CHAPMAN UNIVERSITY
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July 15, 2019

Mr. David Fowler
President
The Family Action Council of Tennessee, Inc.
1113 Murfreesboro Road, No. 106-167
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Dear Mr. Fowler:

I am the Henry Salvatori Professor of Law & Community at Chapman University School of Law, where I also served as Dean from 2007 to 2010. I am also the founding Director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute. Prior to entering academia in 1999, I was a law clerk to Supreme Court Justice Clarence Thomas and Fourth Circuit Judge J. Michal Luttig, the Director of Congressional and Public Affairs at the U.S. Commission on Civil Rights, and an attorney with the national law firm of Kirkland & Ellis.

I have co-authored a major constitutional law textbook; provided entries in the Oxford Encyclopedia of Legal History and the Oxford Companion to the Supreme Court; and written more than sixty book chapters and scholarly articles in such journals as the *University of Chicago Law Review*, the *Georgetown Law Journal*, the *American Journal of Legal History*, the *Harvard Journal of Law & Public Policy*, the *BYU Journal of Public Law*, and the *Cato Supreme Court Review*.

I have also participated in over 140 cases before the Supreme Court of the United States, as amicus curiae or on behalf of parties, including in such landmark cases as *Boy Scouts of America v. Dale*; *Zelman v. Simmons-Harris* (the Ohio school vouchers case); *Newdow v. U.S. Congress* (the Pledge of Allegiance case); and *Gonzales v. Carhart* (the partial birth abortion case).

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I received my J.D. from the University of Chicago, where I was an Olin Fellow in Law & Economics, a Bradley Fellow in Constitutional History, a member of the Law Review, and Order of the Coif. I have a Ph.D. and an M.A. in Government from the Claremont Graduate School and a B.A. in Politics and Economics from the University of Dallas.[1]

You have asked me to opine on the following two questions:

1. Do the powers of the federal judiciary extend to imposing on states a requirement that they enact laws by which a license is provided for the form or kind of marriage to which people have a right under the Fourteenth Amendment according to the opinion of the United States Supreme Court in *Obergefell v. Hodges*, *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015)?

2. Is legislation that repeals Tennessee's existing statutory scheme providing for the issuance of a license for any form or kind of a relationship stipulated or designated by that scheme to be a marriage and instead allows a document to be recorded with a state or local official that only provides public notice and evidence of a man and woman having entered into marital contract at common law as husband and wife clearly controlled by or clearly constitutionally foreclosed by *Obergefell*?

In my professional judgment, the answer to both questions is no. In the development of this opinion I have reviewed the *Obergefell* opinions, the August 24, 2015 Final Judgment and Permanent Injunction entered in *Tanco v. Haslam*, United States District Court, Middle District of Tennessee, Nashville Division, Case No. 3:13-cv-01159, the pertinent provisions of the Tennessee Constitution, and Tenn. Code Ann. §§ 36-3-103, -104, and -113.

The Federal Judicial Power Cannot Compel or "Commandeer" States to License a Fourteenth Amendment Marriage

The federal judicial power is principally that of judgment, not will nor force. The latter powers instead reside in the legislative and executive branches of the federal government. That is not to deny to federal courts any power to fashion as part of its judgment a remedy for a breach of the law, but the remedy must be a proper means of curing the constitutional violation, and it "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[2]

Respect for the Separation of Powers

[1] The views expressed below are mine alone, and are not intended to represent the views of the institutions with which I am affiliated.

[2] *Missouri v. Bradley*, 433 U.S. 267, 281-82 (1977).

Federal courts must therefore respect and not violate by means of a remedy the separation of powers between the legislative and executive functions and, by virtue of that remedy, usurp the constitutional functions of the other branches of government.

This respect is most evident when a federal court holds a portion of a statute or statutory scheme unconstitutional (as was the case in *Obergefell*) and must then determine with respect to its remedial power of injunctive relief whether the intent of the legislative body, in enacting the statute or scheme, intended those provisions not in violation of the constitution to remain in force or intended the whole of the statute or statutory scheme to rise or fall on the constitutionality of the one provision in question. This presents the question of severability.

