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## The Precarious Position of Same-Sex Divorce in Texas

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# THE PRECARIOUS POSITION OF SAME-SEX DIVORCE IN TEXAS

By: Shawna M. Young

## ABSTRACT

Currently, same-sex couples that are legally married in a jurisdiction that recognizes same-sex marriage may not be able to divorce if they move to Texas. Of the few cases tried in Texas, most courts refused to grant the same-sex divorce because the courts refused to recognize the underlying marriage. Because these couples cannot simply return to the granting state due to most states' divorce residency requirements, they cannot divorce and face untold issues due to this inability. While Texas does offer the opportunity for the couple to declare the marriage void, declaring the marriage void is not an adequate legal remedy and may not prevent property and other legal issues. Instead, Texas should analyze divorce as implicating rights separate from those implicated by marriage. Based on such analysis, Texas should grant same-sex divorces.

While several authors have addressed this issue from a national standpoint, this Comment addresses the issue as it stands in Texas, where a jurisdictional split between the courts of appeals makes it ripe for discussion.

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## I. INTRODUCTION

Like marriage, divorce is an option most people take for granted. But not everyone can marry the person they love, and once married, not everyone can divorce the person they once loved. As the debate rages over whether same-sex marriage should be recognized, a mini-debate is raging over whether states that do not recognize same-sex marriage should at least grant same-sex couples' divorces.

As of this Comment, thirteen states and the District of Columbia recognize same-sex marriages.<sup>1</sup> In those states that do not recognize same-sex marriages, some courts have held that refusing to recognize out-of-state, same-sex marriages includes refusing to grant divorces to those couples who are otherwise validly married.<sup>2</sup> According to these courts, granting divorces to same-sex couples means recognizing the underlying marriage in contravention of their states' laws.<sup>3</sup>

However, there are serious ramifications if courts refuse to recognize valid, out-of-state same-sex marriages in order to grant divorces. If a legally married, same-sex couple moves to a state that refuses to divorce them, the couple may be unable to obtain a divorce altogether. Most married couples cannot simply return to the state that granted their marriage to divorce because all but four states have divorce residency requirements that preclude divorce for couples no longer residing in the state.<sup>4</sup> Precluded from divorcing in their new

1. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated Jun. 26, 2013).

2. *See, e.g., Chambers v. Ormiston*, 935 A.2d 956, 967 (R.I. 2007); *Kern v. Taney*, 11 Pa. D. & C. 5th 558, 576 (Berks Cnty. Ct. Com. Pl. 2010); *Rosengarten v. Downes*, 802 A.2d 170, 172 (Conn. App. Ct. 2002).

3. *See, e.g., Chambers v. Ormiston*, 935 A.2d 956, 967 (R.I. 2007); *Kern v. Taney*, 11 Pa. D. & C. 5th 558, 576 (Berks Cnty. Ct. Com. Pl. 2010); *Rosengarten v. Downes*, 802 A.2d 170, 172 (Conn. App. Ct. 2002).

4. As of the date of this Article, Alaska, Louisiana, South Dakota, and Washington do not have divorce residency requirements. *Grounds for Divorce and Residency Requirements*, ABA SEC. FAMILY LAW (Winter 2013), available at [http://www.americanbar.org/groups/family\\_law/resources/family\\_law\\_in\\_the\\_50\\_states.html](http://www.americanbar.org/groups/family_law/resources/family_law_in_the_50_states.html); *see also* Colleen McNichols Ramais, *'Til Death Do You Part . . . and This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013, 1015 (2010) (citing HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 703 (2d ed. 1987)).

state of residency and precluded from returning to the granting state just to divorce, these couples may find themselves in the untenable position of having no method of terminating their legal relationship.<sup>5</sup>

This Comment focuses on the situation in Texas for same-sex couples seeking a divorce. Part II explains the legal landscape in Texas for same-sex marriages and divorces. Part III addresses whether granting a divorce means recognizing the underlying marriage. Part IV discusses the constitutional analysis of denying divorce to same-sex couples and discusses some of the state interests Texas has suggested as justification for denying same-sex divorces. Part V discusses the inadequacy of declaring same-sex marriages void. Part VI suggests the scales are weighted toward Texas courts granting same-sex divorces.

## II. THE STATE OF AFFAIRS IN TEXAS

According to the U.S. Census Bureau, Texas is ranked fourth in number of same-sex couples.<sup>6</sup> Even so, Texas does not recognize same-sex marriages, even if the marriage is valid in other jurisdictions.<sup>7</sup> Whether Texas grants same-sex divorces is less settled.<sup>8</sup>

### A. Texas Laws Regarding Same-Sex Marriage

In 2003, the Texas Legislature passed a bill prohibiting same-sex marriage that became section 6.204 of the Texas Family Code.<sup>9</sup> The statute states in part:

(b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state. (c) The state or an agency or political subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.<sup>10</sup>

The statute is nestled among other sections in the Family Code that prohibit marriages that are against public policy, such as marrying

5. Mary Patricia Byrn & Morgan Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1, 2 (2012).

6. *Same-Sex Couple Households: 2011 American Community Survey*, UNITED STATES CENSUS BUREAU (2011), <http://www.census.gov/hhes/samesex/files/sssex-tables-2011.xls>.

