 890 So.2d 70, 74 (Ala.2003). Rather, the Court “effectively restated the standard ... using language adopted from the Supreme Court of the United States.” *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So.2d 1253, 1256 (Ala.2004) (emphasis added). The *Cedar Bluff* Court explained the development as follows:

****17** “In *Jones v. Black*, 48 Ala. 540 (1872), this Court first articulated a test for determining whether a party has the necessary standing to challenge the constitutionality of an act of the Legislature. We stated then:

“ ‘A party who seeks to have an act of the legislature declared unconstitutional, must not only show that he is, or will be injured by it, but he must also show how and in what respect he is or will be injured and prejudiced by it. Injury will not be presumed; it must be shown.’

“48 Ala. at 543. In *Alabama Alcoholic Beverage Control Board v. Henri-Duval Winery, LLC*, 890 So.2d 70, 74 (Ala.2003), a party challenged the constitutionality of Alabama’s Native Farm Winery Act, § 28-6-1 et seq., Ala.Code 1975. In that case, this Court effectively restated the standard articulated in *Jones*, using language adopted from the Supreme Court of the United States:

“ ‘A party establishes standing to bring a challenge [on constitutional grounds] when it demonstrates the existence of (1) an actual, concrete and particularized “injury in fact”—“an invasion of a legally protected interest”; (2) a “causal connection between the injury and the conduct complained of”; *516 and (3) a likelihood that the injury will be “redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).’ ”

904 So.2d at 1256–57 (emphasis omitted).⁷

By comparing this Court’s own standing formulation from *Jones v. Black*, 48 Ala. 540 (1872) (focusing on injury), with the adopted, three-pronged formulation from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct.

2130, 119 L.Ed.2d 351 (1992) (focusing on injury), the *Cedar Bluff* Court showed that this was no seismic shift in Alabama standing law. The Court simply used the federal formulation to state its own entrenched standing law more precisely. See *Ex parte King*, 50 So.3d 1056, 1059 (Ala.2010) (“[I]n 2003 this Court adopted the ... more precise[] rule regarding standing based upon the test used by the Supreme Court of the United States.”); *Muhammad v. Ford*, 986 So.2d 1158, 1162 (Ala.2007) (“In [*Henri-Duval*], this Court adopted a more precise rule regarding standing articulated by the United States Supreme Court.”).

What this Court did not do in *Henri-Duval* in 2003, and has not done since, is overrule those cases recognizing the equally entrenched standing rule applicable in mandamus cases seeking to compel performance of a public duty. To be sure, the rule is known in the modern law of other states under such labels as the “public-standing exception,” the “public-standing doctrine,” and “public-interest standing,” etc. For example, the Indiana Supreme Court in 2003 concluded, after surveying the laws of numerous accordant states: “*The public standing doctrine, which applies in cases where public rather than private rights are at issue and in cases which involve the enforcement of a public rather than a private right, continues to be a viable exception to the general standing requirement.*”  *State ex rel. Cittadine v. Indiana Dep’t of Transp.*, 790 N.E.2d 978, 983 (Ind.2003) (emphasis added). In affirming the viability of the rule, the court explained:

****18** “Under our general rule of standing, only those persons who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct will be found to have standing. Absent this showing, complainants ***517** may not invoke the jurisdiction of the court. It is generally insufficient that a plaintiff merely has a general interest common to all members of the public.

“[Relator] seeks to avoid this general rule by invoking the public standing exception. *He does not contend that he has suffered a specific injury, but argues that, because the object of the mandate is to procure the enforcement of a public duty, he has standing under Indiana’s public standing doctrine.* As we recently noted in  *Schloss [v. City of Indianapolis]*, 553 N.E.2d 1204 (Ind.1990)]:

“ ‘Indiana cases recognize certain situations in which public rather than private rights are at issue and hold that the usual standards for establishing standing need not be met. This Court held in those cases that *when a case involves enforcement of a public rather than a private right* the plaintiff need not have a special interest in the matter nor be a public official.’

 *Schloss*, 553 N.E.2d at 1206 n. 3 (quoting *Higgins [v. Hale]*, 476 N.E.2d [95,] at 101 [(Ind. 1985)]). Specifically, the public standing doctrine eliminates the requirement that the relator have an interest in the outcome of the litigation different from that of the general public.

“The public standing doctrine has been recognized in Indiana case law for more than one hundred and fifty years.”

 790 N.E.2d at 979–80 (emphasis added; some citations omitted).

More recently, the historical yet still vital “public-interest standing” was invoked in a 2013 New York mandamus proceeding:

“However, in matters of great public interest, a citizen may maintain a mandamus proceeding to compel a public officer to do his or her duty. The office which the citizen performs is merely one of instituting a proceeding for the general benefit, the only interest necessary is that of the people at large. One who is a citizen, resident and taxpayer has standing to bring an Article 78 proceeding for the performance by officials of their mandatory duties, even without a personal grievance or a personal interest in the outcome. The public interest standing of a citizen has been extended to corporations as well as other organizations.

****19** “In fact, as far back as the Nineteenth Century, the Court of Appeals held, the writ of mandamus may, in a proper case, and in the absence of an adequate remedy by action, issue ... on the relation of one, who, in common with all other citizens, is *interested in having some act done, of a general public nature, devolving as a duty upon a public officer or body, who refuse to perform it.*”

Marone v. Nassau Cnty., 967 N.Y.S.2d 583, 589, 39 Misc.3d 1034, 1040–41 (Sup.Ct.2013) (expressing a limitation of the doctrine to “*matters of great public interest*”) (internal quotation marks and citations omitted);

emphasis added).

Still more recently, the California Court of Appeal affirmed the vitality of the “public-interest exception”:

“It is true that ordinarily the writ of mandate will be issued only to persons who are beneficially interested. Yet, in [1945, the California Supreme Court] recognized an exception to the general rule where the question is one of *public right* and the object of the mandamus is to procure *the enforcement of a public duty*, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in *having the laws executed and the duty in question enforced*. The exception promotes the policy *518 of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a *public right*. It has often been invoked by California courts.”

 *Hector F. v. El Centro Elementary Sch. Dist.*, 173 Cal.Rptr.3d 413, 418, 227 Cal.App.4th 331, 338 (2014) (emphasis added; internal quotation marks and citations omitted).

The same rule is found in states throughout the nation. See, e.g., *Southern LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 660, 755 S.E.2d 683, 687 (2014) (“ ‘Where the question is one of [a] *public right* and the object is to procure the enforcement of a *public duty*, no legal or special interest need be shown [to petition for mandamus], but it shall be sufficient that a plaintiff is interested in *having the laws executed and the duty in question enforced*.’ ” (quoting Ga.Code Ann. § 9–6–24 (West 2014) (emphasis added)));  *Protect MI Constitution v. Secretary of State*, 297 Mich.App. 553,

566–67, 824 N.W.2d 299, 306 (2012), rev’d on other grounds, 492 Mich. 860, 819 N.W.2d 428 (2012); *ProgressOhio.org, Inc. v. JobsOhio*, 973 N.E.2d 307, 313 (Ohio Ct.App.2012);  *State ex rel. Kansas City Power & Light Co. v. McBeth*, 322 S.W.3d 525, 531 (Mo.2010) (“[W]here the duty sought to be enforced is a simple, definite ministerial duty imposed by law, the threshold for standing is extremely low.”);  *Anzalone v. Administrative Office of Trial Court*, 457 Mass. 647, 653–54, 932 N.E.2d 774, 781 (2010); *Stumes v. Bloomberg*, 551 N.W.2d 590, 592 (S.D.1996);  *State ex rel. Clark v. Johnson*, 120 N.M. 562, 568–69, 904 P.2d 11, 17–18 (1995); *Rogers v. Hechler*, 176 W.Va. 713, 348 S.E.2d 299 (1986);  *Wells v. Purcell*, 267 Ark. 456, 461, 592 S.W.2d 100, 103 (1979) (“The rule is well settled, that when ... the proceedings are for the enforcement of a *duty affecting not a private right, but a public one, common to the whole community*, it is not necessary that the relator should have a special interest in the matter.” (emphasis added)); and *Florida Indus. Comm’n v. State ex rel. Orange State Oil Co.*, 155 Fla. 772, 775, 21 So.2d 599, 600–01 (1945) (“We also said in that case that where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, it being sufficient that he is interested as a citizen in *having the law executed and the duty in question enforced*.” (emphasis added)).⁸

Alabama’s public-standing rule, as articulated in *Kendrick*, contemplates an action in the name of the State, which obviously has standing in its own right. Like the authorities from other states cited above, it *519 respects the injury-in-fact requirement for general standing when a plaintiff seeks in his own name to vindicate his or her private right, while equally respecting the alternative rule (or exception) for cases brought in the name of the State to vindicate the public interest in the enforcement of duties owed to the public rather than to an individual. Several Alabama cases illustrate this fidelity.

****20** First, in *Rodgers v. Meredith*, 274 Ala. 179, 146 So.2d 308 (1962), a clerk of the circuit court petitioned, in his own name, for a writ of mandamus to compel the county sheriff to perform his statutory duty to file written reports with the clerk regarding the prisoners entering and leaving the county jail. The Court held that compliance with the statute was mandatory for the sheriff. 274 Ala. at 185–86, 146 So.2d at 314. But the Court also held that the circuit clerk did not have standing to seek mandamus to

compel the sheriff's performance because the statute conferred no private right on the clerk. 274 Ala. at 186, 146 So.2d at 314. In so holding, the Court distinguished the private standing on which the clerk relied in error from the public standing on which the clerk could have relied:

“We hold that the duty here placed on the sheriff by [the reporting statute] is a legal duty in which the public has an interest, as distinguished from an official duty affecting a private interest merely. Under the settled rule, petition for mandamus to compel a public officer to perform such duty is properly brought in the name of the state on the relation of one or more persons interested in the performance of that duty. The instant petition was not so brought.”

274 Ala. at 186, 146 So.2d at 314–15 (emphasis added). In other words, *because the duty involved was owed to the public,*⁹ *the clerk did not have a private interest in the matter, and so the action could be brought only as an on-relation action in the name of the State.* 274 Ala. at 186, 146 So.2d at 315.

Second, in *Kendrick*, a citizen relator, in the name of the State, sued his county commission to force it to provide voting machines for elections in compliance with a State statute. The statute required the county to provide voting machines for all elections in the county, but gave the commission discretion not to provide machines in any precinct having less than 100 registered voters. 256 Ala. at 213, 54 So.2d at 447. The respondents challenged the relator's petition on the basis that he failed to show the requested relief would redress any injury particular to him, because he failed to show he voted in a precinct entitled to be provided voting machines. *Id.*

In rejecting the respondents' challenge to the relator's standing, the Court cited the public-standing rule:

****21** “It is now the settled rule in Alabama that a mandamus proceeding to compel a public officer to perform *a legal duty in which the public has an interest*, as distinguished from an official duty affecting *a private interest merely*, is properly brought in the name of the State on the relation of one or more persons interested in the performance of such duty to the public.”

256 Ala. at 213, 54 So.2d at 447 (emphasis added). Applying the public-standing rule, the Court concluded:

***520** “It is clear that the act which petitioner seeks to have performed does not concern the sovereign rights of the State and is one in which *the public, all the people of Jefferson County, have an interest*. Petitioner's right to have the act performed is *not dependent upon the fact that he may or may not vote in a voting place where the governing body is required to install a voting machine.*”

Id. (emphasis added).

Similarly, in *Homan v. State ex rel. Smith*, 265 Ala. 17, 18, 89 So.2d 184, 186 (1956), a relator filed an action seeking to force the respondents, all the members of the Board of Commissioners of the Town of Muscle Shoals,

“to forthwith call an election for and in the Town of Muscle Shoals, a municipal corporation in Alabama, to decide the question whether said town shall be annexed to the City of Sheffield, a municipal corporation in Alabama, and to pass the necessary Ordinance providing for such an election to be held not less than thirty days after the passage of the Ordinance, in accordance with the provisions of Title 37, § 188.”

265 Ala. at 18, 89 So.2d at 185. The circuit court granted the petition, and, on appeal, the respondents contended that the relator did not have a sufficient interest in the action. The *Homan* Court rejected the argument:

“The act sought to be performed does not concern the sovereign rights of the State and is one in which the public, all of the people of the municipalities involved, have an interest. We hold that this mandamus proceeding was properly brought in the name of the State on the relation of J.E. Smith, and that the trial court did not err in overruling motion of appellants to require Smith to show by what authority the suit was filed in the name of the State of Alabama.”

265 Ala. at 19, 89 So.2d at 186 (emphasis added).

In  *Gray v. State ex rel. Garrison*, 231 Ala. 229, 231, 164 So. 293, 295 (1935), the Court held that a county commissioner’s statutory duty to sign a warrant on appropriation for a public library was “a legal duty in which there was such public interest as warranted a proceeding by mandamus in the name of the state.” And in *Marshall County Board of Education v. State ex rel. Williams*, 252 Ala. 547, 551, 42 So.2d 24, 27 (1949), the Court held that a petition for mandamus to a county board of education to compel its performance of a statutory duty to allow school enrollment only to students of a certain age “was for the enforcement of a public duty by respondents and, therefore ... was properly brought in the name of the State on the relation of the petitioners.”

Whereas in *Rodgers* the petitioner lacked standing to bring the action in his own name because he had no particularized injury (and he failed to invoke public standing through an on-relation action in the name of the State), in each of the other cases discussed above the relator properly invoked public standing. In each, the official duty was imposed by applicable law, and the duty owed was to the public. In particular, the right at issue was not the relator’s private right.

****22** In *Henri–Duval Winery, L.L.C.*, 890 So.2d at 74, the plaintiff, a winery, brought an action for its own benefit, not that of the public, to invalidate, not enforce, a statute providing for the taxation of wine sales. A careful reading of the plurality opinion in *Ex parte Alabama Educational Television Commission*, 151 So.3d 283 (Ala.2013), reveals a similar circumstance. The plaintiffs there sought not to procure an injunction requiring the commission to hold open meetings in the future pursuant ***521** to applicable law, something that could benefit the public, but to vindicate a violation of their private rights allegedly stemming from a meeting that had already occurred:

“Applying the *Lujan* [v.  *Defenders of Wildlife*, 504 U.S. 555 (1992),] test here, we conclude that Pizzato and Howland do not have standing to bring this action because they have failed to demonstrate ‘a likelihood that [their alleged] injury will be “redressed by a favorable decision.” ’ *Henri–Duval*, supra. Pizzato and Howland argue that they were injured by the Commission’s termination of their employment and that that ‘termination was the direct result and consequence of the Commissioners’ violation of the Open Meetings Act.’

“....

“... [T]he only specific relief Pizzato and Howland requested was the civil fines provided for in § 36–25A–9(g)[, Ala.Code 1975]. Like the injury in  *Steel Co. [v. Citizens for a Better Environment*, 523 U.S. 83 (1998)], however, the alleged injury here was caused by an alleged one-time violation of the Open Meetings Act that was wholly past when Pizzato and Howland’s action was filed. Pizzato and Howland have not alleged any ‘continuing or imminent violation,’ nor does any ‘basis for such an allegation appear to exist.’ ”

Alabama Educ. Television Comm’n, 151 So.3d at 288 (footnote omitted); see also *id.* at 291 (Murdock, J., concurring specially) (“[W]e do not have before us a claim by which a media organization or a citizen seeks to enjoin an anticipated future violation of the statute.”).

In sum, injury in fact has always been the primary focus of Alabama’s general standing rule (as it has been for the other states discussed above). See *King*, 50 So.3d at 1059 (“Traditionally, Alabama courts have focused primarily on the injury claimed by the aggrieved party to determine whether that party has standing.”). For over a century, however, Alabama has recognized that actions may be

brought in the name of the State in circumstances comparable to those in which other states refer to public-interest standing. See, e.g., *Bryce*, 172 Ala. at 229, 55 So. at 638. As in other states, as Alabama adopted the formulaic restatement of the general standing rule (adopted by this Court in *Henri-Duval*), we did not overrule our cases providing for such proceedings by persons interested in the enforcement of a public duty.¹⁰

As indicated, relators must show that they are seeking to require a “public officer *522 to perform a legal duty in which the public has an interest.” *Kendrick*, 256 Ala. at 213, 54 So.2d at 447. It could not be clearer that the public—the people of Alabama—have an interest in the respondents’ faithful compliance with Alabama’s marriage laws. The duty owed by the probate judges to follow state law in the issuance of marriage licenses is a duty owed to the public. We refer the reader in this regard to our discussion of the fundamental nature of this law and the critical interest of the public in it for the reasons discussed in Part I above.¹¹

****23** That the duty and corresponding right at issue are owed to and held by the public is made even clearer when one considers the exact nature of the duty in question as one that is not even susceptible of vindication as a private right. The duty is not of some affirmative action on the part of the respondents, because the statute in question merely authorizes, without requiring, the issuance of licenses by a probate judge. See § 30–1–9 (a probate judge “may” issue marriage licenses). Rather, the duty sought to be enforced is in the negative, i.e., to *not* take certain action. It is a duty *not* to issue marriage licenses to same-sex couples. It is hard to conceive of a *private right* in any person to *prevent* the issuance of a marriage license to another person. The duty and the corresponding right are intrinsically public in their nature, not even susceptible to an action by an individual asserting a private right as to their enforcement.

^[5] Notwithstanding the foregoing, the respondents contend that the present case falls within a subcategory of on-relation cases that can only be brought in the name of the State by the Attorney General. They point to the below emphasized portion of the larger passage from *Williams* with which we began our discussion of standing:

“It is now the settled rule in

Alabama that a mandamus proceeding to compel a public officer to perform a legal duty in which the public has an interest, as distinguished from an official duty affecting a private interest merely, is properly brought in the name of the State on the relation of one or more persons interested in the performance of such duty to the public; *but if the matter concerns the sovereign rights of the State, it must be instituted on the relation of the Attorney General, the law officer of the State.*”

Marshall Cnty. Bd. of Educ. v. State ex rel. Williams, 252 Ala. 547, 551, 42 So.2d 24, 27 (1949).

In *Morrison v. Morris*, 273 Ala. 390, 391–92, 141 So.2d 169, 169–70 (1962), the relator, a member of the Jefferson County Board of Equalization, sought a writ of mandamus against the chairman of the board to void a notification sent by the board to certain taxpayers that changes had been made in assessment of their property.

“Identical motions to dismiss were filed by the appellee, by the State of Alabama, and by the Attorney General individually, grounded upon the position that the appellant was not a proper party to the petition since the functioning of *523 the Board was an activity affecting the sovereign rights of the State, necessitating the filing of such petition by the law officer of the State, the Attorney General.”

