No. 15-0688

In the Supreme Court of Texas

JACK PIDGEON AND LARRY HICKS,
Petitioners,

v.

MAYOR SYLVESTER TURNER AND THE CITY OF HOUSTON,
Respondents.

On Petition for Review from the
Fourteenth Court of Appeals at Houston, Texas
Nos. 14-14-00899-cv, 14-14-00932-cv

BRIEF OF THE FOUNDATION FOR MORAL LAW, AND OF THE INSTITUTE FOR CREATION RESEARCH, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutions, Statutes, and Rules

Other Authorities

INTEREST OF AMICI CURIAE

The Foundation for Moral Law ("the Foundation") is a 501(c)(3) tax-exempt nonprofit organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers (www.morallaw.org). The Foundation has an interest in this case because the opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), so far departs from the text and original understanding of the Constitution as to draw the legitimacy of that opinion into question. The Foundation's commitment to Biblical definitions of marriage and family is also at issue in this litigation.

The Institute for Creation Research ("ICR") is an educational Christian ministry (chartered in California, with its primary place of business in Texas) that promotes Genesis-based apologetics and creation science (www.icr.org/tenets). As such, ICR is committed to promoting and defending Biblical truths and values regarding marriage and family (institutions that God Himself created), as taught, *inter alia*, in *Genesis* 2:18-25, *Matthew* 19:3-9, *Mark* 10:2-12, and 1 *Corinthians* 7.

COMPLIANCE WITH RULE 11, TEX. R. APP. P.

The list of parties and counsel appears in Petitioners' Brief on the Merits filed May 9, 2016 and is not repeated here. Additionally, amici are satisfied with the statement of the case, the statement of facts, the statement of jurisdiction, and

the statement of procedural history in Petitioners' brief, so those sections are not repeated herein. Rule 11(a), Tex. R. App. P.

No fee was paid or is to be paid for preparing this brief. Rule 11(c), Tex. R. App. P. A certificate of service accompanies this brief. Rule 11(d), Tex. R. App. P.

ISSUE PRESENTED

To what extent (if any) is this Court obligated to apply *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), as precedent in this case?

SUMMARY OF ARGUMENT[1]

The Constitution may be amended only by the process set forth in Article V. *See infra*, § IA. Yet the Supreme Court in *Obergefell* by judicial fiat usurped the amendment process and announced a new right to same-sex marriage nowhere stated in the Constitution nor contemplated by its Framers. The Declaration of Independence, the foundational document of this country, declares that liberty is an endowment bestowed by the Creator. Finding in the uncharted depths of the Due Process Clause an anarchic "liberty" to redefine the holy state of matrimony to encompass perverse lusts whose indulgence Blackstone described as "the infamous crime against nature," the Supreme Court disgraced not only the Constitution but also the institution of marriage. *See infra*, § IB. Needless to say, the Fourteenth Amendment, designed to protect the civil rights of freed slaves, was not intended to create a mock form of marriage to legitimize perversity and in the process trample on the rights of the states to self-government. *See infra*, § IC.

No fiercer or more devastating attack on *Obergefell* as an illegitimate and unconstitutional edict can be made than that presented by the four dissenters in that case. *See infra*, § II. The doctrine of judicial supremacy that presumes to elevate

[1] This amicus brief is a condensation and adaptation of the special concurrence of **Chief Justice Roy Moore** in *Ex parte State ex rel. Alabama Policy Institute*, [Ms. 1140460, Mar. 4, 2016] ___ So. 3d ___ (Ala. 2016), thanks to attorneys **John Eidsmoe** and **Martin Wishnatsky**. In fact, the undersigned Texas attorney has repeatedly relied upon the Constitutional law (and legal history) scholarship and expertise of Dr. John Eidsmoe ever since the early AD1980s.

the Court over the Constitution is itself illegitimate. Even soldiers, who are under the strictest of discipline, are enjoined not to obey orders that are patently illegal. *See infra*, § III.

Rather than merely construe *Obergefell* narrowly, as the petitioners and other amici recommend, this Court should avail itself of the opportunity to declare *Obergefell* an illegitimate usurpation of legislative power that the justices of this Court in faithfulness to their oath "to support this Constitution," U.S. Const. art. VI, are duty bound to reject.

