

# CRAZY IN ALABAMA: JUDICIAL PROCESS AND THE LAST STAND AGAINST MARRIAGE EQUALITY IN THE LAND OF GEORGE WALLACE

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## INTRODUCTION

On June 26, 2015, the Supreme Court of the United States ruled in *Obergefell v. Hodges* that prohibitions on same-sex marriage violate the Fourteenth Amendment.<sup>1</sup> In hindsight, the decision seems inevitable, the culmination of a precisely two-year race towards marriage equality that began with the Court's 2013 invalidation of the federal Defense of Marriage Act on June 26, 2013.<sup>2</sup> Federal trial and appellate courts were almost uniform in declaring state bans on same-sex marriage unconstitutional,<sup>3</sup> and the Supreme Court denied certiorari<sup>4</sup> or stays of judgment<sup>5</sup> in all of those cases. Additionally, high-ranking public officials in several states gave up their opposition to marriage equality, ordering the issuance of licenses to same-sex couples even before all litigation had concluded.<sup>6</sup>

Alabama represented the glaring exception. During winter and spring

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<sup>1</sup> No. 14-556, 2015 WL 2473451 (2015) [<http://perma.cc/43H2-96VP>].

<sup>2</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013) [<http://perma.cc/YTV8-ZJB4>].

<sup>3</sup> *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) [<http://perma.cc/WGF4-VZD3>]; *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) [<http://perma.cc/MNM4-39LQ>]; *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) [<http://perma.cc/CR5F-PAQ7>]; *Strawser v. Strange*, 44 F. Supp. 3d 1206 (S.D. Ala. 2015) [<http://perma.cc/QCG9-JEBG>]; *Searcy v. Strange*, No. 14-0208-CG-N, 2015 WL 328728 (S.D. Ala. Jan. 23, 2015) [<http://perma.cc/ALM6-XD4B>]; *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014) [<http://perma.cc/3BC3-RKYW>].

<sup>4</sup> See, e.g., *Bogan v. Baskin*, 135 S. Ct. 316 (2014) (mem.) (case from Indiana); *Walker v. Wolf*, 135 S. Ct. 316 (2014) (mem.) (case from Wisconsin); *McQuigg v. Bostic*, 135 S. Ct. 314 (2014) (mem.) (case from Virginia); *Smith v. Bishop*, 135 S. Ct. 271 (2014) (mem.) (case from Oklahoma); *Herbert v. Kitchen*, 135 S. Ct. 265 (2014) (mem.) (case from Utah).

<sup>5</sup> *Strange v. Searcy*, 135 S. Ct. 940 (2015) (mem.) [<http://perma.cc/N9M9-X833>]. *But see id.* at 941 (Thomas, J., dissenting from denial of application for stay) (“This acquiescence may well be seen as a signal of the Court’s intended resolution of that question. This is not the proper way to discharge our Article III responsibilities. And, it is indecorous for this Court to pretend that it is.”).

<sup>6</sup> News Release, Attorney General Pam Biondi, Attorney General Pam Bondi’s Statement Regarding Judge Hinkle’s Order (Jan. 1, 2015), available at <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/891D80F35B6D0B6985257DC0007E5358> [<http://perma.cc/2LYK-Y5YV>]; Letter from Attorney General Kamala Harris to Governor Edmund G. Brown Jr. (June 3, 2013), available at [http://oag.ca.gov/sites/all/files/agweb/pdfs/ht/ag\\_prop\\_8\\_letter.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/ht/ag_prop_8_letter.pdf) [<http://perma.cc/4FVP-E7TN>].

2015, with *Obergefell* looming, Alabama state officials and the Supreme Court of Alabama took an increasingly firm stand against marriage equality and against multiple decisions of a lower federal court invalidating the state's constitutional<sup>7</sup> and statutory<sup>8</sup> bans on same-sex marriage. For many, these efforts echoed in Alabama's unfortunate civil rights history—segregationist Governor George Wallace standing in the doorway of the University of Alabama to prevent admitted African-American students from registering;<sup>9</sup> fire hoses, police dogs, and violence;<sup>10</sup> systematic attempts to silence anti-segregation voices;<sup>11</sup> and massive resistance to *Brown* and to integration.<sup>12</sup> In characterizing the actions of Alabama officials as defiance and rebellion against the federal judiciary<sup>13</sup> or as “reckless rejection of federal constitutional principles,”<sup>14</sup> reporters, commentators, and advocates too easily linked the current controversy over marriage equality to old opposition to integration. Even those who acknowledged the procedural regularity of these officials' actions nonetheless viewed procedural regularity as a cover for discrimination.<sup>15</sup> It was 1963 all over again, with Alabama Chief Justice Roy Moore playing the role of Wallace's heir in bigoted defiance of the federal judiciary and disregard for the federal

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<sup>7</sup> ALA. CONST. art. I, § 36.03 [<http://perma.cc/HF5U-P6YL>].

<sup>8</sup> Ala. Code § 30-1-19 (1975) [<http://perma.cc/SCH3-NDAA>].

<sup>9</sup> MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 437 (2004).

<sup>10</sup> *Id.* at 436–41.

<sup>11</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964) [<http://perma.cc/96NG-GJ6Y>]; Howard M. Wasserman, *A Jurisdictional Perspective on New York Times v. Sullivan*, 107 N.W. U. L. REV. 901, 909 (2013) [<http://perma.cc/9PBQ-CVW7>].

<sup>12</sup> KLARMAN, *supra* note 9, at 342.

<sup>13</sup> Emily Bazelon, John Dickerson, and David Plotz, *The “Would You Attend a Gay Wedding?” Edition*, SLATE POLITICAL GABFEST (Apr. 24, 2015, 11:48 AM), [http://www.slate.com/articles/podcasts/gabfest/2015/04/political\\_gabfest\\_on\\_europe\\_s\\_burgeoning\\_migration\\_crisis\\_the\\_koch\\_brothers.html](http://www.slate.com/articles/podcasts/gabfest/2015/04/political_gabfest_on_europe_s_burgeoning_migration_crisis_the_koch_brothers.html) [<http://perma.cc/KL2C-S8L5>]; Ronald J. Krotoszynski, Jr., *Alabama's Dangerous Defiance*, N.Y. TIMES (Mar. 6, 2015), <http://www.nytimes.com/2015/03/06/opinion/alabamas-dangerous-defiance.html>; Sandhya Somashekhar, *Judicial Defiance in Alabama: Same-Sex Marriages Begin, But Most Counties Refuse*, WASH. POST (Feb. 9, 2014), [http://www.washingtonpost.com/politics/alabama-judge-stakes-out-defiant-stance-against-same-sex-marriages/2015/02/09/a1be2de4-b06f-11e4-854b-a38d13486ba1\\_story.html](http://www.washingtonpost.com/politics/alabama-judge-stakes-out-defiant-stance-against-same-sex-marriages/2015/02/09/a1be2de4-b06f-11e4-854b-a38d13486ba1_story.html) [<http://perma.cc/8DXQ-3V2A>]; Mark Joseph Stern, *Alabama Chief Justice Defies Federal Order. Refuses to Allow Gay Marriages*, SLATE (Feb. 9, 2015, 11:00 AM), [http://www.slate.com/blogs/outward/2015/02/09/alabama\\_s\\_roy\\_moore\\_defies\\_federal\\_court\\_order\\_on\\_gay\\_marriage.html](http://www.slate.com/blogs/outward/2015/02/09/alabama_s_roy_moore_defies_federal_court_order_on_gay_marriage.html) [<http://perma.cc/49YG-HLGC>].