****24** 273 Ala. at 391, 141 So.2d at 169. The *Morrison* Court agreed that the action fell within the sovereign rights of the State and as such could not be brought as an on-relation action by a private party in the name of the State. Its explanation of the applicable rule begins to shed

light on its inapplicability to the present case, however:

“The conduct of County Boards of Equalization is governed by legislative act. Title 51, §§ 81–113, Code, and amendments. The authority of these Boards, having emanated from the State, it necessarily follows that the functioning of the Boards is a matter affecting the State, which has a peculiar interest in the uniformity of their activities. ‘The right of a private individual to enforce by mandamus duties owing to the public is necessarily confined to duties which are not owing to the state in its sovereign capacity. *Where the duty is owing to the government as such*, private individuals, even though taxpayers, cannot resort to mandamus to enforce it;’ 35 Am.Jur., Mandamus, § 321, citing [State ex rel. Foshee v. Butler](#), 225 Ala. 194, 142 So. 533 [(1932)]. See also [State ex rel. Chilton County v. Butler](#), 225 Ala. 191, 142 So. 531 [(1932)]. *Where a right pertains to the sovereignty of the State*, proceedings for the enforcement of such right are to be instituted by the Attorney General.”

[273 Ala. at 391–92, 141 So.2d at 169–70](#) (emphasis added).

The rule as stated in *Marshall County* and *Morrison* is that only the Attorney General may bring an action in the name of the State if its purpose is to enforce a “duty owing to the government as such.” The duty in those cases concerned the payment of taxes. [Lewright v. Love](#), 95 Tex. 157, 159, 65 S.W. 1089, 1089–90 (1902), is an early example of an action involving the sovereign rights of the state in which the court well explains the significance of this fact. In *Lewright*, the private relator

“file[d] a petition for a writ of mandamus against the comptroller of the state to compel him to institute a suit against the International & Great Northern Railroad Company to recover taxes alleged to be due the state upon the gross passenger earnings of a certain line of its road for the series of years extending from 1879 to 1900.”

[95 Tex. at 159, 65 S.W. at 1089](#). The Texas Supreme Court concluded that the relator could not bring the action, explaining:

“Suits to collect debts due the state must, as a rule, be brought in the name of the state, and by its principal law officer, the attorney general, or by some other law officer whose duty it is to represent the state in legal proceedings, and who may be authorized by statute to sue for it in the particular class of cases.

**25 “....

“In the case of [Kimberly v. Morris](#), 87 Tex. 637, 31 S.W. 808 [(1895)], the rule announced in [[Union Pacific Railroad Co. v. Hall](#), 91 U.S. 343, 23 L.Ed. 428 [(1875)], ‘that private persons may move for a mandamus to enforce a public duty not due to the government as such, without the intervention of the government law officer,’ was quoted with approval.... [I]t should be held, as it seems to us, that a citizen of the state, though a taxpayer, cannot maintain a suit to compel an officer to perform a function due merely to the government as such, and in which he can *524 have no private interest whatever. There are some decisions which probably hold to the contrary, but we think the great weight of authority and the better reason support the rule announced by us. We therefore conclude that, if a suit of this character were maintainable against the comptroller, the relator in the petition before us is not the proper party to bring it.”

[95 Tex. at 159–60, 65 S.W. at 1089–90](#) (emphasis added). The duty in *Lewright*—the collection of taxes owed to the government—was one owed to the government as such, and as such could only be brought by the state’s attorney general.

The *Lewright* court’s conclusion followed from the fact that taxation is a sovereign right of the state, a proposition that has been repeated by courts throughout the country, including our own. See, e.g., [Doremus v. Business Council of Alabama Workers’ Comp. Self-Insurers Fund](#), 686 So.2d 252, 253 (Ala.1996) (“The exclusive power and authority to sue for collection of State taxes lies with the State.”); [State ex rel. St. Louis Young Men’s Christian Ass’n v. Gehner](#), 320 Mo. 1172, 1182, 11 S.W.2d 30, 34 (1928) (“Taxation is a sovereign right of the state....”); and [Aldridge v. Federal Land Bank of Columbia](#), 203 Ga. 285, 290, 46 S.E.2d 578, 581 (1948) (noting “the sovereign right of the State to tax as declared

by the constitution”).¹²

Alabama on-relation cases bear out this distinction between duties owed to the government and duties owed to the public. This Court has addressed cases concerning the sovereign rights of the State in which the Court concluded that a private party could not bring the on-relation action. In *Morrison*, as already noted, the Court concluded that the duty of the Board of Equalization was owed to the government as such, not to the public at large, because it implicated the power of taxation.

Another such case, heavily relied upon by the respondents, is  *State ex rel. Foshee v. Butler, State Tax Commissioner*, 225 Ala. 194, 142 So. 533 (1932), a case in which the relator, a resident citizen and taxpayer of Chilton County, sought a writ of mandamus to compel the State tax commissioner to assess the property of the Alabama Power Company in that county at 60 percent instead of 45 percent. The Court concluded that the

****26** “Relator shows no official duty to the public at large, but only to the state in its sovereign capacity. The general rule is that *an individual cannot enforce a right owing to the government*; certainly not in any case, *unless he sustains an injury peculiar to himself*....

“He is, as is Chilton [C]ounty in its case, merely seeking to force the state, by the unauthorized use of its name, to control an administrative function of one of its officers, in respect to a matter which is the prerogative of the state.”

 225 Ala. at 195, 142 So. at 534.

The *Foshee* Court’s mention of the case of “Chilton County” is a reference to  *State *525 ex rel. Chilton County v. Butler, State Tax Commissioner*, 225 Ala. 191, 142 So. 531 (1932), what *Foshee* describes as the “companion case” to  *Foshee*, 225 Ala. at 194, 142 So. at 533. In *Chilton County*, the county likewise brought an on-relation action to force the tax commissioner to assess the property of Alabama Power Company in that county at 60 percent instead of 45 percent. In a passage that explains the outcome in both cases, the Court stated:

“In respect to petitions for mandamus and other remedial writs when they seek to enforce private rights, petitioner may pursue such remedy without the use of the name of the state.... But when relief is sought against a public officer to require the performance of a public duty to the general public as distinguished from the state in its sovereign capacity, the petition is properly brought in the name of the state on the relation of petitioner, a member of the general public who may have such right.”

 *Chilton County*, 225 Ala. at 192–93, 142 So. at 532. Both *Chilton County* and *Foshee*, however, involved the tax commissioner. The duty involved was one owed to the government as such, not to the public at large:

“So that when a county undertakes to use the name of the state to require state officers to fix a certain value upon property for taxation generally, *it is seeking to enforce a claim which involves sovereign capacity*, rather than one which relates to a function delegated to the county, *and does not show a private right with the privilege of using the name of the state as a mere formal party*. 38 Corpus Juris, 838.

“Relator here is seeking to use the name of the state to enforce a public duty to it in its sovereign right which belongs exclusively to [the state], and it has not delegated to the county nor to any one the right to enforce the duties to it of its own administrative officer. The Attorney General and perhaps the Governor are vested with the ultimate power, conferred by the sovereignty, to control this sort of litigation.”

****27**  *Chilton County*, 225 Ala. at 193–94, 142 So. at 533.¹³

***526** In a separate argument, the respondents contend that the above-emphasized language states that the petitioner must have some “injury peculiar to himself” in order to qualify as a relator who can invoke the standing of the State in an on-relation action. Respondents misread *Foshee* and *Chilton County* and ignore other Alabama authorities in reaching this conclusion. Again, in *Foshee*, the Court noted that the “[r]elator shows no official duty

[by the defendant] to the public at large, but only to the state in its sovereign capacity. The general rule is [indeed] that an individual cannot enforce a right *owing to the government*; certainly not in any case, *unless he sustains an injury peculiar to himself.*" 225 Ala. at 195, 142 So. at 534 (emphasis added). In other words, a private party cannot bring an action that concerns *a duty owed to the government as such*, unless the private party also seeks to vindicate or obtain redress for his or her own private rights or injury relating thereto.¹⁴

*527 ¹⁶¹ Granted, *Kendrick* and similar cases do refer to on-relation actions brought in the name of the State "on the relation of one or more *persons interested in the performance of [a] duty*" to the public. E.g., *Kendrick*, 256 Ala. at 213, 54 So.2d at 447. Even if we were to now consider this language as a basis for qualifying prospective on-relation plaintiffs beyond the holding of mere citizenship, the nature of the "interest" we would impose in order to qualify a relator on behalf of the State, at least in the unique situation where, as here, the Attorney General is unavailable to fulfill his normal role of representing the public interest, certainly would not be an interest that rises to the same level required of plaintiffs under *Lujan*. The State itself supplies that standing. The only question would be whether the relator has a sufficient "peculiar interest" in the matter or a sufficient relationship to the State, coupled with the ability to do so, that he or she can be expected to prosecute the matter vigorously to the end of assuring a proper adversarial proceeding for its just resolution. Ultimately, we need not resolve the question whether there is a need for such an interest that would bear on API's and ACAP's status as relators in this proceeding. We are clear to the conclusion that Judge Enslen more than satisfies such criteria. As an individual, he would have the same interest held by other members of the public, yet, in his official capacity, he obviously has a relationship with the State and an interest in discharging his ministerial duty in a manner that is consistent with both Alabama law and the United States Constitution. Moreover, in his judicial capacity, his jurisdiction includes cases involving adoptions, administration of estates, guardianships, and conservatorship in which he must assess whether a marriage exists. In other words, Judge Enslen's position will require him to confront the question of the validity of purported "marriages" licensed by other probate judges and to address unavoidable derivative questions. Indeed, even if we were to consider the issue before us as a matter concerning the "sovereign right" of the State as urged by the respondents, Judge

Enslen would well qualify to prosecute it in the name of the State under the circumstances presented.¹⁵

Judge Reed also argues that there must be a limitation on public standing because "[a]ll laws and executive actions affect the public in some sense, directly or indirectly." But he cannot point to any authority or to the articulation of some sort of rule that would explain where we are to draw the line between those "public-duty" cases *528 that members of the public can bring and those that only the Attorney General can bring. The only line articulated in precedents here or elsewhere is between those cases that involve a duty owed to the public and those that involve a duty owed to the government as such. We can find no line of the nature he suggests differentiating between public-duty cases that can be brought by a citizen and those that can be brought only by the Attorney General, with one exception: Many states have limited the availability of on-relation or comparable actions on behalf of the state to "matters of great public interest" or "matters of great importance." We have no problem applying such a limitation in the present case, for we can think of no matter of greater public interest or importance than the one before us.

**28 It is beyond question that the duty to issue marriage licenses only in accordance with Alabama law is a duty owed to the public for its benefit. The failure to perform that duty damages the framework of law and institutions the people have chosen for themselves. The proceeding before us is properly before us as an on-relation action to enforce a duty to the public—the people who must live their lives and raise their families within that framework and within the society made possible thereby.

C. The Federal Court Order Does Not Prevent this Court from Acting

¹⁷¹ 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*. The answer is no.

¹⁸¹ ¹⁹¹ Although decisions of state courts on federal questions are ultimately subject to review by the United

States Supreme Court, 28 U.S.C. § 1257(a), as are decisions of federal courts, neither “coordinate” system reviews the decisions of the other. As a result, state courts may interpret the United States Constitution independently from, and even contrary to, federal courts.¹⁶ For that matter, it is even true that “[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”

” *Camreta v. Greene*, 563 U.S. 692, 709, 131 S.Ct. 2020, 2033 n. 7, 179 L.Ed.2d 1118 (2011) (quoting 18 J. Moore et al., *Moore’s Federal Practice* § 134.02[1][d], p. 134-26 (3d ed. 2011)). As the Seventh Circuit Court of Appeals noted in *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir.1995), “[federal district court decisions] cannot clearly establish *529 the law because, while they bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and therefore do not establish the duties of nonparties.”

^[10] Numerous Alabama cases confirm this reasoning. “[I]n determining federal common law, we defer only to the holdings of the United States Supreme Court and our own interpretations of federal law. Legal principles and holdings from inferior federal courts have no controlling effect here, although they can serve as persuasive authority.” *Glass v. Birmingham So. R.R.*, 905 So.2d 789, 794 (Ala.2004). See also *DolgenCorp, Inc. v. Taylor*, 28 So.3d 737, 744 n. 5 (Ala.2009) (noting that “United States district court decisions are not controlling authority in this Court”); *Ex parte Hale*, 6 So.3d 452, 458 n. 5 (Ala.2008), as modified on denial of reh’g (“[W]e are not bound by the decisions of the Eleventh Circuit.”); *Ex parte Johnson*, 993 So.2d 875, 886 (Ala.2008) (“This Court is not bound by decisions of the United States Courts of Appeals or the United States District Courts....”); *Buist v. Time Domain Corp.*, 926 So.2d 290, 297 (Ala.2005) (“United States district court cases ... can serve only as persuasive authority.”); *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, 627 So.2d 367, 373 n. 1 (Ala.1993) (“This Court is not bound by decisions of lower federal courts.”); *Preferred Risk Mut. Ins. Co. v. Ryan*, 589 So.2d 165, 167 n. 2 (Ala.1991) (“Decisions of federal courts other than the United States Supreme Court, though persuasive, are not binding authority on this Court.”).

****29** ^[11] ^[12] Federal courts have recognized that state-court review of constitutional questions is independent of the same authority lodged in the lower

federal courts. “ ‘In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court.’ ” *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir.1970) (quoting *State v. Coleman*, 46 N.J. 16, 36, 214 A.2d 393, 403 (1965)).

“Although consistency between state and federal courts is desirable in that it promotes respect for the law and prevents litigants from forum-shopping, there is nothing inherently offensive about two sovereigns reaching different legal conclusions. Indeed, such results were contemplated by our federal system, and neither sovereign is required to, nor expected to, yield to the other.”

Surrick v. Killion, 449 F.3d 520, 535 (3d Cir.2006).

The United States Supreme Court has acknowledged that 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.” *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). Two Justices of the United States Supreme Court in special writings have elaborated on this principle.

“The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation. In our federal

system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."

****30**  *Lockhart v. Fretwell*, 506 U.S. 364, 375–76, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) ***530** (Thomas, J., concurring). See also  *Steffel v. Thompson*, 415 U.S. 452, 482 n. 3, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (Rehnquist, J., concurring) (noting that a state court "would not be compelled to follow" a lower federal court decision).

III. Respondents' Ministerial Duty is Not Altered by the United States Constitution

The United States District Court for the Southern District of Alabama has declared that Alabama's laws that define marriage as being only between two members of the opposite sex—what has been denominated traditional marriage—violate the United States Constitution. After careful consideration of the reasoning employed by the federal district court in *Searcy I*, we find that the provisions of Alabama law contemplating the issuance of marriage licenses only to opposite-sex couples do not violate the United States Constitution and that the Constitution does not alter or override the ministerial duties of the respondents under Alabama law.

It is important to observe at the outset that some of the federal courts that have declared traditional marriage laws unconstitutional have insinuated that these marriage laws are something new by pointing to the marriage laws and amendments that states began enacting in the early 1990s. By focusing on this spate of laws, the federal courts have asserted that marriage laws were enacted to target homosexuals. This line of argument was born in  *United States v. Windsor*, — U.S. —, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), when the United States Supreme Court concluded that Congress's passage of the Defense of Marriage Act ("DOMA") in 1996 demonstrated a clear animus toward homosexuals because Congress rarely chose to enter the realm of domestic-relations law. But as *Windsor* itself observed,

domestic law historically is controlled by the states.¹⁷

For example, in Alabama it is true that the Act was enacted in 1998 and that the Amendment was ratified in 2006. Laws that include the concept of marriage as between a husband and wife have existed, however, since the inception of Alabama as a state in 1819.¹⁸ Such laws include the ***531** full statutory scheme set out in 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.

Further, 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.¹⁹ And beyond even that statutory ***532** scheme, what ultimately is at issue is the entire edifice of family law discussed previously, an edifice that has existed in some form since before the United States was even a country.²⁰ See 1 Judith S. Crittenden and Charles P. Kindregan, Jr., *Alabama Family Law* § 1:1 (2008) (observing that "a whole range of state and federal legal rights and obligations depend on the existence of a valid marriage. If there is no legal marriage, then those rights and obligations do not apply. These legal rights and obligations are basic to the well-being of society, as the United States Supreme Court has noted in describing the importance of marriage as having a 'basic position' in 'society's hierarchy of values.'" (quoting  *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971))). It is no small thing to wipe away this edifice with a wave of the judicial wand.

****31** It is in this context that we turn then to the specific reasoning employed by the federal district court, reasoning that can be boiled down to the following train of thought. (1) Marriage is a fundamental right. (2) Under

the Due Process and Equal Protection Clauses of the United States Constitution, laws that impinge upon fundamental rights are subject to “strict scrutiny” and are sustained only if supported by a “compelling state interest” and if they are “narrowly tailored” to fulfill that interest. (3) The interests cited by the State of Alabama in support of its laws limiting marriage to opposite-sex couples are either not compelling state interests or the limitation is not so narrowly tailored as to meet the stated interest. (4) Therefore, Alabama’s marriage laws impermissibly violate the right to marry and consequently “violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”

[13] [14] [15] The *Searcy I* plaintiffs’ first constitutional claim that led to the federal court’s decision and the reasoning it adopted is one that is often repeated in the marriage debate. The *Searcy I* plaintiffs contended that Alabama’s marriage laws violate the Equal Protection Clause because those laws unconstitutionally discriminate against same-sex couples in favor of opposite-sex couples by conferring benefits on the latter under the law not accorded to the former.

“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.... *The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.*

*533 “The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.”

**32  *City of Cleburne, Tex. v. Cleburne Living Ctr.*,

473 U.S. 432, 439–40, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (emphasis added and citations omitted).

[16] The difficulty with the *Searcy I* plaintiffs’ equal-protection claim is that, in order to trigger a “strict-scrutiny” analysis, the offending law must discriminate against a suspect class, e.g., a class determined by race, alienage, or national origin. It is often contended that although laws upholding traditional marriage do not implicate any of these suspect classes, they do discriminate based on gender, a category the United States Supreme Court has stated is sometimes entitled to heightened scrutiny. See, e.g.,  *United States v. Virginia*, 518 U.S. 515, 532, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (observing that “[w]ithout equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post- *Reed v. Reed*, 404 U.S. 71 (1971),] decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men)” (footnote omitted)).

The fact is, however, that traditional-marriage laws do not discriminate based on gender: All men and all women are equally entitled to enter the institution of marriage. Only by redefining the term “marriage” to mean something it is not (and in the process assuming an answer as part of the question), can this statement be challenged. Put in the negative, traditional-marriage laws do not discriminate on the basis of gender because all men and all women are equally restricted to marriage between the opposite sexes.