ARGUMENT

INTRODUCTION

On June 26, 2015, by a bare 5-4 majority,[2] the United States Supreme Court declared that all states must now recognize a fundamental right to "same-sex marriage." *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

The Chief Justice of the United States Supreme Court, John Roberts, and Associate Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, asserted in dissent that the majority opinion in *Obergefell* had no basis in the law, history, or tradition of this country. As shall be demonstrated below, *Obergefell* is an unconstitutional exercise of judicial authority that usurps the legislative prerogative of the states to regulate their own domestic policy. The petition and other amicus briefs filed in this case also question the legitimacy of *Obergefell*.

In their initial filing petitioners asked this Court narrowly to construe *Obergefell* because it "has no basis in constitutional text or history." *Petition for Review* (Sept. 10, 2015), at 9.

> [T]he fourteenth amendment would never have been ratified if it stripped the States of their authority to define marriage as the union of one man and one woman, or if it delegated to the federal judiciary the power to impose same-sex marriage on the States at a future moment of its choosing. *Obergefell* reflects a "living Constitution" mindset,

[2] Two of the five justices in the majority arguably should have recused because they had declared themselves publicly in favor of same-sex marriage while *Obergefell* was pending before the Court. The Foundation filed such a motion with the Court on May 21, 2015. See Docket for Case No. 14-556, *Obergefell v. Hodges*, https://goo.gl/nBW2sZ.

> where judges create new constitutional rights that have no basis in the text and could never attain the supermajoritarian backing that Article V requires before a new constitutional rule can be entrenched.

Id. at 9-10. Having condemned *Obergefell* as an unlawful imposition upon the constitutional text, petitioners then argued that any application of that case should be as narrow as possible. "A state court's ultimate obligation is to the Constitution, not to the jargon and innovations created by Supreme Court justices. ... And an opinion that concocts a constitutional right with no basis in text or history should be construed as narrowly as possible." *Id.* at 10. Petitioner's Brief on the Merits (May 9, 2016) repeated this argument. *See id.* at 12-13. *See similarly Petitioner's Reply Brief on the Merits* (July 13, 2016), at 11-13.

In their motion for rehearing, petitioners emphasized the illegitimacy of *Obergefell*.

> The Supreme Court's ruling in *Obergefell* imposes a "right" that cannot be found anywhere in the Constitution. And the Court's opinion does not even attempt to explain how the language of the fourteenth amendment could support the idea that States must license and recognize marriages between homosexual couples. There is much discussion of "fundamental rights" and "equal dignity," but those phrases do not appear in the Constitution and cannot be invoked to thwart a State's duly enacted laws.

Petitioners' Motion For Rehearing (Oct. 3, 2016), at 7. Although stopping short of asking this Court to defy *Obergefell*, petitioners further added that "*Obergefell* violates the tenth amendment by intruding on powers reserved to the States." *Id.* at 8. Noting the parallel "court-created right to abortion that cannot be found

anywhere in the Constitution," *id.*, petitioners stated that "the current Supreme Court will continue to use its power to advance the ideology of the sexual revolution until there is a change of membership. And that makes it all the more urgent for this Court to narrowly construe the *Obergefell* ruling ... to avoid disrespect of the Constitution and the rule of law." *Id.* at 9.

An amicus brief of Texas legislators and conservative leaders encouraged this Court to take "the opportunity to diminish federal tyranny and reestablish Texas Sovereignty" and "to restore the Rule of Law." *Amicus Curiae Brief of State Senators, State Representatives, and numerous Conservatives leaders throughout Texas* (Oct. 14, 2016), at 10. Arguing that *Obergefell* should be narrowly construed, the three top executive officials of Texas stated that "the doctrine of substantive due process becomes particularly pernicious when courts elevate their policy preferences above those of legislatures." *Amicus Curiae Brief Of Governor Greg Abbott, Lieutenant Governor Dan Patrick, and Attorney General Ken Paxton, in Support Of Petitioners* (Oct. 27, 2016), at 14. These amici concur.