<sup>14</sup> Ariane de Vogue, *Judge Strikes Down Alabama Same-Sex Marriage Ban, But Puts Hold on Ruling*, CNN (May 22, 2015, 6:33 AM), <http://www.cnn.com/2015/05/21/politics/alabama-same-sex-marriage> (quoting Southern Poverty Law Center deputy legal director David Dinielli) [<http://perma.cc/Q4QA-J338>].

<sup>15</sup> See Adam Lamparello, *Why Chief Justice Roy Moore and the Alabama Supreme Court Just Made the Case For Same-Sex Marriage*, 17 U. PA. J. CONST. L. ONLINE 1, 3 (2015), available at [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1013&context=jcl\\_online](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1013&context=jcl_online) [<http://perma.cc/QHP2-9NWZ>]; Krotoszynski, *supra* note 13.

Constitution.<sup>16</sup>

But while the comparison was easy, it also was, as a matter of judicial process, inaccurate.

In fact, the controversy in Alabama is significant for what it demonstrates about judicial procedure and the limited scope of injunctive relief in constitutional litigation. It reveals how judicial decisionmaking and judicial remedies actually function in a geographically divided and hierarchical federal judiciary. True, the resulting process was uncertain, inefficient, chaotic, and even ugly. To the extent this triggered concerns for “the integrity of the judicial system, which rises and falls on the public’s perception,”<sup>17</sup> one might complain that this process shook public confidence in the system. But the appropriate response is to change the public’s perception and understanding of how the judicial process really operates in constitutional litigation and why. When George Wallace stood in the doorway fifty years ago, he did so in defiance of a federal court injunction directed at him and compelling him to refrain from interfering with the admission of African-American students to the University of Alabama.<sup>18</sup> By contrast, Alabama’s last stand against marriage equality was about the steps necessary to produce that binding federal order against a proper defendant as to proper plaintiffs in the face of procedural reality.

*Obergefell* has settled the constitutional debate over marriage equality, rendering the events of those several months in Alabama a historical footnote, a final speed bump in an inexorable move to marriage equality that we will remember in just that way. Nevertheless, these events illustrate the procedure at the heart of constitutional and civil rights enforcement and are therefore worth exploring in that light. And because marriage equality will not be the last constitutional controversy contested in the federal courts, judges, attorneys, the media, and the public must recognize and understand these procedural realities.

### JUDICIAL ORDERS AND LITIGATION CHAOS

In late January 2015, Judge Callie Granade of the Southern District of Alabama twice held that Alabama’s same-sex marriage bans violated the Fourteenth Amendment—first in *Searcy v. Strange*,<sup>19</sup> brought by a female couple married in California and seeking a second-parent adoption in Alabama, and second in *Strawser v. Strange*,<sup>20</sup> brought by two same-sex

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<sup>16</sup> Lamparello, *supra* note 15, at 3–4.

<sup>17</sup> Lamparello, *supra* note 16, at 3.

<sup>18</sup> United States v. Wallace, 218 F. Supp. 290, 292 (N.D. Ala. 1963) [<http://perma.cc/NN8K-RZUT>].

<sup>19</sup> Searcy v. Strange, No. 14-0208-CG-N, 2015 WL 328728 (S.D. Ala. Jan. 23, 2015).

<sup>20</sup> Strawser v. Strange, No. 14-0424-CG-C, 2015 U.S. Dist. LEXIS 8439 (S.D. Ala. Jan. 26, 2015) [<http://perma.cc/GR9F-L365>].

couples seeking marriage licenses in Mobile. The sole named defendant in both actions was Alabama Attorney General Luther Strange. Both injunctions prohibited Strange from enforcing state laws banning same-sex marriage. The *Strawser* injunction further bound 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 same-sex marriage,” incorporating the injunctive scope permitted by Federal Rule of Civil Procedure 65(d)(2).<sup>21</sup>

In Alabama, however, responsibility for issuing marriage licenses rests with probate judges<sup>22</sup> who are members of the judicial branch,<sup>23</sup> although performing executive or administrative functions such as issuing marriage licenses.<sup>24</sup> The licensing power does not rest with the state attorney general or with any executive branch official subject to his control. Given state separation of powers principles, the attorney general also lacks any supervisory authority over probate judges. Alabama thus presented a bizarre situation. The state officials empowered to issue marriage licenses to same-sex couples were not parties to the federal litigation and not required by the resulting injunction to issue any licenses or to refrain from enforcing the marriage ban. The only state official subject to the injunction—the attorney general—lacked the power to issue, or order anyone else to issue, marriage licenses to same-sex couples. There also did not appear to be any single state-level official who could supervise and control the state’s probate judges.

Compare this with, for example, litigation over California’s Proposition 8 (Prop 8). Two same-sex couples sued six executive officer defendants—the Governor, the state attorney general, the director and deputy director of the state Department of Public Health (DPH), and the county clerk–recorders (the officials who actually issue licenses) for two counties. After finding that Prop 8 violated the Fourteenth Amendment, the district court permanently enjoined the six defendant officials from applying or enforcing the state marriage ban and directed them to ensure that all persons under their control or supervision similarly did not enforce the ban.<sup>25</sup> As that injunction was ready to take effect,<sup>26</sup> California Attorney General Kamala Harris advised DPH officials to notify all county clerks

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<sup>21</sup> *Id.*; see also FED. R. CIV. P. 65(d)(2)(B)–(C).

<sup>22</sup> See ALA. CONST. art. III, § 42 [<http://perma.cc/682D-764K>]; Ala. Code § 12-13-30 (1975) [<http://perma.cc/M263-6XFX>].

<sup>23</sup> Ala. Code § 30-1-9 (1975) [<http://perma.cc/5NV6-NPNN>].