See, e.g.,  *Bishop v. United States ex rel. Holder*, 962 F.Supp.2d 1252, 1286 (N.D.Okla.2014) (“Common sense dictates that the intentional discrimination occurring in this case has nothing to do with gender-based prejudice or stereotypes, and the law cannot be subject to heightened scrutiny on that basis.”);  *Geiger v. Kitzhaber*, 994 F.Supp.2d 1128, 1139–40 (D.Or.2014) (“The state’s marriage laws discriminate based on sexual orientation, not gender. In fact, the ban does not treat genders differently at all. Men and women are prohibited from doing the exact same thing: marrying an individual of the same gender.”). Thus, if such laws discriminate against a classification, it is one based on sexual orientation, not gender. As the federal district court itself observed in its memorandum opinion in *Searcy I*: “Eleventh Circuit preceden[t] holds that such classification is not suspect.

 *Lofton v. Secretary of Dep’t of Children and Family Services*, 358 F.3d 804, 818 (11th Cir.2004).”²¹ See also

 *DeBoer v. Snyder*, *534 772 F.3d 388, 413 (6th

Cir.2014) (noting that “[t]he Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review and indeed has not recognized a new suspect class in more than four decades”).

^[17] Because Alabama’s marriage laws are not subject to strict scrutiny under the Equal Protection Clause, they need only survive a rational-basis analysis to pass constitutional muster. We have reviewed at length the more than rational bases for Alabama’s understanding of marriage in Part I, above. As discussed, one legitimate interest behind the laws (among others) is recognizing and encouraging the ties between children and their biological parents. Alabama’s marriage laws clearly survive rational-basis review.

****33** ^[18] The *Searcy I* plaintiffs’ second contention was that Alabama’s marriage laws violate the Due Process Clause of the Fourteenth Amendment because, according to their complaint, “[t]he Constitution protects the rights and liberties of married, homosexual couples just as it does heterosexual, married couples.” As we previously noted, the federal district court latched onto this argument, stating that “[n]umerous cases have recognized marriage as a fundamental right.” In this way, the federal district court subjected Alabama’s marriage laws to strict-scrutiny analysis.

To support its assertion that “marriage” is a fundamental right, the federal district court cited such cases as *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The federal district court is, of course, correct that there are several United States Supreme Court cases stating such a principle. In *Zablocki v. Redhail*, 434 U.S. 374, 383–84, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), for example, the Court stated: “ ‘Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival.’ [*Loving*, 388 U.S.] at 12, quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).” In *Griswold*, the Court stated that marriage is “a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” *381 U.S. at 486*. In *Meyer*, the Court recognized

that “the right of an individual ... to marry, establish a home and bring up children” is protected by the *Due Process Clause*. 262 U.S. at 399.

What the federal district court ignored in these cases, however, is that the Supreme Court plainly was referring to *traditional marriage* when it proclaimed that marriage is a fundamental right. See, e.g., *DeBoer*, 772 F.3d at 412 (observing that “[w]hen *Loving* and its progeny used the word marriage, they did not redefine the term but accepted its traditional meaning”). This is evident from the fact that in each of those cases the discussion of the right involved children. It is also apparent from the fact that, as the federal district court discussed, in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), the Supreme Court summarily dismissed “for want of a substantial federal question” an appeal from the Minnesota Supreme Court in which that court concluded that a state statute ***535** defining marriage in the traditional manner did not violate the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution. Despite disagreement among the federal circuit courts of appeal regarding *Baker*’s strength as precedent in the wake of *Windsor*,²² *Baker* indisputably demonstrates that, in the plethora of cases in which the Supreme Court has discussed a “right to marriage,” it was not referring to an institution that formally recognized homosexual relationships.

Thus, what the federal district court has done is to declare an entirely new concept of “marriage” a fundamental right under the guise of the previously understood meaning of that institution. It is, plainly and simply, circular reasoning—it assumes the conclusion of the matter, i.e., that marriage as newly defined is a fundamental right, in the premise of the question without acknowledging that a change of terms has occurred.²³ As one federal appeals court judge has noted: “To now define the previously recognized fundamental right to ‘marriage’ as a concept that includes the new notion of ‘same-sex marriage’ amounts to a dictionary jurisprudence, which defines terms as convenient to attain an end.”²⁴ ***536** *Bostic v. Schaefer*, 760 F.3d 352, 391 (4th Cir.2014) (Niemeyer, J., dissenting).²⁵

****34** The ostensible reason for the federal district court’s judicial sleight of hand is apparent enough: conferring fundamental-right status upon a concept of marriage divorced from its traditional understanding is, to say the

least, curious.

“[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ [ *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977)] (plurality opinion);  *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’), and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed,’  *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest. [ *Reno v. Flores*, 507 U.S. 292, 302 (1993)].”

 *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

“It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation’s history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See  *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 [(2003)]. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.”

 *Windsor*, — U.S. at —, 133 S.Ct. at 2715 (Alito, J., dissenting) (footnote omitted). See also  *Hernandez v. Robles*, 7 N.Y.3d 338, 361, 821 N.Y.S.2d 770, 777, 855 N.E.2d 1, 8 (2006) (“Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any

society in which marriage existed, that there could be marriages only between participants of different sex.”).²⁶ See Part I, *supra*.

***537** Beyond the obvious historical problem with labeling marriage as defined by the *Searcy I* plaintiffs a fundamental right, there exists another logical problem with doing so. Proponents of same-sex marriage repeatedly contend that extending the benefits of marriage to their relationships carries no religious or moral dimension and therefore does not constitute a fundamental shift in the social fabric of America, because marriage, as far as the government is concerned, is simply a civil acknowledgment of a legal bond. See  *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 321, 798 N.E.2d 941, 954 (2003) (“We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage.... [C]ivil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution.”).²⁷ If marriage truly is nothing more than a state-granted legal license, it is difficult to see how it could rise to the status of a fundamental right of such importance that the United States Constitution prohibits states from approving only the historically accepted understanding of the institution.

****35** Before we follow the proponents of same-sex marriage down the road toward finding their new definition of marriage constitutionally significant (but somehow socially innocuous), we need to know what characteristic of marriage is so fundamental that it warrants constitutional protection. As the *Glucksberg* Court observed: “[A] ‘careful description’ of the asserted fundamental liberty interest” is required in substantive-due-process cases.  521 U.S. at 721. Although it is undeniable that the institution of marriage is fundamental,²⁸ it is also undeniable that several aspects of marriage are not treated as fundamental.²⁹ ***538** The United States Supreme Court observed in *Windsor* that

***539** “[m]arriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare  *Vt. Stat. Ann., Tit. 18, § 5142* (2012), with  *N.H.Rev.Stat. Ann. § 457:4* (West Supp.2012). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington, see *Iowa Code § 595.19* (2009);  *Wash. Rev.Code § 26.04.020*

(2012)—prohibit the practice).”

 *Windsor*, — U.S. at —, 133 S.Ct. at 2691–92. No one contends (yet) that state age and consanguinity requirements violate a fundamental right to marriage even though such requirements clearly limit a person’s choices as to whom the person may marry. What differs, then, about the claims of same-sex partners? What of their relationship rises to the level of a constitutional right with which the states allegedly may not interfere?

One possible answer is the act of sex, albeit absent potential procreative consequences. The United States Supreme Court has stated that sexual intercourse is protected by the right to privacy allegedly embedded in the “substantive” component of the Due Process Clause. Indeed, this was the constitutional basis for the Court’s striking down state sodomy laws in  *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). But the *Lawrence* Court did so under the rationale that government had no interest in interfering with the sexual conduct of consenting adults in the privacy of their bedrooms.³⁰ That rationale does not work here because same-sex partners expressly seek *public state-government approval* of their relationships. In other words, in *Lawrence* the protected constitutional interest was personal privacy, but here the *Searcy I* plaintiffs alleged that there is a constitutional interest in the public recognition of unions between couples of the same sex that overrides any interest Alabama has in limiting such unions to opposite-sex couples. Neither *Lawrence*, nor *Windsor*, nor any other decision of the United States Supreme Court has found such a fundamental right, and such a right cannot with any logic be embedded in the so-called right to *privacy* that has been trumpeted by the Supreme Court since *Griswold*.

Another possible answer to the question is love. Under this theory, a person has a right to marry the person he or she loves regardless of that person’s gender. This notion has broad public appeal and is, perhaps, the mantra most repeated in public discussions of this matter. But although love may be an important factor in a lasting marriage, civil marriage has no public interest in whether the people seeking a marriage license love one another. “[N]o State in the country requires couples, whether gay or straight, to be in love.”  *DeBoer*, 772 F.3d at 407. State governments *540 do not inquire about whether couples love each other when they seek a marriage license, nor do governments have any justifiable reason to do so. Moreover, if love was the *sine qua non* of marriage, then polygamy also would be constitutionally protected

because

****36** “there is no reason to think that three or four adults, whether gay, bisexual, or straight, lack the capacity to share love, affection, and commitment, or for that matter lack the capacity to be capable (and more plentiful) parents to boot. If it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage.”³¹

Id.

Proponents of the new definition of marriage therefore leave us with an untenable contradiction. On the one hand, they insist that expanding the definition of marriage to include relationships between members of the same sex constitutes nothing more than offering marriage licenses to another class of individuals. It is akin to modifying the age of consent for marriage or changing the length of residency required in a state before one can receive a marriage license, changes that are wholly within state government’s power to modify, without altering the nature of marriage. On the other hand, proponents of same-sex marriage contend that this new definition of marriage is so fundamental that the Constitution prohibits states from maintaining the traditional definition of marriage, yet they are unable to articulate a fundamental element of their definition of marriage that would justify government sponsorship of it. Thus, under their own theory, either the aspect of marriage the same-sex partners insist should be included in the institution is not fundamental to its nature, in which case Alabama’s laws enforcing the traditional definition of marriage are not unconstitutional, or marriage is a fundamental right but the characteristics upon which same-sex partners necessarily must hinge their definition of marriage fail to explain government’s interest in marriage.

Having discarded candidates for what aspect of marriage is so fundamental that it warrants constitutional protection, we are left with the characteristic that has remained unchanged throughout history: marriage has always been between members of the opposite sex. The obvious reason for this immutable characteristic is nature. Men and women complement each other biologically and socially. Perhaps even more obvious, the sexual union between men and women (often) produces children.³² Marriage demonstrably channels the results of sex between members of the opposite sex—procreation—in a socially advantageous manner.³³ It creates the family, the institution that is almost *541 universally acknowledged

to be the building block of society at large because it provides the optimum environment for defining the responsibilities of parents and for raising children to become productive members of society. See, e.g., [Lehr v. Robertson](#), 463 U.S. 248, 256–57, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (“The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society.... [A]s part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.”); [Smith v. Organization of Foster Families For Equal. & Reform](#), 431 U.S. 816, 843–44, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) (“[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot(ing) a way of life’ through the instruction of children.” (quoting [Wisconsin v. Yoder](#), 406 U.S. 205, 231–33, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972))); [Williams v. North Carolina](#), 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279 (1942) (“The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of [the] commanding problems....”). In short, government has an obvious interest in offspring and the consequences that flow from the creation of each new generation, which is only naturally possible in the opposite-sex relationship, which is the primary reason marriage between men and women is sanctioned by State law.

In his dissent in *Goodridge*, Judge Cordy summarized well many of the public purposes of traditional marriage, and, therefore, why traditional marriage is a rational state policy:

****37** “Civil marriage is the institutional mechanism by which societies have sanctioned and recognized particular family structures, and the institution of marriage has existed as one of the fundamental organizing principles of human society. See C.N. Degler, *The Emergence of the Modern American Family*, in *The American Family in Social–Historical Perspective* 61 (3d ed.1983); A.J. Hawkins, Introduction, in *Revitalizing the Institution of Marriage for the Twenty–First Century: An Agenda for Strengthening Marriage* xiv (2002); C. Lasch, *Social Pathologists and the Socialization of Reproduction*, in *The American Family in Social–Historical Perspective*,

[61.] at 80 [(3d ed.1983)]; W.J. O’Donnell & D.A. Jones, *Marriage and Marital Alternatives* 1 (1982); L. Saxton, *The Individual, Marriage, and the Family* 229–230, 260 (1968); M.A. Schwartz & B.M. Scott, *Marriages and Families: Diversity and Change* 4 (1994); Wardle, *‘Multiply and Replenish’: Considering Same–Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol’y 771, 777–780 (2001); J.Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* 28, 40, 66–67 (2002). Marriage has not been merely a contractual arrangement for legally defining the private relationship between two individuals (although that is certainly part of any marriage). Rather, on an institutional level, marriage is the ‘very basis of the whole fabric of civilized society,’ J.P. Bishop, *Commentaries on the Law of Marriage and Divorce, and Evidence* *542 in *Matrimonial Suits* § 32 (1852), and it serves many important political, economic, social, educational, procreational, and personal functions.

“Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. See [Milford v. Worcester](#), 7 Mass. 48, 52 (1810) (civil marriage ‘intended to regulate, chasten, and refine, the intercourse between the sexes; and to multiply, preserve, and improve the species’). See also P. Blumstein & P. Schwartz, *American Couples: Money, Work, Sex* 29 (1983); C.N. Degler, *supra* at 61; G. Douglas, *Marriage, Cohabitation, and Parenthood—From Contract to Status?*, in *Cross Currents: Family Law and Policy in the United States and England* 223 (2000); S.L. Nock, *The Social Costs of De–Institutionalizing Marriage*, in *Revitalizing the Institution of Marriage for the Twenty–First Century: An Agenda for Strengthening Marriage*, *supra* at 7; L. Saxton, *supra* at 239–240, 242; M.A. Schwartz & B.M. Scott, *supra* at 4–6; Wardle, *supra* at 781–796; J.Q. Wilson, *supra* at 23–32. Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined (particularly in the modern age of widespread effective contraception and supportive social welfare programs), but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.

“The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. See G.L. c. 209C, § 6 (‘a man is presumed to be the father of a child ... if he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce’). Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. See J.Q. Wilson, *supra* at 23–32. See also P. Blumstein & P. Schwartz, *supra* at 29; C.N. Degler, *supra* at 61; G. Douglas, *supra* at 223; S.L. Nock, *supra* at 7; L. Saxton, *supra* at 239–240, 242; M.A. Schwartz & B.M. Scott, *supra* at 4–6; Wardle, *supra* at 781–796. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.

****38** “The marital family is also the foremost setting for the education and socialization of children. Children learn about the world and their place in it primarily from those who raise them, ***543** and those children eventually grow up to exert some influence, great or small, positive or negative, on society. The institution of marriage encourages parents to remain committed to each other and to their children as they grow, thereby encouraging a stable venue for the education and socialization of children. See P. Blumstein & P. Schwartz, *supra* at 26; C.N. Degler, *supra* at 61; S.L. Nock, *supra* at 2–3; C. Lasch, *supra* at 81; M.A. Schwartz & B.M. Scott, *supra* at 6–7. More macroscopically, construction of a family through marriage also formalizes the bonds between people in an ordered and institutional manner, thereby facilitating a foundation of interconnectedness and interdependency on which more intricate stabilizing social structures might be built. See M. Grossberg,

Governing the Hearth: Law and Family in Nineteenth-Century America 10 (1985); C. Lasch, *supra*; L. Saxton, *supra* at 260; J.Q. Wilson, *supra* at 221.”

 *Goodridge*, 440 Mass. at 381–84, 798 N.E.2d at 995–96 (Cordy, J., dissenting) (footnote omitted).³⁴

***544** Ultimately, these are the purposes of marriage that relate to government. Government is concerned with public effects, not private wishes. The new definition of marriage centers on the private concerns of adults, while the traditional definition focuses on the benefits to society from the special relationship that exists between a man and a woman, i.e., the effects for care of children, the control of passions, the division of wealth in society, and so on.

The federal district court and other courts that have struck down traditional marriage laws have stated that states cannot distinguish traditional marriage on the basis of procreation and the beneficial effects the institution provides to children because some married couples cannot or do not have children, and yet government recognizes their marriages. This argument is nothing more than an attempt to use the exception to disprove the rule.³⁵ The fact that many people do not vote in elections does not invalidate the value of using elections to allow people to choose their government leaders. “Marriage laws are not aimed at making all married sex procreative but only seek to encourage that all man-woman sex occurs in marriage, as a protection for when such sex is procreative—a protection for the baby, the often vulnerable mother, and society generally.” Stewart, 31 Harv. J.L. & Pub. Pol’y at 344–45.³⁶

****39** The federal district court’s memorandum opinion in *Searcy I* states that “[t]he Attorney General fails to demonstrate any rational, much less compelling, link between its prohibition and non-recognition of same-sex marriage and its goal of having more children raised in the biological family structure the state wishes to promote.” But “ ‘the relevant inquiry here is not whether excluding same-sex couples from marriage furthers [the state’s] interest in steering man-woman couples into ***545** marriage.’ Rather, the relevant inquiry is whether also recognizing same-sex marriages would further [the state’s] interests.”  *Bostic*, 760 F.3d at 394 (Niemyer, J., dissenting)(quoting state-appellant’s brief). In other words, the state simply has to show that recognizing and encouraging marriage between men and women promotes

responsible procreation, not that excluding same-sex couples from marriage encourages heterosexuals to marry. Even if preventing homosexuals from marrying will not increase the likelihood that children are born in wedlock, this does not address the fact that offering marriage solely to heterosexuals indisputably serves as a tool to prevent out-of-wedlock pregnancies. Moreover, the state's policy need only advance a rational goal; it does not need to demonstrate that it is the only way to advance the goal or even that it is the best way to do so. "[R]ational basis review does not permit courts to invalidate laws every time a new and allegedly better way of addressing a policy emerges."  *DeBoer*, 772 F.3d at 405.

^[19] Under United States Supreme Court precedent, another potential method of finding traditional marriage unconstitutional is the notion that Alabama's limitation of marriage to heterosexual unions is based solely on animus toward homosexuals and that, therefore, the laws violate both the Equal Protection Clause and the Due Process Clause. The federal district court did not expressly articulate this position, but doing so would require reliance upon  *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), *Lawrence*, and *Windsor*.

In *Romer*, the Supreme Court struck down an amendment to the Colorado Constitution that "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect" the status of persons based on their " 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.' "

 517 U.S. at 624. The Court did so because the amendment "singl[ed] out a certain class of citizens for disfavored legal status,"  517 U.S. at 633, and "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."  517 U.S. at 634. In short, the amendment "classif[ie]d homosexuals not to further a proper legislative end but to make them unequal to everyone else."  517 U.S. at 635.

****40** In *Lawrence*, the Court struck down a Texas law criminalizing sodomy because, it said, homosexuals "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."  539 U.S. at 578.