Here courts must be careful that the remedy of severing and enjoining enforcement of only a part of a statute or part of a statutory scheme from the whole in which it is contained does not cross over into the legislative function by so altering what is not enjoined as to change the nature or purpose of the legislative enactment. This is particularly true when the portion not enjoined effectively expands the statute beyond what the legislature intended. When this is done, the judicial remedy has effectively created a new law of a statutory nature notwithstanding the fact that the promulgation of new statutory laws is a power constitutionally delegated only to the legislative branch of government.

Respect for Federalism and Our System of Dual Sovereigns

The constitutional restraints on the remedial powers of federal courts are particularly acute and compelling when the proposed remedy touches upon "the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[3] Federal courts should exercise particular care not to "interfere in the decision, made by the people of a state, on how best to distribute certain powers between state and local government or *on whether to give certain powers to its government at all.*"[4] "If federalism and the Tenth Amendment mean anything, they must protect the state's decision on how to structure its own system of government."[5]

Constitutional constraints on the remedial powers of federal courts are particularly necessary when the remedy would expand the duty or authority of a particular state official. Then, the remedy again acts as or serves not only the function of a statutory law for a state, but inasmuch as the delegation of state powers is uniquely a state function, the remedial power is being used to overrule the state's sovereign prerogatives as to what branch, agency, subdivision, or official

[3] *Id.*

[4] John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 Cal. L. Rev. 1121, 1135 (1996)

[5] *Id.*

within state government is given the authority under the state's constitution to prescribe the new duty and, as a consequence, which of them should carry out the new duty. This is particularly "problematic" when the remedial power is expanding the scope of a particular official's duties whose duties can only be prescribed under the state's constitution by a particular branch, division, agency, or other official of state government.[6] That, of course, is precisely the situation under Tennessee law with respect to the duties of county clerks. By statute, Tennessee's county clerks have been authorized to issue a marriage license, but only to "male and female applicants." T.C.A. § 36-4-104(a)(1). If that statute were held to violate the Fourteenth Amendment, which conclusion would be consistent with the Supreme Court's holdings in *Obergefell*, the constitutionally permissible remedy would be to prevent enforcement of the statute, not to enlarge it to confer on county clerks a broader authority than was authorized by the legislature. By virtue of Article VII, section 1 of Tennessee's Constitution, the duties of the state's county clerk's "shall be prescribed by the General Assembly."

Thus, while a federal court, following *Obergefell*, might well be required to hold Tennessee's existing statutory scheme to be unconstitutional, the Tennessee legislature could respond in one of several ways: 1) by adopting a new statute without the male-female condition for civil marriage that the Supreme Court claims is contrary to the Fourteenth Amendment (assuming the authorizing provision in the state constitution were also modified); 2) by removing the offending statute; or 3) by leaving the offending statute in place but inoperative. In either of the latter two cases, there would be no authority for county clerks to issue civil marriage licenses at all, and no authority for a federal court to order them to do so without violating the anti-commandeering principle of *Printz v. United States*.[7]

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[6] The decision of the Tennessee Court of Appeal in *Smith v. State of Tennessee* is particularly apt:

> [U]sing the doctrine of elision to remove 'as defined in § 12-1-202' from Tenn. Code Ann. § 9-8-307(a)(1) (V) would expand the reach of subsection (V) and largely rewrite the statute. *See Crank,* 468 S.W.3d at 29. *Expanding a statute beyond what the legislature intended is usually problematic*. *See Halbert v. Shelby Cnty. Election Comm'n,* 31 S.W.3d 246, 248 (Tenn. 2000) ("In construing legislative enactments, the principal goals are to ascertain the legislative intent and give it effect without unduly restricting or expanding its coverage beyond its limited scope.). *Here, expanding the scope of this statue is particularly problematic because the power to authorize suits against the state is expressly reserved for the legislature by the Tennessee Constitution.* Tenn. Const. art. 1, § 17 ("Suits may be brought against the State in such manner and in such courts as the *Legislature* may by law direct." (emphasis added)). Rewriting the statute as Plaintiff suggests appears to authorize suits against the state in manner that the legislature did not direct, and we are rightfully hesitant to use the doctrine of elision in this context."

Smith v. State of Tennessee, No. E2015-01899-COA-R3-CV (Tenn. Ct. App Dec. 1, 2016) (emphasis added).