<sup>24</sup> *Strawser v. Strange*, No. 14-0424-CG-C, 2015 WL 1880605, at \*3 (S.D. Ala. Apr. 23, 2015) (defining issuance of marriage licenses as an administrative function) [<http://perma.cc/YY2S-PREM>].

<sup>25</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003–04 (N.D. Cal. 2010) [<https://perma.cc/9RQR-3BJP>].

<sup>26</sup> The Supreme Court’s determination that initiative proponents lacked standing to appeal rendered the district court judgment and the injunction final. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) [<http://perma.cc/S55L-L3KY>].

that they were similarly subject to the injunction and should begin issuing marriage licenses to all couples who wanted them. Because DPH controlled county clerk–recorders in administering the state’s marriage license and certification laws,<sup>27</sup> the injunction against the attorney general and the DPH officers effectively enjoined these nonparties subject to their control. And those high-level state officials ordered county-level officials to behave as if the injunction covered all requesting couples.

Judge Granade temporarily stayed the injunctions in *Searcy* and *Strawser* to allow the Eleventh Circuit to consider whether a stay pending appeal was warranted,<sup>28</sup> thereby leaving time for affected actors to consider the scope and effect of those orders. The Alabama Probate Judges Association advised its members not to issue licenses to same-sex couples; because no probate judge was subject to any federal court order, doing so violated the still-existing state law ban on issuing licenses to same-sex couples.<sup>29</sup> Chief Justice Moore went one step further, asserting his authority as the chief administrative officer of the state courts to first advise against<sup>30</sup> and then prohibit<sup>31</sup> probate judges from issuing licenses, emphasizing the limited scope of Judge Granade’s injunction, its nonapplication to probate judges, and the limited precedential authority of district court decisions.

Similar confusion about the scope of a district court injunction had arisen in Florida earlier the same month. Judge Robert Hinkle of the Northern District of Florida had declared invalid that state’s same-sex marriage ban and had enjoined one clerk to grant a license to one couple in one county.<sup>32</sup> The Florida Association of County Clerks (FACC) advised its members that the injunction did not compel any other clerk to issue a license to any other couple and recommended that nonparty clerks refrain from issuing licenses in violation of state law.<sup>33</sup> Judge Hinkle responded

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<sup>27</sup> Letter from Attorney General Kamala Harris to Governor Edmund G. Brown Jr. (June 3, 2013), available at [http://oag.ca.gov/sites/all/files/agweb/pdfs/ht/ag\\_prop\\_8\\_letter.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/ht/ag_prop_8_letter.pdf).

<sup>28</sup> *Strawser v. Strange*, No. 14-0424-CG-C, 2015 U.S. Dist. LEXIS 8439 (S.D. Ala. Jan. 26, 2015); *Searcy v. Strange*, No. 14-0208-CG-N, 2015 WL 328825, at \*3 (S.D. Ala. Jan. 25, 2015) [<http://perma.cc/E4CF-TD48>].

<sup>29</sup> Michael Finch II, *Alabama Probate Judges Association Says Not to Issue Marriage Licenses to Same-Sex Couples on Monday*, AL.COM (Jan. 25, 2015, 5:58 PM), [http://www.al.com/news/mobile/index.ssf/2015/01/alabama\\_probate\\_court\\_judges\\_gay\\_marriage.html](http://www.al.com/news/mobile/index.ssf/2015/01/alabama_probate_court_judges_gay_marriage.html) [<http://perma.cc/655V-UGGY>].

<sup>30</sup> Memorandum from Chief Justice Roy S. Moore to Ala. Probate Judges (Feb. 3, 2015), available at [http://media.al.com/news\\_impact/other/Chief%20Justice%20Moore%27s%20memorandum.pdf](http://media.al.com/news_impact/other/Chief%20Justice%20Moore%27s%20memorandum.pdf) [<http://perma.cc/3MY8-9B5T>].

<sup>31</sup> Admin. Order of the Chief Justice of the Supreme Court (Feb. 8, 2015), available at [http://media.al.com/news\\_impact/other/CJ%20Moore%20Order%20to%20Ala.%20Probate%20Judges.pdf](http://media.al.com/news_impact/other/CJ%20Moore%20Order%20to%20Ala.%20Probate%20Judges.pdf) [<http://perma.cc/5GA7-BCFH>].

<sup>32</sup> *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1293 (N.D. Fla. 2014).

<sup>33</sup> Memorandum from Attorneys to FACC (Dec. 15, 2014), available at <http://www.miamiherald.com/news/local/community/gay-south-florida/article4531773.ece/BINARY/Greenberg%20Traurig%20revised%20memo%20to%20clerks> [<http://perma.cc/ZCJ7-ZMC5>].

with an “Order on the Scope of the Preliminary Injunction,” reminding everyone of the historic evils of resistance to federal judicial efforts to vindicate constitutional rights, and insisting that, while his injunction did not require any nonparty clerks to issue licenses to other couples, “*the Constitution*” did.<sup>34</sup> This worked in Florida—both the FACC<sup>35</sup> and the Florida attorney general<sup>36</sup> acceded to clerks issuing licenses without awaiting further lawsuits, orders, or appeals. It worked so well, in fact, that Judge Granade similarly “clarified” her *Searcy* order by block-quoting several paragraphs from Judge Hinkle’s order, notably the insistence that “the Constitution” required issuance of licenses even by nonparty officials to nonparty couples.<sup>37</sup>

On Monday, February 9, the *Strawser* and *Searcy* stays expired when the Supreme Court of the United States (over dissent of Justice Thomas, joined by Justice Scalia) refused to further stay the *Searcy* injunction.<sup>38</sup> Thus did marriage equality come to Alabama, albeit haltingly—within the first two days, probate judges in only sixteen of the state’s sixty-seven counties were issuing licenses to same-sex couples.<sup>39</sup>

Seeking to eliminate the intrastate inconsistency, the federal plaintiffs returned to Judge Granade. The *Searcy* plaintiffs moved to have Probate Judge Don Davis of Mobile—the judge who had refused their adoption in light of the state prohibition on recognizing same-sex marriages—held in contempt for violating the injunction. Judge Granade swiftly and correctly rejected the request, pointing out that Davis was not a party in *Searcy*, not subject to the injunction, and not subject to the court’s contempt power.<sup>40</sup> Moreover, it would have been incoherent to hold Davis in contempt for failing to issue licenses to nonparty couples seeking to be married when the applicable injunction arose in an adoption case involving a married couple.