In *Windsor*, the Court struck down a portion of the

Federal Defense of Marriage Act ("DOMA") because Congress's intrusion into a traditional state-law area demonstrated that DOMA was "motivated by an improper animus."  — U.S. at —, 133 S.Ct. at 2693. The Court explained that DOMA's aim was to "interfere[] with the equal dignity of same-sex marriages" conferred by New York's laws on marriage. *Id.* The Court added that "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency."  — U.S. at —, 133 S.Ct. at 2694. In short, "the principal purpose and the necessary effect of [DOMA] are to demean those *546 persons who are in a lawful same-sex marriage."  — U.S. at —, 133 S.Ct. at 2695.³⁷

The theme from *Romer*, *Lawrence*, and *Windsor* that government cannot single out a group for disfavored treatment solely on the basis of hatred for that particular group does not apply to Alabama's marriage laws. Although Alabama's limitation of marriage to opposite-sex couples prevents homosexual couples from receiving marriage licenses, the laws do not do so for the purpose of singling out same-sex partners for disfavored status. As we have already seen, the marriage laws undeniably have several purposes that have absolutely nothing to do with attempting to treat a particular group in an unequal fashion. The laws attempt to protect children produced in opposite-sex relationships; they fashion a system for parental legal responsibilities; and they encourage family structure and enable formative education and socialization of children. The limitation of marriage to opposite-sex couples has so long existed in law that ascribing its existence solely to hatred toward homosexuals is simply absurd on its face. See  *Lawrence*, 539 U.S. at 570 ("American laws targeting same-sex couples did not develop until the last third of the 20th century."). Even Alabama's marriage amendment, which is of a more recent vintage,

"codified a long-existing, widely held social norm already reflected in state law. '[M]arriage between a man and a woman,' as the Court reminded us just last year, 'had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.' " *Windsor*, 133 S.Ct. at 2689."

****41**  *DeBoer*, 772 F.3d at 408. Alabama's longstanding and continued embrace of traditional

marriage is not due to be struck down on an animus rationale.

If Alabama's marriage laws do not violate the Equal Protection Clause or the fundamental right to marry under the Due Process Clause, and if they are not solely the product of animus toward homosexuals, then Supreme Court precedent provides only one other course to justify the conclusion reached by the federal district court: The notion that marriage confers a certain dignity on its participants that the law cannot deprive individuals of simply because they desire to marry a person of the same sex. This line of reasoning comes from *Windsor*. In *Windsor*, the Court stated:

"Here [New York's] decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.

"....

*547 "... DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. 558, 123 S.Ct. 2472, and whose relationship the State has sought to dignify."

Windsor, — U.S. at —, 133 S.Ct. at 2692, 2694; see also — U.S. at —, 133 S.Ct. at 2693 ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute.").

Several courts that have declared state marriage laws unconstitutional have relied on *Windsor*'s "equal dignity" language. See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir.2014) (emphasizing *Windsor*'s statement that "no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and

dignity' " (quoting *Windsor*, — U.S. at —, 133 S.Ct. at 2696; further citation omitted)); *Kitchen v. Herbert*, 755 F.3d 1193, 1213 (10th Cir.2014) (stating that "freedoms [such as marriage] support the dignity of each person, a factor emphasized by the *Windsor* Court"); *Garden State Equal. v. Dow*, 434 N.J.Super. 163, 206, 82 A.3d 336, 361 (Ch.Div.2013) (relying on *Windsor*'s language that a "[s]tate's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import' " (quoting *Windsor*, — U.S. at —, 133 S.Ct. at 2705)).

Windsor's "equal dignity" rationale contains several problems. First, there is no "equal dignity" provision in the text of the United States Constitution. Instead, what this notion appears to be is a legal proxy for invalidating laws federal judges do not like, even though no actual constitutional infirmity exists.³⁸ Since the notion is not textual, it is at least incumbent upon federal courts employing it to strike down state-marriage laws to describe in concrete terms what "dignity" state-sanctioned marriage confers and therefore exactly what same-sex couples are deprived of by traditional marriage laws.³⁹ But those courts merely repeat the generalized language of *Windsor*. Does a paper license that publicly recognizes the relationship confer "dignity" upon those who obtain it? Is it the fact that government recognition of same-sex relationships declares them to *548 be "the same as" opposite-sex relationships that confers dignity? The United States Supreme Court has held that damage to reputation is not a cognizable interest protected by the Fourteenth Amendment. See *Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (holding that "the interest in reputation ... is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law"). So presumably this notion must be something more than reputation, but it is apparently too difficult for the judges relying on it to describe what it is. If the notion of "equal dignity" is a backdoor way of according fundamental-right status to the new definition of marriage, it utterly fails to cabin that right in any meaningful way.

**42 Furthermore, emphasizing the "dignity" of the public recognition of a marriage places the focus on the adult relationship, again assuming the conclusion as a premise for the question. It constitutes an implicit adoption, without acknowledgment, of the new definition of marriage based solely on a special relationship between two adults—as opposed to the traditional definition of

marriage, which aligns with the historically recognized purpose relating to procreation and the “rights and obligations between the couple and any children the union may produce.” Maggie Gallagher, *What Is Marriage for? The Public Purposes of Marriage Law*, 62 La. L.Rev. 773, 781 (2002).

“Plaintiffs seek to bring the right to marry the person of their choosing regardless of gender within the protection of the well-recognized fundamental right to marry (see  *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673 [(1978)];  *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 [(1967)];  *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 [(1942)]). However, we find merit in defendants’ assertion that this case is not simply about the right to marry the person of one’s choice, but represents a significant expansion into new territory which is, in reality, a redefinition of marriage. The cornerstone cases acknowledging marriage as a fundamental right are laced with language referring to the ancient recognized nature of that institution, specifically tying part of its critical importance to its role in procreation and, thus, to the union of a woman and a man....”

Samuels v. State Dep’t Of Health, 29 A.D.3d 9, 14–15, 811 N.Y.S.2d 136, 140–41 (N.Y.App.Div.2006) (footnote omitted), aff’d sub nom.,  *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006).

****43** Related to the fact that *Windsor* implicitly adopts the new definition of marriage is the fact that *Windsor*’s “equal dignity” rationale necessarily makes a moral judgment about adult sexual relationships, even though the Supreme Court in *Lawrence* and lower courts addressing the marriage issue have purported to disclaim ascribing any merit to moral or religious considerations.⁴⁰ By asserting that denying same-sex couples the status of marriage deprives them of “a dignity and status of immense import,”  ***549 — U.S. at —**, 133 S.Ct. at 2692, the *Windsor* Court made a moral judgment that a married couple has more dignity than an unmarried couple.⁴¹ Many people would agree with such an assessment, but it is not, strictly speaking, a legal judgment—at least according to several courts that have invalidated traditional marriage laws.⁴² It seems at least disingenuous to find a constitutional infirmity with traditional marriage laws by way of a moral judgment when states have been forced to defend those laws apart

from any moral or religious basis, an especially difficult task given that American ideas of marriage indisputably have been shaped by the Jewish and Christian religions. See Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 Fam. L.Q. 427, 428 (2004) (detailing the intertwining history of religious and civil marriage in America and stating that “[t]he Western concept of marriage has been strongly influenced by Judeo-Christian theology”). Moreover, because the *Windsor* Court’s moral judgment is (one must assume) not based on religion, then it must be asked what standard is being used to ***550** judge that marriage is better than nonmarriage, that it contains some kind of higher dignity than other relationships?⁴³ Because the notion is not contained in the Constitution, one may question whether it is nothing more than intuitions.⁴⁴ At any rate, it is not a legal basis for striking down a validly enacted law.

In the end, however, even if one were to accept that marriage carries with it a “dignity” that compels its availability to all, would we not meet ourselves coming? Under that construct, such dignity no doubt would be something gained from the very nature of traditional marriage, the foundation for the family unit within which children may be born and have imparted to them by a mother and father the values needed for responsible citizenship and the furtherance of society.

“To remove from ‘marriage’ a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and state (see e.g.  *Griswold v. Connecticut*, 381 U.S. 479, 486[, 85 S.Ct. 1678, 14 L.Ed.2d 510] [1965]) would, to a certain extent, extract some of the ‘deep[] root[s]’ that support its elevation to a fundamental right.”

Samuels v. State Dep’t of Health, supra.

****44** Finally, an open question exists as to whether *Windsor*’s “equal dignity” notion works in the same

direction toward state laws concerning marriage as it did toward DOMA. The *Windsor* Court stated that “[t]he history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity *conferred by the States in the exercise of their sovereign power*, was more than an incidental effect of the federal statute.”  *Windsor*, — U.S. at —, 133 S.Ct. at 2693. In *Windsor*, New York’s law allowed same-sex couples to obtain marriage licenses. Thus, the “dignity” was conferred by the state’s own choice, a choice that was “without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the  Framers of the Constitution intended.” — U.S. at —, 133 S.Ct. at 2692. The problem with DOMA was that *551 it interfered with New York’s “sovereign” choice. Alabama “used its historic and essential authority to define the marital relation” and made a different “sovereign” choice than New York. *Id.* If New York was free to make that choice, it would seem inconsistent to say that Alabama is not free to make its own choice, especially given that “[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens.”  — U.S. at —, 133 S.Ct. at 2691.

To all of this, proponents of same-sex marriage often retort that there is no reason both the traditional definition and the new definition of marriage cannot coexist. On one level, that argument makes the erroneous assumption that the two definitions are not making different claims as to why marriage exists. On another level, it simply assumes that the definitions are not mutually exclusive.⁴⁵

Redefining marriage by definition implies that the traditional definition is inaccurate. In point of fact, we are concerned here with two different, mutually exclusive definitions. One that marriage is *only* between a man and a woman, and one that does not include this limitation. Both definitions cannot be true at the same time. Insisting that the law must legitimize one definition necessarily delegitimizes the other.

Throughout the entirety of its history, Alabama has chosen the traditional definition of marriage. Some other states, like New York, have more recently chosen the new definition. The United States Constitution does not require one definition or the other because, as the *Windsor* Court noted, “[b]y history and tradition,” and one should add, by the text of the Constitution, “the definition and regulation of marriage ... has been treated as being within

the authority and realm of the separate States.”  — U.S. at —, 133 S.Ct. at 2689–90. That fact does not change simply because the new definition of marriage has gained ascendancy in certain quarters of the country, even if one of those quarters is the federal judiciary.⁴⁶

*552 As it has done for approximately two centuries, Alabama law allows for “marriage” only between one man and one woman. Alabama probate judges have a ministerial duty not to issue any marriage license contrary to this law. Nothing in the United States Constitution alters or overrides this duty.

IV. Order

**45 The named respondents are ordered to discontinue the issuance of marriage licenses to same-sex couples. Further, and pursuant to relator Judge Enslen’s request that this Court, “by any and all lawful means available to it,” ensure compliance with Alabama law with respect to the issuance of marriage licenses, each of the probate judges in this State other than the named respondents and Judge Davis are joined as respondents in the place of the “Judge Does” identified in the petition. Within five business days following the issuance of this order, each such probate judge may file an answer responding to the relator’s petition for the writ of mandamus and showing cause, if any, why said probate judge should not be bound hereby. Subject to further order of this Court upon receipt and consideration of any such answer, each such probate judge is temporarily enjoined from issuing any marriage license contrary to Alabama law as explained in this opinion.

As to Judge Davis’s request to be dismissed on the ground that he is subject to a potentially conflicting federal court order, he is directed to advise this Court, by letter brief, no later than 5:00 p.m. on Thursday, March 5, 2015, as to whether he is bound by any existing federal court order regarding the issuance of any marriage license other than the four marriage licenses he was ordered to issue in *Strawser*.

PETITION GRANTED; WRIT ISSUED.**

STUART, BOLIN, PARKER, MURDOCK, WISE, and BRYAN, JJ., concur.

MAIN, J., concurs in part and concurs in the result.

SHAW, J., dissents.

MAIN, Justice (concurring in part and concurring in the result).

I concur fully in the main opinion except for Part II.B. As to Part II.B., I concur in the result only. Consistent with my dissent from the Court's earlier decision to order answer and briefs in this matter, I continue to harbor concerns regarding some of the procedural aspects of this highly unusual case. Nevertheless, given the unique facts of this case and the intervention of Probate Judge John Enslen, I am persuaded that Judge Enslen has a sufficient interest in these proceedings to satisfy the criteria necessary for standing.

*553 SHAW, Justice (dissenting).

**45 I do not believe that this case can be filed in this Court at this time; as discussed below, I do not believe that this Court yet has jurisdiction.

It is unfortunate that the federal judiciary has refused to stay the order striking down Alabama's marriage-protection laws until the Supreme Court of the United States can conclusively rule on the issue within the next few months. The federal district court's order did nothing less than change the very definition of the institution of marriage in Alabama. Such a drastic change in Alabama law warranted the granting of a stay. The lack of a stay has resulted in much unnecessary confusion and costly litigation. Because I do not believe the case before this Court is properly filed, I cannot, at this time, express my opinion as to whether the federal court's decision was correct.

Against this backdrop, I write to express my concern that, in an attempt to reduce confusion and to restore order, the main opinion has deviated from certain principles of law that undermine its rationale for assuming jurisdiction of, and extending relief to, the petitioners here. This

deviation from the law, I fear, will have unforeseen consequences in future cases. For that reason, I cannot join the main opinion. My concerns are as follows:

1. *This Court does not have jurisdiction in this case.*

****46** Normally, this Court hears appeals from lower court decisions. Here, public-interest groups have filed a petition directly with this Court in an attempt to invoke its "original" jurisdiction, which is rare. "Original jurisdiction" is "[a] court's power to hear and decide a matter before any other court can review the matter." *Black's Law Dictionary* 982 (10th ed.2014).

This Court's original jurisdiction is described in the Constitution: "The supreme court shall have original jurisdiction ... to issue such remedial writs or orders as may be necessary to give it general supervision and control of courts of inferior jurisdiction...." Ala. Const.1901, Art. VI, § 140(b)(2) (emphasis added). Alabama Code 1975, § 12-2-7(2), states that this Court has authority to exercise "original jurisdiction" in determining and issuing writs of *mandamus* in matters where "no other court has jurisdiction." So, if another court has jurisdiction over this *mandamus petition*, the plain language of § 12-2-7(2) provides that this Court cannot exercise original jurisdiction. Circuit courts are courts of general jurisdiction whose judgments may be appealed to this Court and that, under § 12-2-7(2), cannot be bypassed. This Court is applying a different rule in *this* case.

This Court routinely hears petitions challenging a lower court's *decision* in a *pending* case; this does not constitute hearing a matter "before another court" gets that opportunity and is not an exercise of original jurisdiction. Alabama Code 1975, § 12-2-7(3), states that this Court has authority to issue "remedial and original writs as are necessary to give to it a general superintendence and control of courts of inferior jurisdiction." There is no indication in the plain language of this Code section that the reference to "original writs" encompasses "original jurisdiction"; rather, the language refers to writs that review interlocutory decisions of the lower courts:

“Other procedures by which decisions of a supervised court are brought to a supervising court for review are provided by the writs of certiorari, mandamus, and prohibition. Known variously as ‘prerogative writs,’ ‘peremptory writs,’ ‘extraordinary writs,’ ‘supervisory writs,’ and ‘original writs,’ these writs are not, *554 when appropriately employed, alternatives to appeal, but lie under circumstances in which an appeal does not lie. One or another of these writs can, under prescribed circumstances, be used to invoke supervisory review of interlocutory decisions that could not be appealed.”

Jerome A. Hoffman, *Alabama Appellate Courts: Jurisdiction in Civil Cases*, 46 Ala. L.Rev. 843, 852 (Spring 1995).

****47** Advising a probate judge how to issue government marriage licenses is not “superintendence and control” of an inferior court’s performance of a judicial function. Instead, it is instructing a State official acting in a nonjudicial capacity on how to perform a ministerial act. Specifically, probate courts are courts of limited jurisdiction.⁴⁷ The jurisdiction of those courts is specified in Ala.Code 1975, § 12–13–1, which lists the types of cases and controversies the courts may hear. Issuing marriage licenses is not a function of the court or of its judicial power—the court has no judicial power to issue a marriage license.⁴⁸ Instead, it is something the legislature has instructed that probate judges “may” do.⁴⁹

 Ala.Code 1975, § 30–1–9; *Ashley v. State*, 109 Ala. 48, 49, 19 So. 917, 918 (1896) (“The issuance of a marriage license by a judge of probate is a ministerial and not a judicial act.”). There is no exercise of a probate court’s jurisdiction when a probate judge issues a marriage license because the source of the probate judge’s authority to issue such a license does not stem from the jurisdiction of the court. By acting in this case, this Court is not correcting a legal mistake by a judicial officer; it is not supervising or correcting a court. Section 140(b), Ala. Const.1901, and § 12–2–7(3), Ala.Code 1975, are simply inapplicable in this case.

Furthermore, the decision in  *Ex parte Alabama Textile Products Corp.*, 242 Ala. 609, 7 So.2d 303 (1942), provides no exception. In that case, this Court purported to hear the petition under what is now § 12–2–7(3) and not § 12–2–7(2). A subsequent decision, *State v. Albritton*, 251 Ala. 422, 424, 37 So.2d 640, 642 (1948), notes that § 12–2–7(3)⁵⁰ allows the Court to supervise only the *exercise of judicial power*: “It is clear from [§ 12–2–7(3)] that the justices of the supreme court are limited in the issuance of these extraordinary writs as necessary to give general superintendence and control of inferior jurisdictions. *That is, to supervise persons and bodies clothed with judicial power in the exercise thereof.*” (Emphasis added.) It further notes that *Alabama Textile* involved a review of a “judicial action” of “an inferior tribunal vested with judicial or quasi judicial power,” and *is thus also so limited. Id.* In other words, *Alabama Textile* does not provide this Court with original jurisdiction to supervise the nonjudicial functions of probate judges. See also *Russo v. *555 Alabama Dep’t of Corr.*, 149 So.3d 1079, 1081 (Ala.2014) (“This Court does not have original jurisdiction to issue writs against State officers and employees other than to the lower courts.”), and *Ex parte Anderson*, 112 So.3d 31, 35 (Ala.2012) (on application for rehearing) (Murdock, J., concurring specially) (“In her application for rehearing, Anderson ... [argues] that her petition to this Court did *not* seek a writ directed to the circuit court requiring it to enforce its original orders but, instead, was a petition asking this Court to issue a writ directly to the State comptroller. I am not persuaded that such a petition is within the *original* jurisdiction of this Court....”).⁵¹ This Court is applying a different rule in *this* case.

2. The public-interest groups cannot sue in the State’s name.

****48** The public-interest groups here are attempting to pursue this case “in the name of the State.” Citizens can sometimes sue in the name of the State to compel a public officer to perform a legal duty in which the public has an interest. But they cannot do this when “the matter concerns the sovereign rights of the State....”  *Morrison v. Morris*, 273 Ala. 390, 392, 141 So.2d 169, 170 (1962).⁵² I must respectfully disagree with the conclusion that this case does not concern the sovereign rights of this State. The relief requested and the relief granted touch directly

on Alabama's sovereign authority to define the institution of marriage. This Court is applying a different rule in *this* case.