[7] 521 U.S. 898 (1997).

Thus, in my professional judgment, nothing the Supreme Court held in *Obergefell* purported (or could purport) to impose nor did it authorize a lower federal court by means of a judicial remedy to impose on Tennessee a new statutory scheme for licensing the kind of marital relationship that the Supreme Court has now held to be afforded by the Fourteenth Amendment; commandeer state officials to issuance license a relationship not within the definition of the marital relationship found in Tennessee's existing statutory licensure scheme, particularly when, by the state's Constitution, that official's duties may only be prescribed by the state's legislative branch; or impose a duty on the state to expand its practice of licensing what its state constitution defines as a marital relation to include in addition a relation stipulated by a branch of the federal government to be a marital relation.

All such acts of commandeering a state, its agencies and subdivisions, its officials, and its legislative body are impermissible under the U.S. Constitution.[8] At most, *Obergefell* would authorize a federal court to enjoin Tennessee from re-enacting some type of statutory scheme for the *licensing* of what is thereby designated a marital relationship if that scheme makes the issuance of a license dependent on the sex of the applicants for the license.

***Obergefell's* Analysis Does Not Prohibit Tennessee From Allowing the Recordation of a Document Evidencing and Proving Notice of a Marital Contract at Common Law.**

In regard to the second issue presented to me, I have read the opinion letter of law professor Adam MacLeod dated March 9, 2019 with respect to what is there called the Marital Contract at Common Law Recording Act. I concur in his assessment relative to *Obergefell's* application to the second issue:

> The Constitution of the United States does not deprive the states of their power to declare and make more secure natural rights and duties. To the contrary, the First through Ninth and Fourteenth Amendments expressly contemplate that the state and national governments will continue to give legal recognition to the rights and duties that the people enjoy as a matter of fundamental law. So, when the Supreme Court of the United States decided in *Obergefell v. Hodges* that states must extend the status of *civil* marriage—a status generated by a state's positive laws—to same-sex couples, the Court expressly bracketed and set aside as irrelevant its jurisprudence concerning those fundamental rights and duties that are found in the common law, what the majority called "history and tradition." The Court further insisted that it was not disparaging the views of those who understand marriage to be an inherently man-woman union, as the common law has always taught from time immemorial.

[8] *See, e.g., Printz v. United States*, 521 U.S. 898 (1997).

While I might take issue with the breadth of his claim that "the holding and reasoning of *Obergefell do not bear upon*" (emphasis added) the constitutionality of a statute that repeals Tennessee's existing statutory scheme for licensing a relationship designated by that positive law to be a marriage and allows a document to be recorded with a state or local official that only provides public notice and evidence of a marital contract at common law between a man and woman as husband and wife, I fully agree that the *Obergefell* decision certainly does not conclusively control the issue and that there is a legitimate basis upon which its constitutionality could be defended.

Let me add that I have no doubt that should the Marital Contract at Common Law Recording Act be adopted, it would be immediately challenged in federal court and likely held by the lower courts to be unconstitutional under the authority of *Obergefell*, notwithstanding the limited reach of the actual holding in *Obergefell*. And I also have no doubt that, were the composition of the Supreme Court the same as it was in *Obergefell*, such an extension of the limited holding would be affirmed by the Supreme Court. *Obergefell* was, after all, a blatant exercise of raw will rather than legal judgment, as the Chief Justice himself noted in his dissent, and were the same court to get this variation on the issue, that raw will would likely have been exercised in the same fashion again. But this Court's composition is not the same, and one hopes that the much more persuasive legal arguments of the Justices who dissented in *Obergefell* would prove persuasive to the Justices who have joined the Court since *Obergefell* was decided in 2015.

The Common Law Recording Act you have proposed is just the kind of development in the law that should force the Court to reconsider its prior views. Were it otherwise, we would find ourselves in precisely the predicament that Abraham Lincoln described in his First Inaugural Address. Decisions of the Supreme Court "must be binding in any case upon the parties to a suit … [and] also entitled to very high respect and consideration in all parallel cases.… 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." I applaud Tennessee for contemplating a legislative strategy that will reassert the right of the people to govern themselves on such a vital question as the very definition of marriage.

Sincerely,

John C. Eastman

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