The *Strawser* plaintiffs—whose action did involve issuance of marriage licenses—made the more appropriate and effective move. They amended their complaint to add Davis as a defendant and to add two new couples as plaintiffs. Two days later, Judge Granade extended the

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<sup>34</sup> Brenner v. Scott, No. 4:14cv107-RH/CAS, 2015 WL 44260, at \*1 (N.D. Fla. Jan. 1, 2015) (emphasis in original) [<https://perma.cc/7LHY-QCVE>].

<sup>35</sup> Howard Wasserman, *The Process of Marriage Equality, Redux*, PRAWFSBLAWG (Jan. 3, 2015, 9:31 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/01/the-process-of-marriage-equality-redux.html> [<http://perma.cc/HN4G-8U58>].

<sup>36</sup> News Release, Attorney General Pam Biondi, Attorney General Pam Bondi’s Statement Regarding Judge Hinkle’s Order (Jan. 1, 2015), available at <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/891D80F35B6D0B6985257DC0007E5358>.

<sup>37</sup> *Searcy v. Strange*, No. 14-0208-CG-N (S.D. Ala. Jan. 28, 2015), available at <http://www.clearinghouse.net/chDocs/public/PB-AL-0005-0008.pdf> [<http://perma.cc/67VW-66GZ>].

<sup>38</sup> See *Strange v. Searcy*, 135 S. Ct. 940 (2015) (mem.); *id.* at 940 (Thomas, J., dissenting from denial of application for stay).

<sup>39</sup> Somashekhar, *supra* note 13.

<sup>40</sup> *Searcy v. Strange*, No. 14-0208-CG-N, 2015 WL 519725, at \*1 (S.D. Ala. Feb. 9, 2015) [<http://perma.cc/A97M-V3B3>].

injunction to Davis as to all four plaintiff-couples.<sup>41</sup> Probate judges in more (although still not all) counties responded to the expanded order by beginning to issue licenses.

The key to understanding these moves, as well as the source of confusion, is the inherently limited nature of judicial decisions and judicial awards of injunctive relief. Even when addressing important constitutional and social issues such as due process, equal protection, and marriage equality, a court resolves only a discrete dispute between particular, identified parties, producing an order that controls their rights, obligations, and behavior as to one another, but not behavior of or towards nonparties.<sup>42</sup> Thus, neither of Judge Granade's original injunctions prohibited any probate judge from enforcing the same-sex marriage ban or obligated any probate judge to issue a marriage license to a same-sex couple, as none was a defendant or subject to the control of a defendant. Expanding the *Strawser* injunction against Judge Davis obligated only him, but no other probate judge, to refrain from enforcing the ban and to issue licenses. And that obligation extended only to the *Strawser* plaintiffs (four couples), but to no one else.<sup>43</sup>

Along with the injunctions, Judge Granade also declared the marriage bans constitutionally invalid. But those declarations functioned chiefly as explanation and justification for her orders to the parties. The opinions affected the rest of the world only through their precedential force and the extent to which they might influence the next court in resolving a similar constitutional question involving different parties.<sup>44</sup> Importantly, however, federal district opinions are not binding authority on any other court—state court, other federal districts, the same federal district, or even the same federal district judge in a subsequent case.<sup>45</sup> This was another unique feature of Alabama's marriage-equality controversy—the Eleventh Circuit neither spoke nor froze the status quo until it could speak. Thus, everything flowed from decisions of a single trial judge rather than the decision of a court of appeals, which at least would have provided binding precedent within the circuit.

At best, Judge Granade's opinion had persuasive authority; it might convince another court to adopt the same understanding of the Fourteenth

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<sup>41</sup> *Strawser v. Strange*, 44 F. Supp. 3d 1206, 1207–09, 1210 (S.D. Ala. 2015).

<sup>42</sup> *Martin v. Wilks*, 490 U.S. 755, 762 (1989) [<http://perma.cc/RA75-W89N>]; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) [<http://perma.cc/ZDE5-89L5>]; cf. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 217 (Concise 4th ed. 2012).

<sup>43</sup> Cf. LAYCOCK, *supra* note 42, at 217.

<sup>44</sup> Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1340 (2000); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1328 (1996).

<sup>45</sup> *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) [<http://perma.cc/6FXW-6ELY>]; *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) [<http://perma.cc/LLF2-WS2X>]; Fallon, *supra* note 44, at 1340.

Amendment and to order a new defendant to issue marriage licenses to new plaintiffs. Her attempt to “clarify” the injunction (mimicking Judge Hinkle’s move in Florida) did not—and, as a matter of law, could not—change this reality. Licenses were required by “the Constitution” only as interpreted by one district judge in a single judicial opinion that was not binding on any other court or any other case. Moreover, a public official cannot be in contempt of the Constitution, the district court’s declaration of unconstitutionality, or the district court precedent; a person only can be in contempt of a judicial order directed to him personally. Whatever Judge Granade declared that the Constitution required, it did not actually obligate any nonparty probate judge or clerk to follow that requirement.

Thus, that every other Alabama official did not voluntarily comply with Judge Granade’s constitutional interpretation did not reflect Massive Resistance *Redux*. Probate judges who declined to issue licenses were not flouting the law, rebelling against the Constitution, or defying federal authority in not abiding by a single non-binding precedent in a case to which they were not party. Nor was Chief Justice Moore in advising and ordering probate judges that they were not obligated by the order or bound by the precedent. The constitutional question remained open and it was possible (if unlikely) that the next district judge might rule differently on the constitutional question in the next action.

Of course, nothing prohibited nonparty probate judges from voluntarily acting in accordance with Judge Granade’s non-binding order, rather than forcing new parties to commence new constitutional litigation against them.<sup>46</sup> In fact, judicial and political processes incentivize them to do so. The likely result of a new lawsuit by a new couple—especially in the Southern District, where any action would be assigned to Judge Granade under the district’s related-case rule<sup>47</sup>—was practically (albeit not legally) a foregone conclusion. Moreover, any probate judge who forced a lawsuit and was enjoined would have been liable for the plaintiffs’ reasonable attorney’s fees, as every couple obtaining injunctive relief compelling issuance of a marriage license would qualify as a “prevailing party” in a constitutional action.<sup>48</sup> These incentives worked in states from California to Florida, where officials recognized that it was not worth the time, expense, or effort to force new litigation that they would lose; they began issuing licenses to all requesting couples, even though not judicially compelled to do so by an injunction that only guaranteed licenses to a few identified

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<sup>46</sup> Cf. LAYCOCK, *supra* note 42, at 217.

<sup>47</sup> S.D. Ala. L.R. 3.3(a) [<http://perma.cc/7YD3-DSW8>].