3. *The public-interest groups do not have standing.*

Not just anyone can file a lawsuit; the person or entity filing the action must have "standing," meaning the person or entity must have a sufficient stake in the controversy to be allowed to file the case.⁵³ The legal test this Court would normally use to determine whether "standing" exists is found in [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), which this Court has adopted.⁵⁴ In *Lujan*, certain environmental groups alleged that the Secretary of the Interior was not correctly applying the law, and they wanted the courts to order the Secretary to apply the law in a different way. The Supreme Court of the United States held, among other things, that, in order for those interest groups to sue, they must have been "injured": "the plaintiff must have suffered an 'injury in fact'—an invasion *556 of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.' " [504 U.S. at 560](#) (footnote and citations omitted). The injury suffered must impact the plaintiff "in a personal and individual way." [504 U.S. at 560 n. 1](#). Using this logic, this Court has held in the following cases that groups of interested people claiming that they have been broadly or generally harmed by allegedly unconstitutional or unauthorized governmental acts did not show the required injury: *Ex parte King*, 50 So.3d 1056 (Ala.2010); *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So.2d 1253 (Ala.2004); and *Kid's Care, Inc. v. Alabama Dep't of Human Res.*, 843 So.2d 164 (Ala.2002). The public-interest groups' alleged injuries in this case are not personal or individual in nature. Their injuries are no different than the injuries alleged in the above cases, where standing was rejected by this Court. Their disagreement with the probate judges, alone, does not provide sufficient standing. Government officials cannot be sued simply because a person thinks the officials are doing something wrong; the thing they are doing must result in "concrete and particularized" and "actual or imminent" harm to the person seeking judicial relief.

This Court is applying a different rule in *this* case. Here, the Court is recognizing an exception to *Lujan* when a party simply claims that it is acting on behalf of a public interest. If such recitation in the complaint is all that is required to avoid running afoul of *Lujan*, then *Lujan* is meaningless. The implications of such a holding are troublesome.

4. *This mandamus petition is procedurally deficient.*

****49** "When this Court considers a petition for a writ of mandamus, the only materials before it are the petition and the answer and any attachments to those documents." *Ex parte Guaranty Pest Control, Inc.*, 21 So.3d 1222, 1228 (Ala.2009). When a party seeks mandamus review of a lower court decision, it must attach to the petition "[c]opies of any order or opinion or parts of the record that would be essential to an understanding of the matters set forth in the petition." [Rule 21\(a\)\(1\)\(E\), Ala. R.App. P.](#) There is no record below in this case because there is no lower court proceeding. Although the petition includes various documents issued by the federal district court, we cannot take judicial notice of another court's records. *Green Tree-AL LLC v. White*, 55 So.3d 1186, 1193 (Ala.2010). We are in a position similar to that of a circuit court hearing an original petition filed in that court. Those courts, however, have the benefit of [Ala.Code 1975, § 6-6-640\(a\)](#), which requires mandamus petitions to be "verified by affidavit."⁵⁵ Thus, the public-interest groups have provided us with no competent evidence upon which we can determine whether they have proven their case. [Ex parte Ocwen Fed. Bank, FSB](#), 872 So.2d 810, 814 n. 6 (Ala.2003) ("The petitioner has the responsibility of supplying the Court with those parts of the record that are essential to an understanding of the issues set forth in the mandamus petition."). Normally, this Court would not ***557** grant relief in such a situation. [Ex parte Allianz Life Ins. Co. of North America](#), 25 So.3d 411 (Ala.2008). This Court is applying a different rule in *this* case.

5. *This Court is addressing issues not presented.*

The public-interest groups have not asked this Court to rule on the constitutionality of Alabama's marriage-protection laws. *Van Voorst v. Federal Express Corp.*, 16 So.3d 86, 92–93 (Ala.2008) (noting that issues not briefed are waived). They have not presented an argument as to that issue. See *Rule 21(a)(1)(C)*, Ala. R.App. P. (providing that a mandamus petition shall contain a statement of the issues presented and the relief sought). The briefs of the respondents appear to operate on the assumption that the constitutionality of the marriage-protection laws will not be addressed. Indeed, our order for answers and briefs may have misled them to believe that no argument as to this issue was required:

“The respondents are ordered to file answers and, if they choose to do so, briefs, *addressing issues raised by the petition*, including, but not limited to, any issue relating to standing or otherwise relating to this Court's subject-matter jurisdiction, and any issue relating to the showing necessary for temporary relief as requested in the petition.”

****50** (Emphasis added.) The *petition* does not demonstrate “a clear legal right” to relief as to this issue because it does not even argue it. This Court would normally not perform a party's legal research. *Dykes v. Lane Trucking, Inc.*, 652 So.2d 248, 251 (Ala.1994) (“[I]t is not the function of this Court to do a party's legal research....”). This Court is applying a different rule in *this* case, and, for all practical purposes, is issuing an advisory opinion on this issue to two public-interest groups. Again, this is something that this Court has held it cannot do. *Stamps v. Jefferson Cnty. Bd. of Educ.*, 642 So.2d 941, 944 (Ala.1994).

For the foregoing reasons, I believe that this case is not properly before this Court. As the main opinion notes, this case is both unusual and of great public interest; however, I do not see a way for this Court to act at this time. By overlooking this Court's normal procedures; by stretching our law and creating exceptions to it; by assuming original jurisdiction, proceeding as a trial court, and reaching out to speak on an issue that this Court cannot

meaningfully impact because the Supreme Court of the United States will soon rule on it; and by taking action that will result in additional confusion and more costly federal litigation involving this State's probate judges, this Court, in my view, is venturing into uncharted waters and potentially unsettling established principles of law. Therefore, I must respectfully dissent.

ORDER

(Issued March 10, 2015)

****113** ^[20] In an opinion issued on March 3, 2015, this Court ordered Judge Don Davis, the Probate Judge for Mobile County,

“to advise this Court, by letter brief, no later than 5:00 p.m. on Thursday, March 5, 2015, as to whether he is bound by any existing federal court order regarding the issuance of any marriage license other than the four marriage licenses he was ordered to issue in *Strawser* [*v. Strange* (Civil Action No. 14–0424–CG–C, Jan. 26, 2015)].^[1]”

***558** On March 5, Judge Davis filed a motion seeking an 11–day extension of time, until March 16, 2015, to comply with this Court's order. On March 9, Judge Davis filed a “Response to Show Cause Order” in which he asserts that he should not be included in this Court's March 3 order out of concern that doing so would require him to violate the federal district court order previously entered in *Strawser*.² Because we find Judge Davis's concern to be without merit, and for the additional reasons

discussed below, Judge Davis’s motion for extension is denied, and he is added as a respondent to this mandamus proceeding and is enjoined from issuing any further marriage licenses contrary to Alabama law.

Judge Davis asks for the 11–day extension to respond to this Court’s question because he has asked for a “ruling” as to that question from the Alabama Judicial Inquiry Commission (“the JIC”):

“As grounds for this Motion, Judge Davis sets out as follows:

“....

“2. Judge Davis has sought instruction today from the Alabama Judicial Inquiry Commission.

“3. Proper response to this Court is best made after [United States District Court] Judge Granade rules and/or after the Alabama Judicial Inquiry Commission rules.”

(Emphasis added.) Our inquiry to Judge Davis was intended as a factual one. We fail to see what knowledge the JIC might have as to the facts regarding whether Judge Davis is bound by an order in any case other than *Strawser v. Strange* (Civil Action No. 14–0424–CG–C, Jan. 26, 2015), or the fact of what the *Strawser* order says. As to the latter, the task of reading the order in *Strawser* and understanding what it says is the task of this Court, not the JIC.³

Judge Davis also notes that he has asked the federal district court “for a stay” of its order in *Strawser*. The fact of this request offers no basis for delay here; indeed, the prospect of such a stay by the federal court is compatible with the action of this Court. Further, Judge Davis has made no showing that the federal court order for which he seeks a stay is one that has not already been executed, i.e., one that concerns any license other than those already issued to the plaintiffs in that case.

^[21] Our opinion of March 3 serves as binding statewide precedent. To ensure compliance with that precedent, we also entered on that date and as part of our opinion an order specifically directing Alabama probate judges not to issue marriage licenses contrary to that precedent. Davis has made no showing that he was, or is, the subject of any previously entered federal court order other than the one issued in *Strawser*, and he makes no showing that that order has any continuing, binding effect on him as to any

marriage-license applicants beyond the four couples who were the plaintiffs in that case and who already have received the relief they requested. The inapplicability of the federal *559 court order to any other couple is evident from the terms of the order itself:

“Probate Judge Don Davis is hereby ENJOINED from refusing to issue marriage licenses to plaintiffs due to the Alabama laws which prohibit same-sex marriage. If Plaintiffs take all steps that are required in the normal course of business as a prerequisite to issuing a marriage license to opposite-sex couples, Judge Davis may not deny them a license on the ground that Plaintiffs constitute same-sex couples or because it is prohibited by the Sanctity of Marriage Amendment[, Ala. Const.1901, § 36.03,] and the Alabama Marriage Protection Act[, [Ala.Code 1975, § 30–1–19](#),] or by any other Alabama law or Order pertaining to same-sex marriage.”

****114** (Capitalization in original; emphasis added.)

^[22] In his motion, Judge Davis himself places emphasis on the same passages we have emphasized above. In the absence of a showing otherwise, we are left to read this language in accordance with its plain meaning: It grants injunctive relief against Judge Davis only as “to [the] plaintiffs” in *Strawser*. Our reading of this plain language is confirmed by the fact that the plaintiffs in *Strawser* sought relief only on their own behalf, not on behalf of any others, and by the fact that federal jurisprudence contemplates that a federal court decides only the case before it, see *Ex parte State ex rel. Alabama Policy Institute*, 200 So.3d 495, 528–30 (Part II.C.) (Ala.2015),⁴ in turn binding the parties before them only with respect to the other parties in the case.⁵

Notwithstanding the plain description of the activity enjoined by the quoted language in the federal court order

requiring Judge Davis to issue licenses “to [the] plaintiffs” in the *Strawser* case, Judge Davis questions whether the following language somehow was intended to enjoin him in relation to persons other than the four couples who sued and obtained a ***560** judgment against him for their personal benefit:

“This injunction binds Judge Don Davis and all his officers, agents, servants and employees, and others in active concert or participation with any of them, who would seek to enforce the marriage laws of Alabama which prohibit or fail to recognize same-sex marriage.”

The apparent purpose of this latter passage was to clarify *who* is bound by the federal court’s order, not *what* action that order requires of those persons. The question of “what” is the subject of the clear statement in the previous paragraph quoted above, i.e., that the enjoined parties are directed to issue marriage licenses specifically “to [the] plaintiffs.” The subsequent reference to persons who “would seek to enforce the marriage laws of Alabama” is in reference to Judge Davis and his agents, employees, etc., to the extent that they would seek to enforce the marriage laws of Alabama as “to [the] plaintiffs.” We are further confirmed in our reading of the federal court’s order by our understanding, as discussed in notes 4 and 5, *supra*, that federal court jurisprudence contemplates that a federal district court adjudicates the obligations, if any, of a defendant or defendants only with respect to the plaintiff or plaintiffs in the case before the court. See also  *Meinhold v. United States Dep’t of Defense*, 34 F.3d 1469, 1480 (9th Cir.1994) (“An injunction ‘should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.’”  *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 2558, 61 L.Ed.2d 176 (1979).... This is not a class action, and Meinhold sought only to have his discharge voided and to be reinstated.... Beyond reinstatement ..., DOD should not be constrained from applying its regulations to Meinhold and all other military personnel.” (emphasis added));  *Zepeda v. United States Immig. & Naturalization Serv.*, 753 F.2d 719, 727 (9th Cir.1983) (“A federal court ... may not attempt to determine the rights of persons not

before the court.”); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir.1974) (holding that “the injunction against the School District from enforcing its regulation *against anyone other than [the plaintiff]* reaches further than is necessary” (emphasis added)).

As we explained in our March 3 opinion, this Court has acted to ensure statewide compliance with Alabama law in an orderly and uniform manner. We have before us in this case a petitioner in the form of the State that has an interest in and standing as to the actions of every probate judge in the State. Moreover, as we noted in the opinion, Alabama’s probate judges took a variety of different positions in the wake of the federal district court’s decisions, and no single circuit court has jurisdiction over all probate judges to enable it to address that disarray. The inclusion of Judge Davis, along with all the other probate judges in this State, as a respondent subject to this Court’s March 3 order as to future marriage-license applicants is necessary and appropriate to the end of achieving order and uniformity in the application of Alabama’s marriage laws.

****115** Based on the foregoing, Judge Davis is added to this mandamus proceeding as a respondent and is subject to this Court’s order of March 3, 2015.  [Section 30–1–9, Ala.Code 1975](#), provides that Judge Davis “may” issue “marriage licenses.” To the extent he exercises this authority, he must issue those licenses in accordance with the meaning of the term “marriage” in that Code section and in accordance with other provisions of Alabama law, as discussed in our March 3 opinion.

STUART, PARKER, MURDOCK, MAIN, WISE, and BRYAN, JJ., concur.

SHAW, J., dissents.

***561** SHAW, Justice (dissenting).

As explained in my dissent in *Ex parte State ex rel. Alabama Policy Institute*, 200 So.3d 495, 553 (Ala.2015), I do not believe that this Court has jurisdiction in this case; therefore, I dissent.

ORDER

(Issued March 4, 2016)

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.”

****51** 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 ***562** 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.

****52** 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, 33 S.Ct. 515, 57 L.Ed. 864 (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, 192 L.Ed.2d 609 (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. ***563** 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....”

****53** 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

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

****54** “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) (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, 87 S.Ct. 1213, 18 L.Ed.2d 288 (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 recuse.”).

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, 189 L.Ed.2d 476 (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, 128 S.Ct. 761, 169 L.Ed.2d 627 (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

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 *565 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).

**55 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, 192 L.Ed.2d 609 (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.*, 200 So.3d 495 (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,  § 30–1–19, 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

****56** 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, ***566** 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, 85 S.Ct. 1678, 14 L.Ed.2d 510 (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."

****57** 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 ***567** 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).

****58** • "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 ***568** 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, 25 S.Ct. 358, 49 L.Ed. 643 (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:

****59** "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 *569 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, 112 S.Ct. 2791, 120 L.Ed.2d 674 (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:

****60** “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 *570 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* 200 So.3d 495, 547 (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, 72 S.Ct. 205, 96 L.Ed. 183 (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, 50 S.Ct. 436, 74 L.Ed. 1056 (1930) (Holmes, J., dissenting).

As late as 1986, the United States Supreme Court specifically declared:

****61** “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.”

2841, 92 L.Ed.2d 140 (1986), overruled by  *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (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, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (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 *571 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.

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:

 *Bowers v. Hardwick*, 478 U.S. 186, 195, 106 S.Ct.

“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.”

****62**   *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.

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 ***572** 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,  15 L.Ed. 691 (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.

****63** 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, 97 S.Ct. 1932, 52 L.Ed.2d 531 (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 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 *573 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.*

****64** “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  *574 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.

****65** 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.” *575  576 U.S. at —, 135 S.Ct. at 2631. He 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

****66** 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:

" '[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, 186 L.Ed.2d 808 (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....

***576** "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:

****67** 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 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, 85 S.Ct. 1678, 14 L.Ed.2d 510 (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 *577 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).

****68** 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 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, 92 S.Ct. 1029, 31 L.Ed.2d 349 (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 *578 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

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).

**69 In  *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (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, 93 S.Ct. 705, 35 L.Ed.2d 147 (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 *579 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, 93 S.Ct. 705. “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, 93 S.Ct. 762, 35 L.Ed.2d 147 (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).

****70** The incorporation of the sexual revolution into the Constitution continued in  *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (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, 106 S.Ct. 2841, 92 L.Ed.2d 140 (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 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:

***580** “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.*"

****71**  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, 5 S.Ct. 747, 29 L.Ed. 47 (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 ***581** 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, 51 S.Ct. 570, 75 L.Ed. 1302 (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).

****72** 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 *582 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, 66 S.Ct. 826, 90 L.Ed. 1084 (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”).

**73 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.”

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.

***583 **74** 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 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

 576 U.S. at —, 135 S.Ct. at 2625–26. Justice Alito

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. Enslin, 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:

****75** “I, the undersigned, possess the following sincere religious beliefs which I hold sacred. I seek from this Court a ***584** 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 Enslin 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:

****76** “[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 *585 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 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*, 123 F.Supp.3d 924 (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.”

“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. *Ableman v. Booth*, 62 U.S. (21 How.) 506,  16 L.Ed. 169 (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 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 *586 sense but also our duty to the Constitution.

V. The Supreme Law of the Land

**77 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

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

****78** 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 ***587** 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 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 U.S. (16 Pet.) 1, 18,  10 L.Ed. 865 (1842), overruled by  *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (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.”

****79** *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 ***588** 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.

****80** “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 ***589** “contrary to reason” as well as “contrary to the divine law.” See  *Murphy v. Ramsey*, 114 U.S. 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*, 200 So.3d at 507)).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 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.

****81** 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, *590 "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:

****82** "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).

***591** 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,  2 L.Ed. 60 (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,  15 L.Ed. 691 (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

****83** 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 ***592 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, 115 S.Ct. 1447, 131 L.Ed.2d 328 (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 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

****84** 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 ***593** as “the rule of law” 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 (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 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).

****85** 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 ***594** 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 Clause²⁷ 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?

****86** Lincoln taught that an order of the Supreme Court was limited to the parties in the case before the Court; beyond 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 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 ***595** 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*, 122 F.Supp.3d 1085 (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, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). Judge Learned Hand stated:

****87** “[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 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

***596** “(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*, 200 So.3d at 529 (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*, 200 So.3d at 529 (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:

****88** “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, 117 S.Ct. 1055, 137 L.Ed.2d 170 (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, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989): "Indeed, inferior federal courts are *597 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

****89** 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).

***598** 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

****90** 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, 82 S.Ct. 1380, 8 L.Ed.2d 620 (1962). The 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. at 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?

****91** 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), ***599** 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, 108 S.Ct. 2268, 101 L.Ed.2d 69 (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).

****92** 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, 192 L.Ed.2d 609 (2015), in which a 5–4 majority declared, without any constitutional basis, that same-sex applicants have a fundamental constitutional right to marriage, I ***600** 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, 110 S.Ct. 2430, 110 L.Ed.2d 332 (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

****93** 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:

***601** “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, 117 S.Ct. 2258, 138 L.Ed.2d 772 (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., 200 So.3d 495, 530–31 n. 18 (Ala.2015) (“API”). Further, this Court made reference to

****94** “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*), ***602** a union between one man and one woman.”

API, 200 So.3d at 531 (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, 200 So.3d at 500 (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, 186 L.Ed.2d 808 (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 [10 S.Ct. 850, 34 L.Ed. 500] (1890) (‘The whole subject of the domestic relations of husband *603 and wife, parent and child, belongs to the laws of the States and not to the laws of the United States’).”