In light of the arguments of petitioners and other amici that *Obergefell* is an illegitimate exercise of judicial power, the Foundation and ICR offer this brief to explain that lower courts are not bound to follow a Supreme Court ruling that has no basis in the Constitution. But first we explain why *Obergefell* defies the Constitution.

I. Amending the United States Constitution by Judicial Fiat

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

A. Amending the Constitution in Violation of Article V

In reality, the *Obergefell* majority presumes to amend the United States Constitution to create a right stated nowhere therein. That is a lawless act. The Constitution in Article V provides the only means for amending its provisions:

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

U.S. Const., art. V (emphasis added). The amendment process requires the ratification of three-quarters of the states, not a mere 5 out of 9 Justices on the Supreme Court. The *Obergefell* majority states that the Founders anticipated that

the Constitution might require alteration. Employing Justice Anthony Kennedy's signature rhetoric, the opinion states:

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

135 S. Ct. at 2598. 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 court can suggest that the U.S. Constitution would benefit from a particular amendment, courts do not possess the authority to insert an amendment into the Constitution under color of a judicial opinion, and then demand compliance therewith. In 1965 Justice Hugo Black, in a critique of such judicial activism, commented on the Court's discovery of a heretofore unknown constitutional right for married couples to use contraception—a right supposedly found in the "penumbra" of the Bill of Rights. He stated:

> The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents

> for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.

Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting). In 1983, Brevard Hand, the Chief Judge of the United States District Court for the Southern District of Alabama, stated: "Amendment through judicial fiat is both unconstitutional and illegal. Amendment through judicial fiat breeds disrespect for the law, and it undermines the very basic notion that this country is governed by laws and not by men." *Jaffree v. Board of Sch. Comm'rs of Mobile Cnty.*, 554 F. Supp. 1104, 1126 (S.D. Ala. 1983), *rev'd Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983). George Washington warned against attempts to usurp the Article V revision process:

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

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

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

aphorisms of the fortune cookie." 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." 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." 135 S. Ct. at 2608.

- "A truthful statement by same-sex couples of what was in their hearts had to remain unspoken." 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 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." 135 S. Ct. at 2598 (emphasis added).

- "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is *now manifest*." 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." 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." 135 S. Ct. at 2603 (emphasis added).

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

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

B. The True Meaning of Liberty

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

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

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

Throughout the majority opinion Justice Kennedy speaks of the "dignity" of marriage and blatantly asserts that "[t]here is dignity in the bond between two men or two women who seek to marry." 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 tortuously transmogrify its definition to serve inordinate lusts that demean its historic dignity. A "disgrace to human nature" cannot be cured by stripping the institution of holy matrimony of its inherent dignity and redefining it to give social approval to behaviors unsuited to its high station. Sodomy has never been and never will be an act by which a marriage can be consummated.

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

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

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

[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").

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

Liberty in the American system of government is not the right to define one's own reality in defiance of the Creator. The libertarian creed of unbridled self-definition is capsulized in Justice Kennedy's oft-quoted statement: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). But the human being, as a dependent creature, is not at liberty to redefine reality; instead, as the Declaration of Independence states, humans are 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 transmogrified "redefinition" that rejects the natural order that 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 created 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 to "preferences". Man then becomes the autonomous "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 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." Harry V. Jaffa, *Homosexuality and the Natural Law* 39 (1990). As Thomas Jefferson stated:

> And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people

> that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever ....

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

C. Abuse of the Fourteenth Amendment

The invocation of "equal dignity" to justify the invention of a heretofore unknown constitutional right is just another judicial mantra to rationalize the invalidation of state laws that offend the policy preferences of a five-person majority. Justice Black once stated: "There is ... no express constitutional language granting judicial power to invalidate *every* state law of *every* kind deemed 'unreasonable' or contrary to the Court's notion of civilized decencies ...." *Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring). In 1930, in the waning days of his judicial career, Justice Oliver Wendell Holmes expressed his alarm at the elastic qualities the Supreme Court had ascribed to the Fourteenth Amendment to satisfy the Court's desire to exercise plenary supervision over state legislation: "I cannot believe that the [Fourteenth] Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

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

> There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth

> Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Bowers v. Hardwick, 478 U.S. 186, 195 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003). The "claimed right" of which the Court spoke in *Bowers* was the "right" to commit sodomy. Although the Court in 1986 adamantly refused to recognize any such right in the U.S. 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 is now clearly seen in *Obergefell*.