<sup>48</sup> 42 U.S.C. § 1988(b) (2012) [<http://perma.cc/7GQT-S78P>]; Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res., 532 U.S. 598, 603–04 (2001) [<http://perma.cc/AXN7-C55G>]; *see, e.g.*, Stipulation and Agreement as to Costs and Attorneys’ Fees at ¶¶ 10–11, Wolf v. Walker, No. 14-CV-64, (W.D. Wis. Mar. 27, 2015), *available at* <http://pdfserver.amlaw.com/nlj/Wisconsin%20ssm%20fee%20stipulation.pdf> [<http://perma.cc/9AEQ-DH83>].

couples.

One nevertheless might argue that non-acquiescence was itself an act of Massive Resistance to the extent it might have been motivated by animus towards LGBT people and by moral objections to opening the institution of civil marriage to them. But it is impossible to do more than speculate about why individual probate judges acted or failed to act in a given way. More importantly, it does not change the legal reality. Alabama public officials were under no legal obligation to issue licenses or to refrain from enforcing the state marriage ban other than within the limited scope of the controlling federal injunction. And they could wait for that injunction, issued following procedurally appropriate litigation, before acting in a certain way. That does not change even if the decision to wait may have been made with bad motives.

Once that injunction came, of course, a named probate judge would become bound, and in continuing to refuse licenses, he would have been defying a federal order or rebelling against the federal courts. But that never seemed a real danger as to the probate judges who declined to acquiesce in Judge Granade's initial decision; several indicated their intent to abide by, and thus their belief in the legitimacy of, any federal order that might issue against them in the future.<sup>49</sup>

The distinction between a binding injunction and persuasive precedent marks the fundamental difference between 2015 and 1963, between the admittedly halting move towards marriage equality and Wallace's stand in the doorway against desegregation. And it shows why the Wallace analogy, although rhetorically and politically powerful, remains inaccurate.

The students seeking to enroll at the University of Alabama in June 1963 had obtained an injunction from a federal district court ordering university officials to admit them.<sup>50</sup> Additionally, the United States had obtained a separate injunction enjoining Wallace from interfering with enforcement of that first injunction.<sup>51</sup> In standing in the doorway, therefore, Wallace did not merely defy principles of equality emanating from the Fourteenth Amendment as interpreted in recent Supreme Court decisions.<sup>52</sup> He defied a federal court order, expressly binding on him and compelling him to refrain from engaging in certain conduct. Had the United States pursued the option, Wallace could have been held in contempt. And when Deputy Attorney General Nicholas Katzenbach, U.S. Marshals, and a

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<sup>49</sup> Michele Gerlach, *Bowden: No Same-Sex Licenses Here*, ANDALUSIASTARNEWS (Feb. 7, 2015, 1:58 AM), <http://www.andalusiastarnews.com/2015/02/07/bowden-no-same-sex-licenses-here> [<http://perma.cc/X4LN-QSJ2>].

<sup>50</sup> *Lucy v. Adams*, 134 F. Supp. 235, 239 (N.D. Ala. 1955) [<http://perma.cc/M54U-K2FL>].

<sup>51</sup> *United States v. Wallace*, 218 F. Supp. 290, 292 (N.D. Ala. 1963).

<sup>52</sup> *See Sweatt v. Painter*, 339 U.S. 629 (1950) [<http://perma.cc/5E3C-BFPG>]; *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) [<http://perma.cc/WA6X-B7BM>]; *cf. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [<http://perma.cc/6RPP-8R7N>].

federalized National Guard ordered Wallace to stand aside, they acted as the Executive Branch enforcing a valid and binding judicial order, not merely an abstract judicial declaration that the Constitution prohibits segregation in public higher education.

Neither Moore nor Wallace relied on the injunction–precedent distinction. In his doorway speech, Wallace never mentioned the federal judiciary or the federal injunction binding him at that moment; he spoke only of the over-grasping “Central Government” and the absence of federal legislation authorizing integration.<sup>53</sup> This suggests that, in Wallace’s view, even an injunction could not compel him to permit integration of the university. Moore has been even more explicit that he and other state officials may ignore any mandate they regard as unlawful, including one issued by the Supreme Court.<sup>54</sup>

Regardless of whether either emphasized it, however, the distinction remains essential and it controls any process-oriented understanding of marriage-equality litigation in Alabama. Whatever one may believe about the opinions, motivations, or morality of Moore and other state officials, it does not alter the fact that none of them acted unlawfully or in disregard of the law. None disobeyed any court order or otherwise attempted to shirk binding legal duties. Moore was never enjoined, nor even an active litigant in any federal litigation. Individual probate judges made seemingly good faith efforts to determine their precise obligations, weighing competing views from a number of sources. Once enjoined, Davis issued licenses to the four plaintiff-couples in *Strawser* without public protest. And every probate judge who spoke publicly indicated an intention to do the same, if and when enjoined.

#### THE SUPREME COURT OF ALABAMA ENTERS THE FRAY

The equilibrium that emerged from those first weeks—some probate judges voluntarily complying, new plaintiffs initiating or expanding federal litigation against probate judges who did not voluntarily comply, courts issuing new or expanded injunctions and ordering more licenses—might have held until the Supreme Court decided *Obergefell*.

But a new procedural wrinkle emerged in state court. In early March, the Supreme Court of Alabama, exercising its original jurisdiction, issued a

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<sup>53</sup> Governor George C. Wallace, Statement and Proclamation at the University of Alabama (June 11, 1963), available at [http://www.archives.state.al.us/govs\\_list/schooldoor.html](http://www.archives.state.al.us/govs_list/schooldoor.html) [<http://perma.cc/E3JA-6F6L>].

<sup>54</sup> Lamparello, *supra* note 16, at 3–4; Jeremy Diamond, *Chief Alabama Judge Would Defy Supreme Court in Gay Marriage Ruling*, CNN (Feb. 12, 2015, 12:40 PM), <http://www.cnn.com/2015/02/12/politics/roy-moore-alabama-gay-marriage-supreme-court-slavery> [<http://perma.cc/89DH-LZE2>]; Justin Snow, *Roy Moore: Courts Cannot Redefine Biblical Marriage*, METROWEEKLY (Mar. 24, 2015), <http://www.metroweekly.com/2015/03/roy-moore-courts-cannot-redefine-biblical-marriage>.

writ of mandamus prohibiting all probate judges from issuing marriage licenses to same-sex couples.<sup>55</sup>

State mandamus had become a common move by state officials to keep local officials from acquiescing in precedential decisions prior to a binding injunction. For example, following Tenth Circuit decisions invalidating marriage bans in Utah and Oklahoma, state officials in Kansas (also located in the Tenth Circuit) obtained a temporary stay from the state supreme court prohibiting county officials from issuing licenses,<sup>56</sup> at least until a federal court applied circuit precedent to hold that Kansas's marriage ban was similarly constitutionally defective and to enjoin its enforcement.<sup>57</sup> South Carolina officials followed a similar course in response to the Fourth Circuit invalidating Virginia's ban when a local official stated his intent to issue licenses to same-sex couples.<sup>58</sup>

Even on this strategic move, however, Alabama posed an additional wrinkle. Because Attorney General Strange was enjoined from enforcing the same-sex marriage ban, he did not litigate the mandamus petition. Instead, two private organizations petitioned as relators of the State.