****95** (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,

****96** “[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 ***604** 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.”

****97** 200 So.3d at 531.

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, 116 S.Ct. 2068, 135 L.Ed.2d 443 (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.”

200 So.3d at 531 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

****98** 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 *606 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 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).

****99** 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, 192 L.Ed.2d 609 (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 life³³ and practically unaccountable³⁴ 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” 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 *607 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.” 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, 90 S.Ct. 1068, 25 L.Ed.2d 368 (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.’ ”

****100** In  *Cotting v. Godard*, 183 U.S. 79, 84, 22 S.Ct. 30, 46 L.Ed. 92 (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,  2 L.Ed. 60 (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, 112 S.Ct. 2791, 120 L.Ed.2d 674 (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 ***608** generation are 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, 109 S.Ct. 2333, 105 L.Ed.2d 91 (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, 122 S.Ct. 2528, 153 L.Ed.2d 694 (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.”).

****101** 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 *609 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, 57 S.Ct. 578, 81 L.Ed. 703 (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."

****102** 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 despotism³⁷ 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. (20 Wall.) 655, 669,  [22 L.Ed. 455 \(1874\)](#), Justice Clifford defined judicial despotism as follows:

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

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

****103** “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 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 ***611** 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.

“....

****104** “... 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

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, 73 S.Ct. 397, 97 L.Ed. 469 (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 *612 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 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 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.

****105** “ ‘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 ***613** 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, 192 L.Ed.2d 609 (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 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).

****106** I concur with this Court’s dismissal of the various postjudgment motions and requests ***614** 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, 192 L.Ed.2d 609 (2015). As discussed below, this Court’s decision, *Ex parte State ex rel. Alabama Policy Institute*, 200 So.3d 495 (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 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, 200 So.3d at 553 (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.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 these post-***615** 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

****107** 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 against them.⁴⁹ This action ***616** on his part, which I view as unauthorized,⁵⁰ now requires a response by this Court to the 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*, 200 So.3d at 553 (Shaw, J., dissenting). As is now demonstrated, Alabama’s 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

****108** 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* ***617** 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, 78 S.Ct. 1401, 3 L.Ed.2d 5 (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 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.” 200 So.3d at 610, 611, 590, 591. 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 originated⁵³ 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 ***618** 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 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.

****109** 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 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 ***619** 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. 200 So.3d at 597. 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, 130 S.Ct. 3020, 177 L.Ed.2d 894 (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](#), 199 So.3d 812 (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”? 200 So.3d at 591. I think that 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

****110** 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 ***620** 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

****111** 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 ***621** 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

****112** Normally, the Justices of this Court would not comment on another Justice’s reasons for declining to recuse himself or 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 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. 200 So.3d at 562.

I noted in *Hinton* that the requirement to recuse one’s self did not apply when the *622 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. 200 So.3d at 563.

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))). 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.

All Citations

200 So.3d 495, 2015 WL 892752

Footnotes

* Note from the reporter of decisions: Although this order is dated March 10, 2015, it was released to the public on March 11, 2015.

1 The petition notes that API

“is a 501(c)(3) non-partisan, non-profit research and education organization with thousands of constituents throughout Alabama, dedicated to influencing public policy in the interest of the preservation of free markets, rule of law, limited government, and strong families, which are indispensable to a prosperous society. API achieves these objectives through in-depth research and policy analysis communicated through published writings and studies which are circulated and cited throughout the state and nation. Over the years, API has published a number of studies showing the great benefits to families of marriage between one man and one woman and the detriments associated with divorce, cohabitation, and same-sex unions, particularly when children are involved. API has consistently cautioned against the gradual shift toward sanctioning same-sex marriage on this basis. API was a leading proponent of both the ... Act, passed in 1998, and the ... Amendment, which was approved by 81% of

Alabama voters in 2006.”

The petition notes that ACAP

“is a non-profit 501(c)(4) organization with thousands of constituents throughout Alabama, which exists to promote pro-life, pro-family and pro-moral issues in [Alabama]. In addition to lobbying the Alabama Legislature on behalf of churches and individuals who desire a family-friendly environment in Alabama, [ACAP] provides a communication link between Alabama legislators and their constituents. After passage of the ... Act, [ACAP] vigorously promoted passage of the ... Amendment to both legislators and citizens, making [ACAP] instrumental in the resulting 81% vote approving the ... Amendment in 2006.”

- 2 Realignment of the parties in civil actions in Alabama is not uncommon. See, e.g., [Richards v. Izzi](#), 819 So.2d 25, 28 (Ala.2001) (“Jefferson County, although originally a defendant, was realigned as a plaintiff.”). Realignment is not uncommon, even when the jurisdiction of the court is called into question. Indeed, when cases are removed to federal court based on diversity jurisdiction, federal courts allow *post-removal realignment* of parties in order to create diversity. See [Lott v. Scottsdale Ins. Co.](#), 811 F.Supp.2d 1220, 1223 (E.D.Va.2011) (noting that “[t]he first question presented—whether post-removal party realignment to create diversity is permissible—is easily answered in the affirmative based on settled authority in this circuit and elsewhere” and providing footnote citing multiple authorities). In this regard, the United States Court of Appeals for the Eleventh Circuit has observed:

“[F]ederal courts are required to realign the parties in an action to reflect their interests in the litigation. The parties themselves cannot confer diversity jurisdiction upon the federal courts by their own designation of plaintiffs and defendants. [City of Indianapolis v. Chase Nat’l Bank](#), 314 U.S. 63, 69, 62 S.Ct. 15, 17, 86 L.Ed. 47 (1941). This Court concludes that the converse of this principle—that parties cannot avoid diversity by their designation of the parties—is also true. Rather it is the ‘duty ... of the lower federal courts[] to look beyond the pleadings and arrange the parties according to their sides in the dispute.’ [Northbrook Nat’l Ins. Co. v. Brewer](#), 493 U.S. 6, 16 n. 5, 110 S.Ct. 297, 302 n. 5, 107 L.Ed.2d 223 (1989) (citations and quotations omitted), as determined by ‘the principal purpose of the suit’ and ‘the primary and controlling matter in dispute,’ [City of Indianapolis](#), 314 U.S. at 69, 62 S.Ct. 15.”

[City of Vestavia Hills v. General Fid. Ins. Co.](#), 676 F.3d 1310, 1313–14 (11th Cir.2012) (emphasis omitted). As the Eleventh Circuit explained, it is a court’s duty to align the parties on their proper sides without regard to the effect of the realignment on jurisdiction. By doing so, we merely “ ‘look beyond the [nomenclature of the] pleadings and arrange the parties according to their sides in the dispute.’ ” [Northbrook Nat’l Ins. Co. v. Brewer](#), 493 U.S. 6, 16 n. 5, 110 S.Ct. 297, 107 L.Ed.2d 223 (1989) (quoting other cases).

- 3 “For better, for worse, or for more of the same, marriage has long been a social institution defined by relationships between men and women. So long defined, the tradition is measured in millennia, not centuries or decades. So widely shared, the tradition until recently had been adopted by all governments and major religions of the world.”

[DeBoer v. Snyder](#), 772 F.3d 388, 395–96 (6th Cir.2014).

As Blackstone stated: “[T]he most universal relation in nature” is that between a parent and child, and that relationship proceeds from the first natural relation, that between husband and wife. 1 William Blackstone, *Commentaries* *446. The “main end and design of marriage” is “to ascertain and fix upon some certain person, to whom the care, protection, the maintenance, and the education of the children should belong.” *Id.* at *455. And

those duties are duties of natural law. *Id.* at *447–50.

- 4 The history of the *Searcy* litigation appears to be yet another manifestation of the confusion that has been generated by this matter. According to the complaint in *Searcy I*, the plaintiffs, C.D.S. and K.M., a same-sex couple, had been married in California, and K.S. was K.M.'s biological son. In December 2011, C.D.S. filed a petition in the Mobile Probate Court seeking to adopt K.S. under a provision of Alabama's adoption code that allows a person to adopt a "spouse's child." § 26–10A–27, Ala.Code 1975.

In April 2012, the Mobile Probate Court, acting through Judge Don Davis, entered a final judgment denying C.D.S.'s petition for adoption as a matter of law based on the Amendment and the Act. C.D.S. appealed, and the Court of Civil Appeals affirmed the April 2012 judgment. See *In re K.R.S.*, 109 So.3d 176 (Ala.Civ.App.2012). C.D.S. did not seek further appellate relief.

In May 2014, C.D.S. and K.M. filed their complaint in *Searcy I*; the defendants included Attorney General Strange and Mobile Probate Judge Davis, among others. The complaint sought an order requiring, among other things, that the defendants grant the adoption of K.S. by C.D.S. The claims against Judge Davis were subsequently dismissed with prejudice. It is unclear to this Court whether the claims against Judge Davis were dismissed because he would function as a court of law, rather than as an executive minister of the law, in relation to any petition within the state judicial system seeking an adoption. (Alternatively, it is unclear whether the claims against Judge Davis were dismissed because the final judgment he entered in April 2012, based as it was on a matter of law, represented a res judicata bar to the relief being sought in the federal court in *Searcy I*.) By the same token, it is unclear on what basis a "case or controversy" existed between the plaintiffs in *Searcy I* and the Attorney General given the Attorney General's lack of authority to affect the actions of the court of law responsible for adjudicating adoption cases. See also note 16, *infra*.

- 5 The opinion in *Alabama Textile* did note that the parties agreed that it was necessary to complete relief that the Court act, but as discussed below, that agreement was considered by the Court only in making the discretionary determination delegated by law to the Court with respect to whether action by it was necessary to provide the relief needed. Ultimately, and most importantly as to this point, the Court was quite clear in its conclusion that such consent is neither necessary nor sufficient to such a determination.

- 6 In *Ex parte Jim Walter Resources, Inc.*, 91 So.3d 50 (Ala.2012), the Court considered the question whether it had original jurisdiction over an original petition filed in this Court seeking a writ of mandamus to direct a probate judge to record a mortgage document. The Tuscaloosa County Probate Court had refused to record the mortgage documents filed by Jim Walter Resources ("JWR") unless a recordation tax was first paid. See § 40–22–2, Ala.Code 1975. We explained that "imposing the recordation tax on a mortgage recorded in a county is part of the administrative duties of the probate judge of the county and, as such, is a ministerial function," and that "[a] writ of mandamus will lie to compel a court to perform ministerial duties." *Jim Walter*, 91 So.3d at 53. Further, we explained our ability to exercise our original jurisdiction over the petition filed with us by explaining that a circuit court's appellate jurisdiction over probate matters is limited under § 12–22–21, Ala.Code 1975, and did not include the taxing issue involved in that case. *Id.*

- 7 Rarely, if ever, could a party attempt to bring a viable public-interest action in the name of the state for the purpose of *challenging* the state's laws, because the state normally would have no interest in such an action. Thus, public-interest standing generally is limited to cases in which a relator seeks on behalf of the state to secure the *enforcement* of the state's laws. See discussion of cases below. Where a party seeks to halt enforcement of a duty otherwise owed to the public, as is common in an action seeking to invalidate a state statute, he or she generally must be able to show a private interest to be vindicated. See, e.g., *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So.2d at 1256 (action seeking to invalidate a state statute) (noting that "[i]n *Jones v. Black*, 48 Ala. 540 (1872), this Court first articulated a test for determining whether a party has the necessary standing," and explaining that "[a] party who seeks to have an act of the legislature declared unconstitutional, must ... show that he is, or will be injured by it" (quoting *Jones*, 48 Ala. at 543)); *Alabama Alcoholic Beverage Control Board v. Henri-Duval Winery, L.L.C.*, 890 So.2d at 74 (stating that "[a] party establishes standing to bring a challenge" to a state statute when it demonstrates the  *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), elements). Compare, e.g., *State ex rel. Highsmith v. Brown Serv. Funeral Co.*, 236 Ala. 249, 251, 182 So. 18, 19 (1938) (allowing the suit to go forward on other grounds, but agreeing with the defendants' general assertion that "relator shows no interest in the controversy, and that one without interest cannot attack an act of the Legislature because it is unconstitutional, which is the attack here made").

- 8 See also  *State ex rel. Bronster v. Yoshina*, 84 Haw. 179, 185, 932 P.2d 316, 322 (1997) ("[S]tanding barriers

should not serve to bar cases of public interest under our jurisdiction. More specifically, 'federal justiciability standards are inapplicable in state court declaratory judgment actions involving *matters of great public importance*.' " (citation omitted)); *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo.1992) ("The threshold requirement for standing is extremely low where mandamus is brought to enforce a nondiscretionary duty allegedly required of a public official.... Even a private citizen was held to have 'the sesame which unlocks the gates of mandatory authority whenever an officer whose functions are purely ministerial refuses to perform his office.' " (citation omitted)); and *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974) ("[I]t has been clearly and firmly established that even though a private party may not have standing to invoke the power of this Court to resolve constitutional questions and enforce constitutional compliance, *this Court, in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance*." (emphasis added)).

- 9 Though it may appear that the duty involved in *Rodgers* was one owed to the government, i.e., to the circuit clerk, the purpose of requiring the sheriff to file the reports was because the public had an interest in knowing who had been committed to and discharged from the prisons.
- 10 The fact that two of the relators here are public-interest, nonprofit corporate entities rather than natural persons does not disqualify them as plaintiffs. See, e.g., *Marone*, 967 N.Y.S.2d at 589, 39 Misc.3d at 1041 ("The public interest standing of a citizen has been extended to corporations as well as other organizations."); *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal.4th 155, 168, 127 Cal.Rptr.3d 710, 720, 254 P.3d 1005, 1013 (2011) ("[C]orporate entities should be as free as natural persons to litigate in the public interest."); *State ex rel. Ohio Motorists Ass'n v. Masten*, 8 Ohio App.3d 123, 129, 456 N.E.2d 567, 573 n. 4 (1982) ("We are persuaded that an Ohio corporation may have as great an interest as a natural person in seeking the just enforcement of state laws, and may be considered to be a citizen of the state of Ohio entitled to institute an action in mandamus."); cf. *Jackson Sec. & Inv. Co. v. State*, 241 Ala. 288, 292, 2 So.2d 760, 764 (1941) ("The general rule is recognized everywhere that a corporation is a citizen, resident or inhabitant of the state under whose laws it was created."); and § 10A-1-2.11, Ala.Code 1975 ("[W]hether or not expressly stated in its governing documents, a domestic entity has the same powers as an individual to take action necessary or convenient to carry out its business and affairs.").
- 11 In a different sense of the public's "interest," the intensity of the public's interest in preserving the institution of marriage as it has always been understood, a union between one man and one woman, is evidenced by the ratification of the Amendment in 2006 by 81% of Alabama voters. Certification of Constitutional Amendment Election Results (June 6, 2006), <http://www.alabamavotes.gov/downloads/election/2006/primary/ProposedAmendments-OfficialResultsCertification-06-28-2006.pdf> (last visited March 2, 2015; a copy of the Web page containing this information is available in the case file of the Clerk of the Alabama Supreme Court).
- 12 Other matters that arguably fall into the category of a state's sovereign rights include the power of eminent domain, see *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 533, 12 L.Ed. 535 (1848) (recognizing that "the power [of eminent domain] ... remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall be ... deemed commensurate with public necessity"), and the power to enforce criminal laws, see *United States v. Wheeler*, 435 U.S. 313, 320, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (observing that both the federal and state governments had "the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other' " (quoting *United States v. Lanza*, 260 U.S. 377, 382, 43 S.Ct. 141, 67 L.Ed. 314 (1922))).
- 13 Even *Lujan* itself, at least on its facts, is not inconsistent with the understanding that a private right is needed when one seeks to assert a claim based on a duty owed to the government as such. Clearly, *Lujan* is not easily assessed, and some have questioned the consistency of application of the principles expressed therein, even in federal cases. See, e.g., *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 641-42, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007) (Souter, J., dissenting) (stating that " 'the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition,' leaving it impossible 'to make application of the constitutional standing requirement a mechanical exercise' " (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82

L.Ed.2d 556 (1984), abrogated on other grounds by [Lexmark Int'l, Inc. v. Static Control Components, Inc.](#), — U.S. —, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L.Rev. 301, 302–04 (2002) (observing that *Lujan's* “easily-stated formula hides much of the complexity of modern case or controversy analysis”). (Of course, a state is free to reject or modify *Lujan* as it may see fit. See, e.g., [ASARCO, Inc. v. Kadish](#), 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) (“[T]he state judiciary here chose a different path, as was their right, and took no account of federal standing rules in letting the case go to final judgment in the Arizona courts.”).) One possible explanation for the seemingly disparate results achieved is that some cases, including *Lujan* and the cases upon which it relies, may be understood as involving attempts by private litigants to state a cause of action by relying upon duties actually owed to a governmental unit, commonly by another governmental unit, whereas others involve what may be understood as seeking to enforce a duty more directly owed to the public. Compare *Lujan*; [Fairchild v. Hughes](#), 258 U.S. 126, 42 S.Ct. 274, 66 L.Ed. 499 (1922); [Massachusetts v. Mellon](#), 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); [Ex parte Levitt](#), 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937); [Schlesinger v. Reservists Comm. to Stop the War](#), 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); [Allen v. Wright](#), 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (abrogated on other grounds by [Lexmark Int'l, Inc. v. Static Control Components, Inc.](#), — U.S. —, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)); [Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.](#), 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); and [Whitmore v. Arkansas](#), 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (duty sued upon was owed to a person other than the plaintiff), with [Federal Election Comm'n v. Akins](#), 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998); [Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. \(TOC\), Inc.](#), 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (seeking to require compliance with anti-pollution laws); and [Massachusetts v. EPA](#), 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (recognizing standing in several environmental groups seeking to enforce a duty imposed on the EPA to regulate certain carbon-dioxide emissions). See generally [Union Pac. R.R. v. Hall](#), 91 U.S. 343, 23 L.Ed. 428 (1875) (holding that a member of the public may bring a mandamus petition to enforce a public duty and need not possess a particularized interest in the duty).