The "fundamental right" to marriage the Supreme Court has invoked in previous cases always involved the right of a man and a woman to marry. *Loving v. Virginia*, 388 U.S. 1 (1967), cited as a precedent for constitutional review of state marriage laws by the *Obergefell* majority, 135 S. Ct. at 2598-99, did not change this fact, but only removed a race-based barrier to participation in that institution. No one doubts that the Fourteenth Amendment was designed to remove such civil disabilities. Equally indisputable is that the states that ratified the Fourteenth

Amendment in 1868 did not remotely intend to empower the federal courts to redefine marriage to include same-sex "marriage".

The majority opinion in *Obergefell* represents the culmination of a change in our form of government from one of three separate-but-equal branches to one in which the judicial branch now exercises the power of the legislative branch.[4] President George Washington asserted that this "spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism." *Farewell Address*, at 226. 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 criticizing the judicial invention of a "constitutional" right to bring contraceptive devices into the marital chamber, Justice Potter Stewart stated:

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

[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.

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 ...." 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." 135 S. Ct. at 2612. The real issue, he explains, "is about whether, in our democratic republic, that decision [regarding the definition of marriage] should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law." *Id.* He also points out that all previous decisions of the Supreme Court that treated marriage as a fundamental right rested on "the core structure of marriage as the union between a man and a woman." 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." 135 S. Ct. at 2616. Thus, "the majority's position [is] indefensible as a matter of constitutional law." *Id.* 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 ...." 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." 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 Benjamin Curtis stated in the *Dred Scott* case, "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." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting).

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." 135 S. Ct. at 2627. Justice Scalia underscores this point: "This practice of constitutional revision by an unelected committee of nine ... *robs the People* of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves." 135 S. Ct. at 2627 (emphasis added).

The opinion of the majority, he further states, "lacks even a thin veneer of law." 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." 135 S. Ct. at 2629. Contending that the majority opinion lacks legal legitimacy, he terms it "a social upheaval," i.e., a social revolution. *Id.* The right to change the form of government in this country belongs to the people themselves through the amendment process, not to judicial oligarchs. Justice Scalia describes the majority's ruling as a "judicial Putsch." *Id.* A "putsch" is "a secretly plotted and suddenly executed attempt to overthrow a government." *Merriam-Webster's Collegiate Dictionary* 1013 (11th ed. 2009). The word is most commonly associated with Adolf Hitler's 1923 attempt to seize power in Germany. Justice Scalia's use of this term underscores the revolutionary nature of the majority's presumptive exercise of judicial power to remake the social order.

Justice Scalia concludes that "to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: *no social transformation without representation*." 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.'" 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. 135 S. Ct. at 2631.

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." 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." 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." 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." 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." 135 S. Ct. at 2636.

D. Justice Alito

Justice Alito notes that the majority's definition of "liberty" has "a distinctively postmodern meaning" in which "five unelected Justices ... impos[e] their personal vision of liberty upon the American people." 135 S. Ct. at 2640 (recognizing that marriage, historically, has been intended 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.[6] 135 S. Ct. at 2641. Many states legitimately worry that abandoning the traditional definition "may contribute to marriage's further decay." 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.*

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

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.

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

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

135 S. Ct. at 2643.

E. Summing Up *Obergefell*: An Ultra Vires and Illegitimate Decision

The dissenting Justices accurately described in detail the illegitimacy of the majority's decision in *Obergefell*. Their criticisms go far beyond mere disagreement with philosophical and/or public-policy arguments posited in the

majority opinion. 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 collateral damage to religious liberties.