In a 134-page per curiam opinion, six justices (with Chief Justice Moore not participating and two justices dissenting) held that Alabama's same-sex marriage ban was constitutionally valid and must be enforced, rejecting concerns about the organizations' standing, questions about the court's own jurisdiction, Judge Granade's contrary decisions, contrary precedent from multiple lower federal courts, and repeated signals from the Supreme Court of the United States.<sup>59</sup> The result was statewide uniformity going forward—no same-sex couples could obtain marriage licenses, at least without a new federal court order. But the four couples granted licenses under the *Strawser* injunction remained married, as did couples granted licenses by other probate judges voluntarily complying with the district court precedent.

This decision generated the strongest denunciations of state–federal stalemates<sup>60</sup> and accusations of defiance and rebellion by the state supreme

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<sup>55</sup> *Ex parte Alabama ex rel. Ala. Policy Inst.*, No. 1140460, 2015 WL 892752, at \*43 (Ala. Mar. 3, 2015) [<http://perma.cc/4CBZ-G83T>].

<sup>56</sup> *Kansas ex rel. Schmidt v. Moriarty*, No. 112,590, slip op. at 2 (Kan. Oct. 10, 2014), available at [http://www.kscourts.org/State\\_v\\_Moriarty/112590.pdf](http://www.kscourts.org/State_v_Moriarty/112590.pdf) [<http://perma.cc/PW3E-3R5X>].

<sup>57</sup> *Marie v. Moser*, No. 14-cv-02518-DDC/TTJ, 2014 WL 5598128 (D. Kan. Nov. 4, 2014) [<https://perma.cc/8KET-DFCE>].

<sup>58</sup> *Condon v. Haley*, 21 F. Supp. 3d 572, 580 (D. S.C. 2014) [<http://perma.cc/3BWJ-HTNP>]; *South Carolina ex rel. Wilson v. Condon*, 764 S.E.2d 247, 248 (S.C. 2014) [<http://perma.cc/ZB95-2JHK>].

<sup>59</sup> *Ex parte Alabama*, 2015 WL 892752, at \*25, \*43; *but see* *Strange v. Searcy*, 135 S. Ct. 940, 941 (2015) (Thomas, J., dissenting from denial of application for stay) (criticizing Court's "acquiescence" in lower court decisions invalidating state bans as an inappropriate "signal of the Court's intended resolution of that question").

<sup>60</sup> Ed Brayton, *AL Supreme Court Sets Up Big Showdown with Fed. Courts*, FREETHOUGHTBLOGS (Mar. 4, 2015), <http://freethoughtblogs.com/dispatches/2015/03/04/al-supreme-court-sets-up-big->

court and by Moore in particular,<sup>61</sup> even though Moore did not participate in the mandamus action. Again, however, a proper focus on the judicial process shows that the state court did not “defy” federal courts or federal law.

The court obviously disagreed with Judge Granade, as well as with the weight of federal appellate and trial courts, on the meaning of the Fourteenth Amendment. But interpretations of federal law by lower federal courts do not bind state courts.<sup>62</sup> State courts considering federal law issues function as inferior federal tribunals; they are vested with the same interpretive leeway on the meaning of federal law as any lower federal court, are bound only by superior Supreme Court precedent, and are subject only to Supreme Court review.<sup>63</sup> A federal district court in a state and a state supreme court can diverge on a constitutional question, just as two federal district courts (even within the same state) can diverge; one court is not precluded from reaching a different decision than the other<sup>64</sup> and one court’s decision is not entitled to greater deference simply because it came first. The Supreme Court of Alabama thus acted entirely within its unquestioned power in reaching a different constitutional conclusion than did the federal district court. One might disagree with the merits of that decision.<sup>65</sup> But disagreement with a state court decision on a question of federal law does not render that decision illegitimate, any more than disagreement with Judge Granade renders her decisions illegitimate. Nor do divergent results mean that one court has rebelled against the other.

The real effect of the mandamus was practical rather than legal. The order stripped probate judges of the option, which many had taken, of voluntarily following Judge Granade’s decision and issuing licenses to same-sex couples without awaiting a new lawsuit and injunction. But it also permitted any probate judge subject to a federal injunction to be released from the mandamus.<sup>66</sup> In fact, Judge Granade and the Supreme Court of Alabama agreed on the initial relationship between their respective orders. The state court declined to release Judge Davis from the mandamus, concluding that he already had satisfied the federal injunction by issuing licenses to the four *Strawser* couples and was not under a continuing federal

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showdown-with-fed-courts [http://perma.cc/69F9-8M75].

<sup>61</sup> See, e.g., Lamparello, *supra* note 16; Krotoszynski, *supra* note 13.

<sup>62</sup> See generally Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53 (2015) [http://perma.cc/8BDU-VZB8]; Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235 (2014) [http://perma.cc/U99U-939D].

<sup>63</sup> James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 234 (2007) [http://perma.cc/VD73-YD8P].

<sup>64</sup> Fallon, *supra* note 44, at 1340.

<sup>65</sup> See generally Lamparello, *supra* note 16.

<sup>66</sup> *Ex parte Alabama ex rel. Ala. Policy Inst.*, No. 1140460, 2015 WL 892752, at \*42 (Ala. Mar. 3, 2015).

obligation to issue licenses to anyone else.<sup>67</sup> Judge Granade declined to stay her injunction against Davis for the same reason—having performed as to the named plaintiffs, Davis faced no conflicting federal and state obligations.<sup>68</sup>

The state mandamus prompted a new federal procedural counter. In May, Judge Granade certified *Strawser* as an injunctive class action.<sup>69</sup> The plaintiff class was defined as

All persons in Alabama who wish to obtain a marriage license in order to marry a person of the same sex and to have the marriage recognized under Alabama law, and who are unable to do so because of the enforcement of Alabama’s laws prohibiting the issuance of marriage licenses to same sex couples and barring recognition of their marriages.<sup>70</sup>