- 14 [Mooring v. State](#), 207 Ala. 34, 91 So. 869 (1921), and [Tarver v. Commissioners' Court](#), 17 Ala. 527, 531 (1850), are among the examples of cases implicating the State's sovereign right of taxation in which a private party was permitted to bring a mandamus petition to force a government entity to collect a tax precisely because the party had a private interest in the tax collected. At issue in *Tarver* was a statute that provided:

“ ‘That it shall be lawful for the commissioners' court of roads and revenue of the county of Tallapoosa to impose such tax in addition to the tax levied for county purposes, as may be necessary to pay any amount of money that the court-house commissioners of said county may be liable to pay for building the court-house and jail.’ Under the authority of these several acts, [Tarver] with the other commissioners contracted with Cameron & Mitchell for the erection of the county buildings, agreeing to pay them \$18,000. The buildings were completed and were received and used by the county. The [Commissioners Court of Tallapoosa County] paid from the proceeds of the sale of the lots the amount agreed on, less the sum of thirty-five hundred dollars. This amount they declined paying on the ground that the work was not completed according to contract. A suit was instituted against [Tarver and the other commissioners] and a judgment finally rendered for twenty-five hundred dollars. The commissioners' court has levied a tax and paid a part of this judgment, but refuses to pay any more or to levy a tax for that purpose.”

17 Ala. at 531. All the commissioners besides Tarver at the time the contract was executed died or left the State, and consequently execution of the judgment was made solely against Tarver. Tarver brought a mandamus petition under the authority of the statute to force the current Commissioners of the Court of Tallapoosa County to levy a tax to pay the judgment against him. The circuit court dismissed the petition. On appeal, this Court granted the petition, stating:

“We think it very clear that it is the duty of the commissioners' court under these facts to levy and collect a tax sufficient to pay the amount of the judgment still unpaid, as well as such amount as may be justly due to the petitioner, and that he has the legal right to demand of

them the performance of this duty.”

17 Ala. at 531.

- 15 Nor would it be of any import for purposes of this proceeding that it was initiated only by the associational relators and not also Judge Enslen. Judge Enslen is a proper party before this Court and has been properly realigned as a relator on behalf of petitioner State of Alabama. Under the circumstances presented, we are clear to the conclusion that, to the extent our precedents applicable to actions filed in trial courts require their dismissal if filed by a party without standing, those precedents have no application here. Our supervisory authority is sufficient to enable us to effect that realignment and accept jurisdiction over the resulting adversarial proceeding in furtherance of our responsibility to restore and maintain order within our judicial system, particularly where as here the State was originally named petitioner and continues as the petitioner and the realignment of Judge Enslen would, at most, effect merely a substitution of the relating person to speak on its behalf.
- 16 That is, a lower federal court, which has no appellate authority over any state court judge acting in a judicial capacity, has no authority or jurisdiction over a state court's rulings as to cases before that state court judge acting in his or her judicial capacity, including as to questions of law. That would be the case, for example, as to a probate judge handling an adoption case or an estate-administration case, as opposed to acting in a ministerial capacity to record a deed or to issue a license. The proper avenue, indeed the only avenue, for appellate review of a final trial court judgment in such a case is “upward” through the coordinate state court system, of which that trial court is a part, followed thereafter by a petition for a writ of certiorari to the United States Supreme Court if necessary. By way of example, the plaintiff in *Searcy I* filed at least one previous petition seeking approval of the adoption of the child at issue. As has been noted, in April 2012, Mobile Probate Judge Davis entered a final trial court order denying that petition on the ground that the requested adoption was not permitted under the Amendment and the Act. C.D.S., as was the proper course, sought relief within the appellate courts of this state. See *In re K.R.S.*, 109 So.3d 176 (Ala.Civ.App.2012).
- 17 “ ‘[R]egulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’ ” *United States v. Windsor*, — U.S. at —, 133 S.Ct. at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)). The *Windsor* Court also observed that “ ‘[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.’ ” — U.S. at —, 133 S.Ct. at 2691 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279 (1942)).
- We note that *Windsor*’s acknowledgment of the states’ sovereign authority over marriage refers to the powers of the states vis-à-vis the federal government. Our discussion in Part II.B of this opinion notes that marriage is a duty owed to the public rather than what on-relation cases such as *Kendrick* have described as “sovereign rights of the state,” which are duties “owed to the government as such.” The fact that, as between the federal government and the states, the law of marriage falls within the sovereign powers of the states does not affect whether marriage licensing is a duty owed to the public rather than one owed to the government as such.
- 18 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.
- 19 Few courts that have ordered the issuance of marriage licenses to same-sex couples appear to have contemplated this issue. The alternative, however, appears 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, all contrary to well established state and federal principles of judicial review. As we observed in [King v. Campbell](#), 988 So.2d 969, 981–83 (Ala.2007):

“This Court addressed the standard for ascertaining severability in [Newton v. City of Tuscaloosa](#), 251 Ala. 209, 217, 36 So.2d 487, 493 (1948):

“ ‘... 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.’

“(Emphasis added.)

“ ‘....

“ ‘... It is also to be said, in the nature of limitation of the rule stated, that *the whole statute will be stricken if the valid and invalid parts are so connected and interdependent in subject-matter, meaning, and purpose that it cannot be presumed that the Legislature would have passed the one without the other, or where the striking of the invalid would cause results not contemplated or intended by the lawmakers, or where that invalid is the consideration or inducement of the whole act, or where the valid parts are ineffective and unenforceable in themselves, according to the legislative intent.*’

“[[Springer v. State ex rel. Williams](#), 229 Ala. 339,] 342–43, 157 So. [219,] 222 (1934) (emphasis added). See also [City of Birmingham v. Smith](#), 507 So.2d 1312, 1317 (Ala.1987), describing the test as *whether the legislature would have enacted the statute without the void provision.*” (Final emphasis added.) See also Robert L. Stern, [Separability and Separability Clauses in the Supreme Court](#), 51 Harv. L.Rev. 76, 76 (1937), explaining that

“the United States Supreme Court, the state courts, and secondary authorities all appear to agree that the test for whether the invalidity of part of a law or of some of its applications will not affect the remainder is ‘(1) if the valid provisions or applications are capable of being given legal effect standing alone, and (2) if the legislature would have intended them to stand with the invalid provisions stricken out.’ ”

20 For that matter, it has existed in history since ancient times. See, e.g., Charles P. Kindregan, Jr., [Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History](#), 38 Fam. L.Q. 427, 428 (2004) (noting that “[t]he Code of Hammurabi, 1780 B.C., provided that ‘if a man take a wife and does not arrange with her the proper contracts, that woman is not his legal wife’ ”).

21 The issue in *Lofton* was whether a Florida statute prohibiting adoption by practicing homosexuals violated the equal-protection and due-process rights of homosexual persons desiring to adopt. The United States Court of Appeals for the Eleventh Circuit determined that no fundamental right to private sexual intimacy existed and, thus, that the Florida statute was subject to rational-basis analysis. It was significant to the Eleventh Circuit in *Lofton* that “the involved actors are not only consenting adults, but minors as well.” [358 F.3d at 817](#). Such is the case with the underlying action before the Mobile Probate Court.

22 Compare [DeBoer](#), 772 F.3d at 400 (observing that “[o]nly the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions ‘until such time as the Court informs [us] that [we] are not’ ” and that “[t]he Court has yet to inform us that we are not” to follow *Baker*), with [Baskin v. Bogan](#), 766 F.3d 648, 660 (7th Cir.2014) (stating that “ [Romer v. Evans](#), 517 U.S. 620, 634–36, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); [Lawrence v. Texas](#), 539 U.S. 558, 577–79, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and *United States v. Windsor* are distinguishable from the present two cases but make clear that *Baker* is no longer authoritative”).

23 The *Searcy I* plaintiffs might respond that defining marriage inherently as available only to members of the opposite sex is also circular, but that argument ignores the fact that millennia of practice stand behind the traditional definition. Such a mistake is similar to an employee’s complaining that his boss cannot tell him what to do because no one informed him that being an employee meant that he would have to do what someone else told him to do. To state that being an employee means that a person works for someone else is not circular reasoning: it is just describing the nature of an “employee.” Likewise, as will be explained more fully in the text below, to state that being married involves two people of the opposite sex joining in a special relationship is not circular: it merely describes the nature of being

“married.”

- 24 This not-so-subtle redefinition of “marriage” is an example of what law professor Steven D. Smith calls “smuggling,” which “implies that an argument is tacitly importing something that is left hidden or unacknowledged—some undisclosed assumption or premise.” Steven D. Smith, *The Disenchantment of Secular Discourse* 35 (2010). Smith goes on to explain that such a tactic is “illicit” when making the undisclosed premise

“explicit would be controversial: you would have to defend the premise, and you don’t want to do that. Or your premise might be illicit because you yourself do not believe it: you like your conclusion, maybe, but you don’t actually believe what would be necessary to support this particular argument for that conclusion. Perhaps, if you were to make your unstated premise explicit, you would be convicted of inconsistency, because you have contradicted that premise on other occasions. Or your premise might be illicit because the conventions of the discourse you are engaging in purport to exclude it.”

Id. at 36.

In this instance, the first two reasons Smith offers for “smuggling” are the most likely to apply. Proponents of the new definition of marriage do not want to have to defend the premise behind their change of definition because doing so would necessarily require the introduction of legislation to effect the change rather than a court order. Also, as is explained in note 31 and the accompanying text, the new definition of marriage put forward by proponents of same-sex marriage carries implications that proponents themselves either do not believe or do not want explicitly revealed at this time because they know that a large majority of the populace is not ready to accept those implications.

- 25 See also  *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 365–66, 798 N.E.2d 941, 984 (2003) (Cordy, J., dissenting):

“This feat of reasoning succeeds only if one accepts the proposition that the definition of the institution of marriage as a union between a man and a woman is merely ‘conclusory’ ..., rather than the basis on which the ‘right’ to partake in it has been deemed to be of fundamental importance. In other words, only by assuming that ‘marriage’ includes the union of two persons of the same sex does the court conclude that restricting marriage to opposite-sex couples infringes on the ‘right’ of same-sex couples to ‘marry.’ ”

- 26 The *Bostic* Court, among others, asserted that “*Glucksberg*’s analysis applies only when courts consider whether to recognize new fundamental rights” and that including same-sex couples in the right to marry does not create a new right, and so, conveniently, it did not matter that there is no historical tradition of same-sex marriage.  760 F.3d at 376. The *Bostic* Court noted that the Supreme Court did not contend that it was creating a new fundamental right to interracial marriage when it struck down Virginia’s miscegenation statute as unconstitutional in *Loving*.  *Id.* at 376–77. This point ignores the fact that the *Loving* Court did not need to create a new fundamental right in order to subject Virginia’s statute to strict-scrutiny analysis because the statute discriminated on the basis of race, which is an express suspect classification in the Fourteenth Amendment.

27 In contrast to the assertion that marriage is “wholly secular,” plaintiffs in some actions seeking to nullify state laws limiting marriage to its traditional understanding have contended that those laws violate the Establishment Clause of the First Amendment to the United States Constitution. See, e.g., [Love v. Beshear](#), 989 F.Supp.2d 536, 541 (W.D.Ky.2014); [Brenner v. Scott](#), 999 F.Supp.2d 1278, 1284 (N.D.Fla.2014); [Love v. Pence](#), (No. 4:14-CV-00015-RLY-TA, Sept. 16, 2014) 47 F.Supp.3d 805 (S.D.Ind.2014).

So which is it? Is marriage a purely civil institution or is it a hybrid of religious and civil acknowledgments of a relationship? So far no court has declared that laws recognizing that marriage exists only between a husband and wife violate the Establishment Clause. Presumably, the issue thus far has been avoided at least in part because the notion that traditional marriage laws violate the Establishment Clause borders on the absurd. Just recently, the United States Supreme Court concluded that the practice of opening legislative meetings with prayer does not violate the Establishment Clause solely because the same practice occurred during the period the First Amendment was framed and ratified. See [Town of Greece v. Galloway](#), — U.S. —, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). It seems safe to assume that the Founders similarly perceived no Establishment Clause problem with state marriage laws.

Regardless of the chance of succeeding on such a claim on its merits today, the fact that some proponents of same-sex marriage now contend that traditional marriage laws violate the Establishment Clause suggests that some of the same precepts upon which the proponents rely in the current debate may be renewed in arguments over successive issues yet to come.

28 As has been noted, the United States Supreme Court stated in [Maynard v. Hill](#), 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888), that marriage is “the most important relation in life,” [id.](#) at 205, and that it is “the foundation of the family and of society, without which there would be neither civilization nor progress,” [id.](#) at 211.

29 Judge Cordy in his dissenting opinion in *Goodridge* observed:

“Casting the right to civil marriage as a ‘fundamental right’ in the constitutional sense is somewhat peculiar. It is not referred to as such in either the State or Federal Constitution, and unlike other recognized fundamental rights (such as the right to procreate, the right to be free of government restraint, or the right to refuse medical treatment), civil marriage is wholly a creature of State statute. If by enacting a civil marriage statutory scheme [a state] has created a fundamental right, then it could never repeal its own statute without violating the fundamental rights of its inhabitants.”

440 Mass. at 366 n. 3, 798 N.E.2d at 985 n. 3 (Cordy, J., dissenting).

The *DeBoer* Court provided an extensive explanation as to why categorizing the right to marry as fundamental in the constitutional sense

“makes little sense with respect to the trials and errors societies historically have undertaken (and presumably will continue to undertake) in determining who may enter and leave a marriage. Start with the duration of a marriage. For some, marriage is a commitment for life and beyond. For others, it is a commitment for life. For still others, it is neither. In 1969, California enacted the first pure no-fault divorce statute. See Family Law Act of 1969, 1969 Cal. Stat. 3312. A dramatic expansion of similar laws followed. See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L.Rev. 79, 90. The Court has never subjected these policy fits and starts about who may leave a marriage to strict scrutiny.

“Consider also the number of people eligible to marry. As late as the eighteenth century, ‘[t]he predominance of monogamy was by no means a foregone conclusion,’ and ‘[m]ost of the peoples and cultures around the globe’ had adopted a different system. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 9 (2000). Over time, American officials wove monogamy into marriage’s fabric. Beginning in the nineteenth century, the federal government ‘encouraged or forced’ Native Americans to adopt the policy, and in 1878 the Supreme Court upheld a federal antibigamy law. *Id.* at 26; see [Reynolds v. United States](#), 98 U.S. 145, 8 Otto 145, 25 L.Ed. 244 (1878).

The Court has never taken this topic under its wing. And if it did, how would the constitutional, as opposed to policy, arguments in favor of same-sex marriage not apply to plural marriages?

“Consider finally the nature of the individuals eligible to marry. The age of consent has not remained constant, for example. Under Roman law, men could marry at fourteen, women at twelve. The American colonies imported that rule from England and kept it until the mid-1800s, when the people began advocating for a higher minimum age. Today, all but two States set the number at eighteen. See Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L.Rev. 1817, 1824–32 (2012). The same goes for the social acceptability of marriage between cousins, a union deemed ‘desirable in many parts of the world’; indeed, around ‘10 percent of marriages worldwide are between people who are second cousins or closer.’ Sarah Kershaw, *Living Together: Shaking Off the Shame*, N.Y. Times (Nov. 25, 2009).... Even in the United States, cousin marriage was not prohibited until the mid-nineteenth century, when Kansas—followed by seven other States—enacted the first ban. See Diane B. Paul & Hamish G. Spencer, ‘It’s Ok, We’re Not Cousins by Blood’: *The Cousin Marriage Controversy in Historical Perspective*, 6 PLoS Biology 2627, 2627 (2008). The States, however, remain split: half of them still permit the practice. *Ghassemi v. Ghassemi*, 998 So.2d 731, 749 (La.Ct.App.2008). Strict scrutiny? Neither *Loving* nor any other Supreme Court decision says so.”

 *DeBoer v. Snyder*, 772 F.3d 388, 412–13 (6th Cir.2014)(emphasis omitted).

These observations take issue with the United States Supreme Court’s designation of marriage as a fundamental constitutional right. Perhaps the strongest recommendation for this view is the simple fact that the United States Constitution does not mention marriage. Indeed, the Supreme Court has observed that “the 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, 26 S.Ct. 525, 50 L.Ed. 867 (1906), overruled on other grounds,  *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942).

Saying that marriage is not a fundamental constitutional right would not demean its importance because “something can be fundamentally important without being a fundamental right under the Constitution.”  *DeBoer*, 772 F.3d at 411. It would simply mean that the Constitution does not dictate policy on the matter.

30 See  *Lawrence*, 539 U.S. at 578 (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

31 For that matter, if love is the defining criterion for marriage, then why must it be limited to marriage between two persons who are both adults, or for that matter between two persons? Where is the definitional limitation in such a criterion? What other limitations that we assume will continue to be true of marriage would logically yield to this criterion?

32 See  *DeBoer*, 772 F.3d at 404 (“One starts from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse.”).

33 One need only consider paternity to name one obvious example of the ways in which marriage organizes social relations. See, e.g.,  *Lehr v. Robertson*, 463 U.S. 248, 263, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (noting that “[t]he most effective protection of the putative father’s opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences”).

34 In a footnote of its opinion, the federal district court rejected several of these purposes of traditional marriage laws—the history and tradition of marriage, encouraging responsible procreation, promoting optimal child-rearing—as not constituting “compelling” state interests by simply citing  *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.2014). *Bostic* sidelined the importance of these purposes of marriage by taking the view that marriage is not just about procreation; rather it is concerned with the happiness of a relationship between two adults. See  *Bostic*, 760 F.3d 352, 380 (“[T]he Supreme Court rejected the view that marriage is about only procreation in *Griswold v. Connecticut*, in which it upheld married couples’ right not to procreate and articulated a view of marriage that has nothing to do with children.”).

There are at least three problems with this tactic.

First, no one is saying that “marriage is about *only* procreation.”  *Bostic*, 760 F.3d at 380 (emphasis added). The State is simply stating that a primary public purpose of marriage concerns procreation and that this is sufficient justification to make a distinction in law as to the types of couples who can marry. The fact that marriage encompasses more than procreation does not by itself invalidate procreation as an interest in the State’s marriage policy.

Second, the decision in *Griswold* was not based on a “right to marry”; it was based on a right to privacy. See  *Griswold*, 381 U.S. at 486 (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”) As with the discussion above about *Lawrence*, the problem in *Griswold* was government’s *interference* with an intimate aspect of an existing relationship, in which the *Griswold* Court clearly was referring to the traditional marriage relationship. (Why else would contraception even be an issue?) The issue here concerns the government’s public recognition of a relationship that until 2002 was unknown in history as being categorized as “marriage.”

Third, the *Bostic* Court’s cavalier rejection of the purposes of traditional marriage fails to acknowledge that the Court made a moral judgment that the new definition of marriage is superior to the traditional view. As Steven Smith has noted:

“[H]ow can we argue about the desirability or justice of restrictions on abortion, or marriage, or drug use, without somehow drawing upon our larger vision of the good life, and upon the religious or philosophical assumptions that give rise to and inform those visions? It is a large question. But the short answer, it seems, is that we cannot.”