Their language is stirring and forthright. Chief Justice Roberts portrays the majority as thieves who are "stealing" the marriage issue from the people. Justice Scalia uses a similar metaphor, stating that the majority "robs the People of ... the freedom to govern themselves." These metaphors identify the essence of the majority's actions: an illegal displacement and usurpation of the democratic process. Chief Justice Roberts accuses the majority of imposing "naked policy preferences" that have "no basis in the Constitution." Accordingly, the majority's "extravagant conception of judicial supremacy" is "dangerous for the rule of law." The unmistakable theme that emerges from these critiques is lawlessness. A court, whose *raison d'être* is to apply preëxisting law, has instead forsaken the law, to impose a political-postmodern assault on the natural order of creation. The majority then acted as judges in name only, having in fact forsaken the judicial role, to engage in "remaking society" and transforming—without legal authority—marriage, 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.[7] 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 Supreme Law of the Land

Less than two weeks after *Obergefell* was released, the Louisiana Supreme Court relied on it to determine that the Louisiana law defining marriage as the union of a man and a woman could no longer be enforced. *Costanza v. Caldwell*, 167 So. 3d 619 (La. 2015). The Louisiana court stated that United States Supreme Court opinions "'must be obeyed in order to maintain the law in its majesty of final decision.'" *Id.* at 621 (quoting *State v. Nichols*, 44 So. 2d 318, 321 (La. 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.

[7] 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.

> 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).

The Foundation and ICR appreciate this Justice's critique of *Obergefell*, which parallels those of its four dissenters. Although this critique is devastating, the Foundation and ICR 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."[8]

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

Does an opinion of the United States Supreme Court, like *Obergefell*, which blatantly affronts the Constitution, automatically become the "rule of law" and the "law of the land?" Sir William Blackstone's *Commentaries on the Laws of*

[8] 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).

England became the "manual of almost every student of law in the United States"[9] during this nation's formative years. Blackstone stated that "*the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law." 1 *Commentaries* *71. Blackstone understood that judges may make mistakes, but in *Obergefell*, according to the forceful dissents, the majority did not merely make a mistake of law, but instead judged not by the law, but by their own will. As Alexander Hamilton stated: "[I]f [the courts] should be disposed to exercise WILL instead of JUDGMENT, the 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 U.S. Constitution, laws made in pursuance thereof, and treaties made under the

[9] 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.

authority of the United States, *not* to opinions of the U.S. Supreme Court.[10] 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 (1842), overruled by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

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

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

[10] "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).

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

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

The Federalist No. 33, at 206. The laws of inheritance are inseparable from those laws that define the family and in particular the marital relationship. Writing in

1788, over two centuries before *Obergefell*, Hamilton understandably could not easily imagine the "forced constructions" of federal authority in that case that altered the very definition of marriage. But his example from the law of descent, intended to illustrate an absurdity, makes it clear that *Obergefell* is an act of usurpation that "will deserve to be treated as such."

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

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

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

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

Id. *69-70 (some emphasis added). Thus, if precedents are "manifestly absurd or unjust," "contrary to reason," or "contrary to the divine [i.e., Biblical] 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,[11] the opinion of the *Obergefell* majority is "contrary to reason" as well as "contrary to the divine law." See *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (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)).[12] 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

Texas officials, elected and appointed, before entering upon the duties of their offices, take an oath to "preserve, protect, and defend the Constitution and

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

[12] "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.

laws of the United States and of this State, so help me God." Art. XVI, § 1(a), Texas Const. 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 administered to an entering cadet at the United States Military Academy at West Point states, in part, "that I will support the Constitution of the United States ... and that I will at all times obey the *legal* orders of my superior officers, and the Uniform Code of Military Justice." 10 U.S.C. § 4346(d) (emphasis added). The success or failure of a mission depends on strict adherence to the chain of command. The principle of obedience to superior orders is also crucial to the proper functioning of a court system. Nevertheless, the principle of obedience to superior officers is based on the premise that the order given is a *lawful* one.

At his court-martial, Lt. William Calley, a unit commander at My Lai in Vietnam who was convicted of killing 22 innocent civilians, defended himself by claiming that he was following the orders of his superior, Captain Ernest Medina.

The military tribunal that considered Lt. Calley's appeal rejected his superior-order defense on the ground that the order he claimed to be following was clearly unlawful. Even if Lt. Calley had acted in obedience to orders, "he would nevertheless not automatically be entitled to acquittal. Not every order is exonerating". *United States v. Calley,* 46 C.M.R. 1131, 1183 (1973). "Military effectiveness depends upon obedience to orders. On the other hand *the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person*." *United States v. Calley*, 48 C.M.R. 19, 26 (1973) (emphasis added).