The defendant class was defined as “All Alabama county probate judges who are enforcing or in the future may enforce Alabama’s laws barring the issuance of marriage licenses to same-sex couples and refusing to recognize their marriages.”<sup>71</sup> In a separate order, Judge Granade extended the preliminary injunction, previously entered against Davis in favor of four couples, to prohibit the defendant class from enforcing the state’s same-sex marriage ban and requiring them to issue marriage licenses to any member of the plaintiff class who followed the proper steps towards obtaining a license. This injunction required every Alabama probate judge to issue licenses to any same-sex couples in Alabama who requested one, with every judge subject to contempt for noncompliance. Recognizing the “imminent” resolution of *Obergefell*, however, Judge Granade stayed the class injunction “until the Supreme Court issues its ruling” on the constitutional question.<sup>72</sup>

The class injunction did set up a potential conflict with the state mandamus. But Judge Granade insisted this did not provide a basis for not extending the injunction to the class. She explained that the choice for the probate judges—comply with the state order by not issuing licenses or comply with the federal order by issuing licenses—“should be simple” in light of the Supremacy Clause and the way in which it empowers federal courts to declare state laws invalid.<sup>73</sup> No probate judge could be held liable

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<sup>67</sup> *Ex parte Alabama ex rel. Ala. Policy Inst.*, No. 1140460, 2015 WL 1036064, at \*1 (Ala. Mar. 10, 2015) [<http://perma.cc/22MD-2ZFC>].

<sup>68</sup> *Strawser v. Strange*, No. 14-0424-CG-C, 2015 WL 1186326, at \*2 (S.D. Ala. Mar. 16, 2015) [<http://perma.cc/HM57-USMD>].

<sup>69</sup> *Cf.* FED. R. CIV. P. 23(b)(1)–(2) (establishing standards for class certification).

<sup>70</sup> *Strawser v. Strange*, No. 14-0424-CG-C, 2015 WL 2449251, at \*1 (S.D. Ala. May 21, 2015) [<http://perma.cc/N37Y-J9S7>].

<sup>71</sup> *Id.*

<sup>72</sup> *Strawser v. Strange*, No. 14-0424-CG-C, 2015 WL 2449468, at \*1, \*6 (S.D. Ala. May 21, 2015) [<http://perma.cc/ACA8-95N2>].

<sup>73</sup> *Id.* at \*4.

for violating Alabama law by engaging in conduct required by the Constitution—issuing marriage licenses to same-sex couples.<sup>74</sup>

While the conclusion was correct, this reasoning misunderstood the conflict at issue. Judge Granade accurately described the role of the Supremacy Clause in a collision between a state law and a federal injunction applying the Fourteenth Amendment to prevent enforcement of that state law. The conflict here, however, was between two judicial decisions and orders—one state, one federal—measuring the validity of a state law under competing interpretations of the federal Constitution. The Supremacy Clause does not grant greater force to an order from a lower federal court than to an order from a state court. Judge Granade’s declaration that the Fourteenth Amendment required defendants to issue licenses did not trump the state Supreme Court’s declaration that the Fourteenth Amendment did not require issuance of those licenses or that state law could prohibit their issuance. Again, a conflict between a lower federal court and a state supreme court stands on the same footing as a conflict between two lower federal courts.

The better justification for rejecting the defendants’ argument was that any potential conflict between the two orders did not compel the federal court to stay its hand. First, as Judge Granade pointed out, *Strawser* was filed and the original injunction entered before the state mandamus issued.<sup>75</sup> Second, the competing orders were unlikely to ripen into a genuine federal-state conflict, because the state mandamus by its terms allowed probate judges facing a competing federal injunction to seek and obtain release from the mandamus.<sup>76</sup> Class certification simply expanded the universe of probate judges subject to the direct force of the federal injunction, thereby expanding the universe of probate judges eligible to seek release from the mandamus—from Judge Davis to every probate judge in the state. A conflict or stalemate thus would arise only if the Supreme Court of Alabama refused to grant the release and continued to enforce the mandamus even against probate judges subject to the class injunction. But the state court gave no indication that it intended to provoke such a direct and open confrontation with a federal court. In any event, by staying the class injunction pending *Obergefell*, Judge Granade preempted even that possible conflict.

#### CONCLUSION: ALABAMA AFTER *OBERGEFELL*

*Obergefell* largely rendered Alabama’s final stand against marriage equality a historical footnote. Although the Supreme Court did not speak directly to Alabama law or directly enjoin Alabama officials, the decision

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<sup>74</sup> *Id.* at \*5.

<sup>75</sup> *Id.* at \*4.

<sup>76</sup> *Ex parte Alabama ex rel. Ala. Policy Inst.*, No. 1140460, 2015 WL 892752, at \*43 (Ala. Mar. 3, 2015).

served as binding precedent on the meaning of the Fourteenth Amendment. And the decision quickly moved Alabama officials to resolve litigation over that state's ban.

Alabama Governor Robert Bentley and Attorney General Strange both expressed profound disagreement with the decision, but pledged that they would uphold the law of the land, which now included a right for same-sex couples to marry on equal terms.<sup>77</sup> The *Strawser* plaintiffs argued that the stay of the class injunction, imposed “until the Supreme Court issues its ruling,”<sup>78</sup> lifted as soon as *Obergefell* issued; the injunction thus became immediately effective without further order from the court, enforceable through contempt proceedings against any probate judge who declined to issue licenses to same-sex couples.<sup>79</sup> The Association of County Commissions recommended that probate judges begin issuing marriage licenses to same-sex couples in the same manner and according to the same requirements as opposite-sex couples.<sup>80</sup> And Judge Granade quickly agreed in a July 1 clarifying order, stating “by the language set forth in the order, the preliminary injunction is now in effect and binding on all members of the Defendant Class.”<sup>81</sup> Probate judges in many parts of the state, including Judge Davis in Mobile, began issuing licenses the day of the ruling.<sup>82</sup>

Especially given the Supreme Court-dictated conclusion, everything that happened in Alabama in the months prior to *Obergefell* arguably wasted time, effort, and thousands of taxpayer dollars, forcing couples to bring additional federal lawsuits seeking discrete injunctions against individual probate judges or to litigate ancillary non-merits issues such as class certification. And the state Supreme Court's mandamus arguably represented a “quixotic” attempt by state officials and advocacy groups to

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<sup>77</sup> Arian Campo-Flores, *Alabama Probate Judges Begin Issuing Licenses for Same-Sex Marriages*, WALL STREET J. L. BLOG (June 27, 2015, 1:43 PM), <http://blogs.wsj.com/law/2015/06/27/alabama-probate-judges-begin-issuing-licenses-for-same-sex-marriages>. Jeremy Diamond, *Alabama Chief Justice: Marriage Ruling Worse than Segregation Decision*, CNN (June 28, 2015, 11:49 AM), <http://www.cnn.com/2015/06/26/politics/roy-moore-conservatives-gay-marriage-alabama-react> [<http://perma.cc/6JQ9-5E62>].