Steven D. Smith, *Disenchantment*, at 105. The *Bostic* Court’s opinion is replete with moral assertions made as statements of fact:

“[S]ame-sex couples [arguably] want access to marriage so that they can take advantage of its hallmarks, including faithfulness and permanence, and that allowing loving, committed same-sex couples to marry and recognizing their out-of-state marriages will strengthen the institution of marriage.”

 760 F.3d at 381.

“[T]he Proponents imply that, by marrying, infertile opposite-sex couples set a positive example for couples who can have unintended children, thereby encouraging them to marry.”

(Footnote cont’d.)

Id.

“[B]y preventing same-sex couples from marrying, the Virginia Marriage Laws actually harm the children of same-sex couples by stigmatizing their families....”

Id. at 383.

Regardless of whether one agrees or disagrees with these assertions, the fact remains that they represent the imposition of the *Bostic* (and *Searcy I*) Court's moral views upon the State under the guise of legal reasoning. It is not reasoning of "a" plus "b" equals "c"; it is the declaration of social policy through judicial fiat under the guise of constitutional law.

- 35 "Human beings are created through the conjugation of one man and one woman. The percentage of human beings conceived through non-traditional methods is minuscule, and adoption, the form of child-rearing in which same-sex couples may typically participate together, is not an alternative means of creating children, but rather a social backstop for when traditional biological families fail. The perpetuation of the human race depends upon traditional procreation between men and women. The institution developed in our society, its predecessor societies, and by nearly all societies on Earth throughout history to solidify, standardize, and legalize the relationship between a man, a woman, and their offspring, is civil marriage between one man and one woman."

 [Sevcik v. Sandoval](#), 911 F.Supp.2d 996, 1015 (D.Nev.2012).

- 36 The *DeBoer* Court noted:

 [Massachusetts Board of Retirement v. Murgia](#), 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), holds that a State may require law enforcement officers to retire without exception at age fifty, in order to assure the physical fitness of its police force. If a rough correlation between age and strength suffices to uphold exception-free retirement ages (even though some fifty-year-olds swim/bike/run triathlons), why doesn't a correlation between male-female intercourse and procreation suffice to uphold traditional marriage laws (even though some straight couples don't have kids and many gay couples do)?"

 [DeBoer](#), 772 F.3d at 407.

- 37 One commentator characterizes the Court's approach in these cases as amounting to name-calling on a scholarly level:

"Typically, judicial decisions invalidating challenged laws ultimately boil down to peremptory assertions by judges that the law in question has no 'rational basis' or is the product of prejudice or 'animus.' Thus, citing 'a substantial number of Supreme Court decisions, involving a range of legal subjects, that condemn public enactments as being expressions of prejudice or irrationality or invidiousness,' Robert Nagel shows how 'to a remarkable extent, our courts have become places where the name-calling and exaggeration that mark the lower depths of our political debate are simply given more acceptable, authoritative form.'"

Steven D. Smith, *The Disenchantment of Secular Discourse*, 9 (2010) (quoting Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 Northwestern Univ. L.Rev. 193, 199 (1993)).

- 38 This is what one law professor has deftly labeled " 'The Not-Nice School of Constitutional Law,' " by which he meant that "the Constitution is taken simply to prohibit any state or federal action that is not nice. Whatever the text may actually provide, this school transforms it into an engine of political wish-fulfillment. What we don't like in government, the Constitution outlaws." Craig A. Stern, *Things Not Nice: An Essay on Civil Government*, 8 Regent U.L.Rev. 1, 2 (1997). See also  [Robicheaux v. Caldwell](#), 2 F.Supp.3d 910, 925 (E.D. La. 2014) ("The federal court decisions thus far exemplify a pageant of empathy; decisions impelled by a response of innate pathos. Courts that, in the words of Justice Scalia in a different context in  [Bond v. United States](#), — U.S. —, —, 134 S.Ct. 2077, 2094, 189 L.Ed.2d 1 (2014) (concurring opinion), appear to have assumed the mantle of a legislative body.").

- 39 As already noted, the Supreme Court's substantive-due-process cases require "a 'careful description' of the asserted fundamental liberty interest."  [Glucksberg](#), 521 U.S. at 720–21 (quoting  [Reno](#), 507 U.S. at 302).

- 40 The *Lawrence* Court stated that "this Court's obligation is to define the liberty of all, not to mandate its own moral

code.”  [Lawrence](#), 539 U.S. at 559. Interestingly, in her special writing in *Lawrence*, Justice O’Connor stated: “Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”  [Lawrence](#), 539 U.S. at 585 (O’Connor, J., concurring in the judgment)(emphasis added).

- 41 The *Windsor* Court also stated that DOMA “places same-sex couples in an unstable position of being in a second-tier marriage.” —  — U.S. at —, 133 S.Ct. at 2694. Justice Scalia responded:

“It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority’s moral judgment in favor of same-sex marriage is to the Congress’s hateful moral judgment against it. I promise you this: The only thing that will ‘confine’ the Court’s holding is its sense of what it can get away with.”

—  — U.S. at —, 133 S.Ct. at 2709 (Scalia, J., dissenting, joined by Thomas, J.).

- 42 Several courts have inveighed that people’s moral or religious views of marriage can have nothing to do with the legality of the institution. See, e.g.,  [Baskin v. Bogan](#), 766 F.3d 648, 669 (7th Cir.2014) (“To be the basis of legal or moral concern ... the harm must be tangible, secular, material—physical or financial, or, if emotional, focused and direct—rather than moral or spiritual.... Similarly, while many heterosexuals (though in America a rapidly diminishing number) disapprove of same-sex marriage, there is no way they are going to be hurt by it in a way that the law would take cognizance of.”);  [Varnum v. Brien](#), 763 N.W.2d 862, 905 (Iowa 2009) (“State government can have no religious views, either directly or indirectly, expressed through its legislation.... As a result, civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals.”);  [Kerrigan v. Comm’r of Pub. Health](#), 289 Conn. 135, 251, 957 A.2d 407, 475 (2008) (“Because, however, marriage is a state sanctioned and state regulated institution, religious objections to same sex marriage cannot play a role in our determination of whether constitutional principles of equal protection mandate same sex marriage.”);  [Goodridge v. Dep’t of Pub. Health](#), 440 Mass. 309, 312, 798 N.E.2d 941, 948 (2003) (“Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us.”).

This divorce of moral and religious ideas from legal debate is now common:

“In [the classical] view, the function of moral reasoning is to determine what actions, or what kind of life, conform to a normative order inherent in nature itself.... A good deal of thinking about suicide, and about moral questions generally, still operates on some such assumption. In much public discourse, however, and especially in academic and legal contexts, explicit appeals to normative dimensions in nature are typically deemed inadmissible. Moral reasoning is supposed to operate without reliance on religious or metaphysical premises.”

Smith, *Disenchantment*, at 60.

- 43 “The secular philosophical tradition speaks of inalienable rights, inalienable human dignity and of persons as ends in themselves. These are, I believe, ways of whistling in the dark, ways of trying to make secure to reason what reason

cannot finally underwrite.” Raimond Gaita, *A Common Humanity: Thinking About Love and Truth and Justice* 5 (Routledge 2000) (1998).

44 “[T]here is no apparent reason why anyone *should* be persuaded [by intuitions]. After all, what credentials can these intuitions claim? Whether intuitions are reliable is, of course, always a question, but in this case the problem goes deeper: it is not at all clear exactly what the intuitions are even *about*. Suppose I do have a ‘moral’ intuition (whatever that is) that, say, polygamous relationships are ‘wrong’ (whatever that means). So what? I may also harbor an obsessive fear of traveling on airplanes, or an abiding premonition that something horrible will happen if I leave the house on Friday the thirteenth, or a sense of profound disgust when I look down at my plate and see that the peas have gotten mixed with the potatoes. Unless these feelings, intimations, or intuitions are grounded in something rational and objectively real, the proper response in each case, it seems, would be therapeutic in nature; it would be a response calculated to help me and anyone else subject to such debilitating feels and intuitions ‘Get over it!’

“Conversely, insofar as contemporary deontological thinkers forego therapeutic response and instead treat such intuitions with utmost respect, it is hard to resist the suspicion that they are acting on lingering assumptions—their own, possibly, or perhaps those of the people whose intuitions provide them with their material—about an intrinsic normative order.”

Smith, *Disenchantment*, at 66 (footnotes omitted).

45 “Acceptance of the broad description requires rejection of two salient aspects of the narrow description of marriage. First, it requires rejecting the notion that marriage is no more than what the narrow model describes. Although genderless marriage proponents rarely, if ever, expressly state that notion of ‘no more than,’ the notion is always implicit in their arguments.¹⁰³ Second, the broad description also requires rejecting the idea that children are not ‘the *sine qua non* of civil marriage’ and that ‘marriage and children are not really connected.’ The broad description portrays marriage as primarily a child-protective and child-centered institution, with most of the institution’s social goods pertaining to the quality of child-rearing. Conversely, the narrow model describes an adult-centered ‘partnership entered into for its own sake, which lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get from it.’

¹⁰³ ... This phenomenon merits close examination for two reasons. First, the notion itself goes to the heart of the veracity of the narrow and broad descriptions; if the ‘no more than’ notion is factually accurate, it must follow that what the broad description depicts beyond the narrow description’s scope is factually false. Conversely, if the ‘no more than’ notion is erroneous as a matter of fact, that error would be established by the validation of the broad description’s additional depictions. Second, if—as demonstrated elsewhere—the ‘no more than’ notion is always or nearly always implicit and therefore not expressly stated and defended, that aspect is also important. *Id.* It is important because it constitutes probative evidence about how defensible the ‘no more than’ notion is.”

Monte Neil Stewart, *Marriage Facts*, 31 Harv. J.L. & Pub. Pol’y 313, 337–38 (2008) (most footnotes omitted; emphasis omitted).

46 According to the National Conference of State Legislatures, only 11 states have accepted same-sex marriage as a result of choices made by the people or their elected representatives. The 26 other states that, to any extent, now have same-sex marriage do so because it has been imposed on them by court order (21 of these by federal courts). See <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx#> 1 (last visited March 2, 2015; a copy of the Web page containing this information is available in the case file of the Clerk of the Alabama Supreme Court).

- ** Note from the reporter of decisions: On March 12, 2015, the Alabama Supreme Court issued an order stating, in part, “[h]aving received no meritorious showing by any of the additional respondents as to why he or she should not be bound in the same manner as the named respondents and Judge Davis, all respondents continue to be bound by the order of this Court.”
- 47 The jurisdiction of probate courts is limited to matters provided by statute. *AltaPointe Health Sys., Inc. v. Davis*, 90 So.3d 139, 154 (Ala.2012).
- 48 See *Alabama Power Co. v. Citizens of State*, 740 So.2d 371, 381 (Ala.1999) (defining “judicial power” vested by the Constitution as “the special competence to decide discrete cases and controversies involving particular parties and specific facts”).
- 49 Probate judges are entrusted with performing numerous nonjudicial tasks, such as maintaining corporate records, Ala.Code 1975, § 10A-1-4.02; issuing driver’s licenses, Ala.Code 1975, § 32-6-4; and, in some counties, serving as the chairperson of the county commission, Ala.Code 1975, § 11-3-1(c). I submit that this Court would not, pursuant to its original jurisdiction, attempt to review a probate judge’s performance of any of these tasks.
- 50 *Albritton* discusses the predecessor statute to what is now § 12-2-7(3).
- 51 I am not stating that a probate judge’s decision to issue a marriage license can never be challenged in the Alabama Supreme Court. I am stating that the case must first be filed in circuit court and then appealed to this Court, where our decision would then have statewide application.
- 52 See also Ala.Code 1975, § 36-15-21 (“All litigation concerning the interest of the state, or any department of the state, shall be under the direction and control of the Attorney General.”).
- 53 This Court has held that standing must exist at the *commencement* of the litigation and cannot be cured by subsequently adding to the case a party that has the requisite standing.  *Cadle Co. v. Shabani*, 4 So.3d 460, 462-63 (Ala.2008). Therefore, this Court’s recognition and alignment of additional petitioners *after* the case was *commenced* cannot cure the standing problem.
- 54 I have argued in the past that *Lujan* does not apply in Alabama in certain circumstances; this Court has not agreed with me. See *McDaniel v. Ezell*, 177 So.3d 454 (Ala.2015) (Shaw, J., dissenting), and *Ex parte Alabama Educ. Television Comm’n*, 151 So.3d 283 (Ala.2013) (Shaw, J., dissenting). Nevertheless, even I agree that *Lujan* applies in a case such as this: “I believe that in ... general challenges to government action, the *Lujan* analysis is helpful.” *Ex parte Alabama Educ. Television*, 151 So.3d at 294 n. 11 (Shaw, J., dissenting).
- 55 That Code section, we have held, does not apply to mandamus petitions governed by the Alabama Rules of Appellate Procedure. See *Ex parte Johnson*, 485 So.2d 1098 (Ala.1986). The plain language of the Code section does not contain such a restriction. I question whether *Ex parte Johnson* excuses the filing of an unverified petition when this Court’s original, and not appellate, jurisdiction is invoked, but I see no need to belabor that issue at this point.
- 1 The decision of the federal district court in *Strawser* was premised on its earlier decision in  *Searcy v. Strange*, 81 F.Supp.3d 1285 (S.D.Ala.2015).
- 2 A “corrected” copy of Judge Davis’s response has since been filed with this Court.
- 3 The latter task is to read the *Strawser* order and to consider the import, if any, of that order as a decision by a court in a coordinate judicial system. The JIC is a tribunal commissioned solely for the investigation and prosecution of “complaints” against judges regarding violation of the Canons of Judicial Ethics and the physical and mental ability of judges to perform their duties. Ala. Const.1901, § 156. It is not a court of law, and it has no authority—and no role to play—in the performance by this Court of its constitutional duties as a court of law to decide the cases brought before it.

- 4 As we noted in Part II.C., “ “[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case,” ’ ’ 200 So.3d at 528 (quoting  *Camreta v. Greene*, 563 U.S. 692, 709 n. 7, 131 S.Ct. 2020, 2033 n. 7, 179 L.Ed.2d 1118 (2011)), quoting in turn 18 J. Moore et al., *Moore’s Federal Practice* § 134.02[1][d], p. 134–26 (3d ed.2011)), much less upon a defendant sued by new plaintiffs in a different case. The principle quoted above from the United States Supreme Court decision in *Camreta* was manifestly reflected in orders entered on this date by the United States District Court for the Middle District of Alabama, in which that court chose to stay its consideration of a case similar to *Strawser* and stated that “[t]his court is not bound by *Searcy*.” *Hard v. Bentley* (Case No. 2:13–cv–00922–WKW; March 10, 2015) (M.D.Ala.).
- 5 In *Brenner v. Scott* (No. 4:14cvl07, Jan. 1, 2015) (N.D.Fla.), a case similar in many respects to the present one, the court explained that “[t]he Clerk has acknowledged that the preliminary injunction requires her to issue a marriage license to the two unmarried plaintiffs,” but that, in “the absence of any request by any other plaintiff for a license,” “[t]he preliminary injunction now in effect does not require the Clerk to issue licenses to other applicants.” See also Vikram David Amar, *Justia–Verdict*, February 13, 2015; <https://verdict.justia.com/2015/02/13/just-lawless-alabama-state-court-judges-refusing-issue-sex-marriage-licenses> (explaining that generally a federal district court can enjoin a defendant only with respect to the defendant’s treatment of plaintiffs actually before the court and that the remedial limitation on federal district courts is defined by the identity of the plaintiffs, not just the identity of the defendants) (last visited March 10, 2015; a copy of the Web page containing this information is available in the case file of the clerk of the Alabama Supreme Court).
- 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.
- 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.
- 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”).
- 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.
- 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.
- 6 This warning was quoted virtually verbatim in Justice White’s majority opinion in  *Bowers v. Hardwick*, 478 U.S. 186, 194, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).
- 7 In a concurring opinion Justice Shaw states that a judge who “cannot abide by a controlling decision of a higher court” should resign. 200 So.3d at 618. 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.
- 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, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and  *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (contraception);  *Roe v. Wade*, 410 U.S.

113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and  *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (abortion).

- 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.
- 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, 50 S.Ct. 436, 74 L.Ed. 1056 (1930) (Holmes, J., dissenting).
- 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).
- 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, 90 S.Ct. 1999, 26 L.Ed.2d 387 (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).
- 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.)
- 15 <http://www.nydailynews.com/news/national/tenn-county-clerk-staffresigns-gay-marriage-ruling-article-1.2281567>. (On the date this special writing was released, this information could be found at the preceding Web address.)
- 16 <http://www.foxnews.com/opinion/2015/08/11/chaplains-banned-frompreaching-that-homosexuality-is-sin.html>. (On the date this special writing was released, this information could be found at the preceding Web address.)
- 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.
- 18 One Justice indeed dissented outright and stated: “Marriage is not only for the parties. Its purpose is to 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.
- 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).
- 21 See  *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir.2012), *aff’d*,  570 U.S. —, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) (noting that “same-sex marriage is unknown to history and tradition”).
- 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.

23 http://www.huffingtonpost.com/entry/ruth-bader-ginsburgtk_55b97c68e4b0b8499b18536b. (On the date this special writing was released, this information could be found at the preceding Web address.)

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.

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

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.

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

28 Justice Shaw terms my arguments about the scope of federal court decisions "silly" and "nonsensical." 200 So.3d at 618. 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.

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

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

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,  8 L.Ed. 483 (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 authorized the President to intervene only if the marshal failed." 83 Notre Dame L.Rev. at 1155.

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.

- 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).
- 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.
- 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).
- 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 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)).
- 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)).
- 42 Ronald Reagan speech "A Time for Choosing" (also known as "A Rendezvous with Destiny"), October 27, 1964.
- 43 *The Federalist No. 78*, at 404 (Alexander Hamilton) (George W. Carey and James McClellan eds., Liberty Fund, 2001).
- 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, 192 L.Ed.2d 609 (2015). See *Ex parte State of Alabama ex rel. Alabama Policy Inst.*, 200 So.3d 495, 604 (Ala.2015) (Bolin, J., concurring specially, Part II); *Ex parte State of Alabama ex rel. Alabama Policy Inst.*, 200 So.3d 495, 531 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).
- 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).

- 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)].”

200 So.3d at 528 (emphasis added). Although this Court could have purported to order Judge Davis to disregard the federal court injunction, it did not do so.

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

- 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 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.

- 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.” 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.”

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.

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, 122 F.Supp.3d 1085 \(D.Kan.2015\)](#), 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.

55 Recently, the Supreme Court issued a decision with no dissents in [James v. City of Boise, — U.S. —, 136 S.Ct. 685, 193 L.Ed.2d 694 \(2016\)](#), 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, 4 L.Ed. 97 (1816).

“The Idaho Supreme Court, like any other state or federal court, is bound by this Court’s interpretation of federal law.”

(Emphasis added.)

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.

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](#).

58 See [28 U.S.C. §§ 351–364](#).