> "[T]he only exceptions recognized to the rule of obedience are cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness ....
>
> "Except in such instances of *palpable illegality*, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly ...."

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

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

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

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

> But believing as I do, that every state officer who is required to take an oath to support the Constitution of the United States as well as of his own state, was designedly placed by the federal constitution itself as a sentinel to guard the outposts as well as the citadel of the great principles and rights which it was intended to declare, secure and perpetuate, I cannot shrink from the discharge of the duty now devolved upon me. I know well its consequences, and appreciate fully the criticism to which I may be subjected. But I believe most sincerely and solemnly that the last hope of free, representative and responsible government rests upon the state sovereignties and fidelity of state officers to their double allegiance, to the state and federal government; and so believing, I cannot hesitate in performing a clear, an indispensable duty.

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

Regarding a court opinion that manifestly and palpably violates the U.S. Constitution as superior to an individual's sworn loyalty to that authority would be a betrayal of that oath and a blatant disregard of the Constitution. Acquiescence 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.

Several months after *Obergefell* was released, two justices of the Mississippi Supreme Court seriously questioned whether they could follow its mandate without violating their oaths to the Constitution. Justice Dickinson framed the issue as follows: "The *Obergefell* dissenters have raised a question which ... implicates our oath of office as justices of this Court: Did the *Obergefell* majority engage in legislative enactment, rather [than] judicial interpretation, exceeding the power conferred upon it by the United States Constitution?" *Czekala-Chatham v. State ex rel. Hood*, 195 So. 3d 187, 190 (Miss. 2015) (Dickinson, J. dissenting). He further explained:

> *I cannot agree with [the] view that my oath of office requires me blindly to follow any decision handed down by the Supreme Court, no matter how absurd or disconnected it may be from the Constitution.* I believe my oath of office imposes upon me a duty to examine those decisions to make sure they indeed are constitutional interpretations, rather than — as the *Obergefell* dissent concluded — an exercise in judicial will that, as Chief Justice Roberts put it, "has no basis in the Constitution or precedent."
>
> My oath of judicial office ... requires me to decide cases agreeably to the Constitution. *I swore no oath to follow decisions that have "no basis in the Constitution."*

Id. at 193 (emphasis added). Justice Dickinson noted that "United States Supreme Court justices are not above the law," *id.*, and that if the judicial oath of office required undeviating loyalty to every prior Supreme Court decision, then any dissent to such precedent by a justice of that Court violated that very oath. *Id.*[13]

Justice Coleman in the same vein stated:

> [T]he possibility that the United States Supreme Court has acted unconstitutionally strikes at the very center of how those of us sworn to do our jobs agreeably to the Constitution of the United States must strive to follow our oaths.
> ....
> No inferior judge, to my knowledge, has ever taken an oath of fealty to the United States Supreme Court ....

[13] Justice Dickinson also noted "substantial support from legal scholars that state courts are not required to recognize as legitimate legal authority a Supreme Court decision that is in no way a constitutional interpretation, but rather is a legislative act by a judicial body." *Id.* at 190. He listed many of those scholars by name. *Id.* at 191-92. See *Statement Calling for Constitutional Resistance to* Obergefell v. Hodges, The American Principles Project (October 8, 2015), https://goo.gl/uoR8QT.

Id. at 199, 201 (Coleman, J., dissenting), offering a number of examples to illustrate "why the statement—that the Constitution means whatever a majority of the Supreme Court says it means—cannot always and universally be true." *Id.* at 203. Suppose, e.g., that the Supreme Court held that the Due Process Clause required every American household to own a giraffe and every Supreme Court justice to receive a $5 million salary—or that all guns must be confiscated to protect interstate commerce, or that Congress must declare war on any nation that does not provide jury trials? *Id.* at 199, 203. "The above examples," Justice Coleman concluded, "are absurd, but the absurdity shows that the conclusion that the U.S. Constitution means whatever a majority of the Supreme Court says it means—cannot always be true." *Id.* at 203-04. Echoing Justice Dickinson, he stated: "no court should be elevated above the Constitution itself." *Id.* at 201.

