



## **A Really Hard Question: What Is Marriage Worth to You?**

March 9, 2018 / in [2018 blogposts](#) [blog](#) / by [David Fowler](#)

The last three weeks I've raised some hard questions that certain Christians—ministers, young couples, and future parents—are going to have to answer. This week I ask perhaps the hardest question of all, one all evangelical Christians will have to answer.

To resolve the questions I've asked, we have to get marriage and parental rights back on a foundation rooted in biological realities, which the Supreme Court rejected in *Obergefell v. Hodges*. We cannot argue for male-female marriage using the legal framework the *Obergefell* Court laid out. We have to go around (or perhaps, more accurately, "above" it).

### ***Obergefell* Governs Marriages Created by Government Statute**

The framework on which *Obergefell* rests is the notion that marriage is something the state defines and licenses. Under that framework, the Court said, same-sex couples have a *right* to a state-issued license to marry.

But the Supreme Court has also recognized that there are other frameworks upon which marriage can rest.

## **Supreme Court Recognizes Non-Governmental Marriages**

In *Meister v. Moore*, the Supreme Court said a couple could be lawfully married even if they did not follow Michigan's statutes on marriage.

That was because those statutes "*do not confer the right*" to marry. The Court said the "leading purpose" of most states' marriage statutes, at that time, was "to secure a registration of marriages" and provide "evidence by which marriages may be proved."

The right of a man and woman to marry (and only a man and woman to marry) was, according to the Court, part of the common law.

**Here's why that's important-common law is a framework for marriage different from that in *Obergefell*.**

Common law then, *as now*, exists outside of, apart from, and prior to any positive enactments by the state. Common law is not government-created law but pre-governmental law governing our interactions with one another that civil governments merely acknowledge.

## **What Does This Mean?**

It means that Tennessee should get out of the business of licensing marriages and allow the common law to govern the “creation” of marriage, meaning a man and woman can marry without getting the government’s permission. That takes the minister and the Christian couple out of the dilemmas I’ve mentioned. It makes common law spouses common law parents, addressing last week’s problem of parental rights.

In place of licensing statutes, the Legislature should enact a law like one currently in Texas that allows a man and woman to register their common law marriage so that there is evidence of the marriage. It is a law like the ones described by the Supreme Court in the Meister case.

Nothing in the Constitution or *Obergefell* requires states to enact statutes creating government-licensed marriages, and courts cannot constitutionally order states to enact licensing statutes.

### **But Won’t SCOTUS Just Redefine Common Law Marriage?**

Perhaps, but eighty years ago, in *Erie Railroad v. Tompkins*, the Supreme Court literally said it was “unconstitutional” for it to tell a state what its common law is, and that case is still the law today.

*Erie Railroad* also said there was no substantive common law at the federal level. If the Court now wants to create a *federal* common law right to marry, then it, not the state, will need to administer this new federal form of marriage.

### **But Won’t Tennessee’s Supreme Court**

## **Just Redefine Common Law Marriage?**

It shouldn't. In 2006, eighty-one percent of Tennessee's voters put this language in their Constitution: "[A]ny judicial interpretation purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee."

*Interpreting common law marriage to include same-sex couples is constitutionally prohibited.*

If our judges so flagrantly violate the clearly expressed will of the people, then the people should demand that the Legislature remove them from office (which isn't the same as impeachment) pursuant to Article VI, Section 6 of the Tennessee Constitution.

## **So What's the Hard Question?**

To take the legislative action I've proposed would bring down a super-sized North Carolina-style boycott. The LGBT groups can't afford to let even one state take back marriage from the Supreme Court lest other conservative states follow suit.

So, here's the hard question: Does the economy mean more to Christians than taking back our state's control over marriage and having laws that reflect the real meaning and design of marriage? Will the "scorn" that group and even other states will cast on our state be too much to bear?

What we choose to do will show us what we really believe. How much is the future of marriage and the family in Tennessee worth to you?

## Commentaries in the Marriage Series:

- [What Are Inalienable Rights and Liberty Worth to You?](https://factn.org/inalienable-rights-liberty-worth-you/) [https://factn.org/inalienable-rights-liberty-worth-you/]
- [A Really Hard Question: What Is Marriage Worth to You?](https://factn.org/really-hard-question-marriage-worth/) [https://factn.org/really-hard-question-marriage-worth/]
- [How Long Before Parents Have to Be Licensed by the State?](https://factn.org/how-long-parents-licensed-state/) [https://factn.org/how-long-parents-licensed-state/]
- [Should Christian Couples Get Legally Married?](https://factn.org/should-christian-couples-get-legally-married/) [https://factn.org/should-christian-couples-get-legally-married/]
- [Are Tennessee's Evangelical Pastors Licensing Same-Sex 'Marriages'?](https://factn.org/are-tennessees-evangelical-pastors-licensing-same-sex-marriages/) [https://factn.org/are-tennessees-evangelical-pastors-licensing-same-sex-marriages/]

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*David Fowler served in the Tennessee state Senate for 12 years before joining FACT as President in 2006. Read David's complete bio*  
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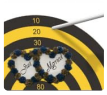
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