<sup>78</sup> *Strawser*, 2015 WL 2449468, at \*6.

<sup>79</sup> Memorandum from Counsel for Association of County Commissions of Alabama to Probate Judges (June 29, 2015), available at [http://acca.informz.net/ACCA/data/images/Sonny%27s\\_Docs/Obergefell%20Memo%20FINAL.pdf](http://acca.informz.net/ACCA/data/images/Sonny%27s_Docs/Obergefell%20Memo%20FINAL.pdf) [<http://perma.cc/DN8Z-4T8E>]; E-mail from Plaintiff Class Counsel to Defense Class Counsel in *Strawser v. Strange* (June 26, 2015), available at [http://acca.informz.net/ACCA/data/images/Sonny%27s\\_Docs/Strawser%20Strange.pdf](http://acca.informz.net/ACCA/data/images/Sonny%27s_Docs/Strawser%20Strange.pdf) [<http://perma.cc/GXL9-H5DF>].

<sup>80</sup> Memorandum from Counsel for Association of County Commissions of Alabama, *supra* note 79.

<sup>81</sup> *Strawser v. Strange*, No 14-0424-CG-C (S.D. Ala. July 1, 2015), available at [http://acca.informz.net/ACCA/data/images/Sonny's\\_Docs/145%20Order%20Grant%20M4%20Clari%20%20and%20staying%20Prelim%20%20Injunct.pdf](http://acca.informz.net/ACCA/data/images/Sonny's_Docs/145%20Order%20Grant%20M4%20Clari%20%20and%20staying%20Prelim%20%20Injunct.pdf) [<http://perma.cc/R57Z-SGQR>].

<sup>82</sup> Kati Weis, *Probate Judge Spends \$200,000 in Tax Dollars to Fight Gay Marriage*, EYEWITNESS NEWS 3 (June 30, 2015, 4:36 AM), <http://www.wfsb.com/story/29437289/probate-judge-spends-200000-in-tax-dollars-to-fight-gay-marriage>.

stop the inevitable,<sup>83</sup> which finally arrived in *Obergefell*.

Of course, *Obergefell* did not settle the issue for everyone. The Supreme Court of Alabama reminded probate judges that the parties in *Obergefell* had twenty-five days to seek reconsideration in the Supreme Court of the United States and ordered further briefing on the new precedent's effect on the state mandamus.<sup>84</sup> Initially, several counties declined to issue licenses to same-sex couples, others ceased issuing licenses at all, and others insisted on waiting for the Supreme Court's mandate to issue,<sup>85</sup> although those practices ended following Judge Granade's July 1 order clarifying that all probate judges statewide were bound by an effective injunction.

And, as expected, Moore was the most vocal in opposition. Off the bench, he argued that *Obergefell* was worse than *Plessy v. Ferguson*<sup>86</sup> and Supreme Court decisions about slavery,<sup>87</sup> and warned that the decision would lead to persecution of Christians,<sup>88</sup> although he did not renew his previous promises to defy any pro-marriage-equality decision.<sup>89</sup> Moore's responses might suggest that he was as motivated by anti-LGBTQ animus as George Wallace was by anti-African-American and anti-integration animus.<sup>90</sup> At the very least, Moore insisted, *Obergefell* did not take effect until the twenty-five day period for seeking reconsideration had expired;<sup>91</sup> he first argued that probate judges were prohibited from issuing licenses in that time period, then revised his position to insist only that they were not required to do so.<sup>92</sup> Of course, both positions failed because both ignored the immediate lifting of the stay of the *Strawser* injunction—it was that order, not the Court's broad constitutional statements in *Obergefell*, that actually controlled Alabama officials as to Alabama law and compelled them to issue licenses to same-sex couples.

The point, however, is that between January 2015 and June 26, 2015,

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<sup>83</sup> Krotoszynski, *supra* note 13.

<sup>84</sup> *Ex parte Alabama ex rel. Ala. Policy Inst.*, No. 1140460 (Ala. June 29, 2015), available at <http://lawprofessors.typepad.com/files/june-29-alabama-supreme-court-order-re-obergefell.pdf> [<http://perma.cc/57UN-XPTZ>].

<sup>85</sup> Campo-Flores, *supra* note 77; E-mail from Plaintiff Class Counsel, *supra* note 79.

<sup>86</sup> Diamond, *supra* note 77.

<sup>87</sup> *Roy Moore on Gay Marriage Ruling: 'Christians are Going to be Persecuted'*, AL.COM (June 28, 2015, 4:31 PM), [http://www.al.com/news/index.ssf/2015/06/roy\\_moore\\_speaking\\_at\\_kimberly.html](http://www.al.com/news/index.ssf/2015/06/roy_moore_speaking_at_kimberly.html) [<http://perma.cc/5KYU-86GM>].

<sup>88</sup> *Id.*

<sup>89</sup> See also Lamparello, *supra* note 15, at 3–4.

<sup>90</sup> Putting aside the debate over whether Wallace was motivated by true belief, political expediency, or a combination of both. KLARMAN, *supra* note 9, at 436–37.

<sup>91</sup> Charles J. Dean, *Roy Moore: Alabama Judges Not Required to Issue Same-Sex Marriage Licenses for 25 Days*, AL.COM (June 29, 2015, 4:54 PM), [http://www.al.com/news/index.ssf/2015/06/roy\\_moore\\_gay\\_marriage.html](http://www.al.com/news/index.ssf/2015/06/roy_moore_gay_marriage.html) [<http://perma.cc/F5YS-X6CZ>].

<sup>92</sup> *Id.*

Alabama officials were legally obligated to issue marriage licenses to four same-sex couples. Beyond that, they were not legally obligated to adhere to merely persuasive authority. They were not obligated by court orders in actions to which they were not party or as to people who were not parties, simply to preserve efficiency for civil rights plaintiffs or public perceptions of the judiciary. And the Supreme Court of Alabama, like any lower federal tribunal, was not bound to follow precedent from a coordinate federal district court. There was no “defiance” in Alabama, only an insistence on procedural regularity, which *Obergefell* ultimately provided and with which most public officials appeared ready to comply.

More importantly, because marriage equality will not be the last civil rights battle fought in the federal judiciary, it is essential that courts, parties, attorneys, commentators, and the public account for and understand how procedural mechanisms affect constitutional litigation and constitutional change. While the controversy over marriage equality in Alabama shared the unfortunate rhetoric of past controversies over integration, comparing the demand for procedural regularity with George Wallace’s grandstanding refusal to comply with an explicit injunction is ill-advised, legally erroneous, historically inaccurate, and dismissive of the significance of formal judicial processes.