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. 137, 179-80 (1803): "[T]he framers of the constitution

contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it?" One scholar plainly states: "The courts are constitutional agents, and as such occupy an inferior position to the Constitution itself." Edward J. Erler, *Sowing the Wind: Judicial Oligarchy and the Legacy of* Brown v. Board of Education, 8 Harv. Journal of Law & Public Policy 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*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) (citing *Dred Scott*, 60 U.S. at 393). 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 sex.

C. Abraham Lincoln and the Limits of Judicial Power

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

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such

> decision may be erroneous in any given case, still the evil effect following it, *being limited to that particular case*, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice.

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

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

Id. at 196 (emphasis added).

Unless, as Lincoln taught, the "evil effect" of *Obergefell* is limited to the parties in that case, the people "have ceased to be their own rulers," having surrendered their government into the hands of a majority on the United States Supreme Court. As Justice Scalia states: "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." 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*, Huffington Post (July 29, 2015).[14] But, as stated above, the Supreme Court does not legitimately “make law”. That power belongs to legislatures or to formal processes for enacting and amending constitutions.

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

[14] https://goo.gl/k1Qpqw.

majority to legislate for the entire nation on a "vital question" by making a decision in a particular case is exactly the assumption of legislative power that Hamilton warned would endanger "the general liberty of the people" and Lincoln identified with the demise of self-government.

D. The Fallacy of Judicial Supremacy

The general principle of blind adherence to United States Supreme Court opinions as "the law of the land" is a dangerous fallacy that is inconsistent with the United States Constitution. Labeling such opinions 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 U.S. Constitution itself, not to unconstitutional and illegitimate opinions of the U.S. Supreme Court.[15] 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,[16] 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

[15] As Justice Tom Parker of the Alabama Supreme Court recently stated: "An illegitimate decision is due no allegiance; our allegiance as judges is to the United States Constitution." *Ex parte State*, No. 1140460 (Ala. Mar. 4, 2016) (Parker J., concurring).

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

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.[17] "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

[17] 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.

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). As Professor George Thomas stated: "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." *The Madisonian Constitution* 37 (2008).

Opinions of the Supreme Court that interpret the U.S. Constitution are, as President 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" that Lincoln described should be confined to the unfortunate defendants in that case. We must protect the God-given institution of marriage from judicial subversion by maintaining loyalty to principles upon which our nation was founded. Justice Sandra Day O'Connor, 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 judges. Speaking at the North Carolina ratification convention in 1788, James Iredell, soon to be a Supreme Court Justice, explained that the Guarantee Clause[18] 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 moreso 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.

CONCLUSION

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

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

To invariably equate the *Obergefell* ruling, that clearly contradicts the U.S. and Texas Constitutions, with "the rule of law", would elevate the U.S. Supreme Court above those Constitutions and would subject Americans to an autocracy foreign to our form of government. Supreme Court Justices are also subject to the Constitution. When "that eminent tribunal" unquestionably violates limitations set forth in that authority, lesser officials—equally bound by oath to the Constitution—have a duty to recognize that fact or become guilty of joining 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.

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 77 (1988). Against the *ultra vires* majority in *Obergefell*, the Foundation and ICR 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*." 135 S. Ct. at 2626 (emphasis added).

The Foundation and ICR, as *amici curiae*, encourage the Justices of this honorable Court, in considering *Obergefell*, to conclude, as demonstrated above, that to fulfill their oaths to "preserve, protect, and defend the Constitution and laws

of the United States," they must reject *Obergefell* as an inapplicable and *ultra vires* (if not lawless and nonjudicial) ruling.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), Tex. R. App. P., the undersigned certifies that this brief complies with the type-volume limitations of Rule 9.4(i)(2)(B). Exclusive of the exempted portions described in Rule 9.4(i)(1), this brief contains 11,800 words. The brief was prepared using Microsoft Word 2016 and was converted directly into a searchable PDF format. Rule 9.4(j).

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CERTIFICATE OF SERVICE

I hereby certify that on February 17th, A.D. 2017, a copy of this brief will have been served upon all parties through the electronic filing manager. Rule 9.5(b), Tex. R. App. P.

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