7. TEX. CONST. art. I, § 32.

8. *See, e.g.*, *State v. Naylor*, 330 S.W.3d 434, 436 (Tex. App.—Austin 2011, pet. filed); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. filed).

9. *See* TEX. FAM. CODE ANN. § 6.204 (West 2012).

10. § 6.204(b)–(c).

close relatives, marrying a minor under sixteen, and marrying a stepchild or stepparent.<sup>11</sup>

When introduced, the bill included a section clearly stating that refusing to recognize same-sex marriage did not infringe on the rights of people in same-sex relationships because same-sex couples had other means of protecting those rights.<sup>12</sup>

In 2005, the Texas Legislature went further and amended the Texas Constitution to add a section limiting marriage to a man and a woman.<sup>13</sup> According to the amendment, “Marriage in this state shall consist only of the union of one man and one woman. . . . This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”<sup>14</sup>

The analysis of the amendment stated that the amendment was being introduced so that the public would vote on the issue of same-sex marriage instead of the court system extending marriage to same-sex couples.<sup>15</sup> Like the analysis for the statute, the analysis for the constitutional amendment included a disclaimer stating that same-sex couples could protect the rights marriage would protect through other legal means.<sup>16</sup> As of this Comment, the Texas Supreme Court has not decided any cases involving the amendment.

### B. *The Jurisdictional Split in Texas Courts of Appeals Regarding Same-Sex Divorce*

Though Texas law obviously prohibits same-sex marriage, Texas courts are still struggling with whether granting divorces to same-sex couples violates the Texas mini-DOMA law interred in the Texas Constitution, Article I, Section 32, and the related Family Code Section 6.204 that voids same-sex marriage and declares such marriages contrary to public policy. Two recent Texas Courts of Appeals cases, *State v. Naylor* and *In re Marriage of J.B. and H.B.*, showcase this struggle.<sup>17</sup>

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11. §§ 6.201–06.

12. Senate Comm. on State Affairs, Bill Analysis, Tex. S.B. 7, 78th Leg., R.S. (2003) (“[T]he legislature finds that through the designation of guardians, the appointment of agents, and the use of private contracts, persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legally recognized familial relationship between the persons.”).

13. TEX. CONST. art. I, § 32.

14. *Id.*

15. TEXAS LEGISLATIVE COUNCIL, ANALYSIS OF PROPOSED CONSTITUTIONAL AMENDMENTS 19 (2005), available at [http://www.lrl.state.tx.us/scanned/Constitutional\\_Amendments/amendments79\\_tlc\\_2005-11-08.pdf](http://www.lrl.state.tx.us/scanned/Constitutional_Amendments/amendments79_tlc_2005-11-08.pdf).

16. *Id.* at 22.

17. See *State v. Naylor*, 330 S.W.3d 434, 436 (Tex. App.—Austin 2011, pet. filed); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. filed).

The first case is *State v. Naylor*, decided by the Third Court of Appeals.<sup>18</sup> There, the trial court granted a divorce between two Texas residents who had traveled to Massachusetts in 2004 to be married.<sup>19</sup> The State of Texas attempted to intervene in the case, but the trial court held that the State's intervention was not timely and refused to allow the State to intervene.<sup>20</sup> The State appealed, and the court of appeals affirmed the trial court's judgment.<sup>21</sup> While the court avoided reaching the merits of the case, the court did note that the trial court could have reasonably interpreted Texas law to allow it to grant the divorce.<sup>22</sup>

The second case is *In re Marriage of J.B. and H.B.*, decided by the Fifth Court of Appeals.<sup>23</sup> There, both parties were residents of Massachusetts when they married.<sup>24</sup> After moving to Texas, J.B. filed a divorce petition.<sup>25</sup> Once again, the State of Texas attempted to intervene.<sup>26</sup> The trial court ruled that the State did not have standing to intervene in the case, and the court granted the divorce, holding that section 6.204 of the Texas Family Code was unconstitutional.<sup>27</sup> The Fifth Court of Appeals granted the State's intervention and overturned the trial court's decision, holding that Texas courts do not have subject-matter jurisdiction to adjudicate same-sex divorce petitions.<sup>28</sup> The court also held that section 6.204 was constitutionally valid and did not violate the Equal Protection clause.<sup>29</sup> A petition for review has been filed with the Texas Supreme Court.<sup>30</sup>

### III. RECOGNIZING THE UNDERLYING MARRIAGE

At first blush, the contention that a Texas court should not grant a divorce for a marriage it would not otherwise recognize seems reasonable. After all, marriage is a necessary precedent condition for divorce. In fact, more than one court has followed this logic and refused to issue a divorce decree.<sup>31</sup> For example, in *Mireles v. Mireles*, the First

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18. *Naylor*, 330 S.W.3d at 436.

19. *Id.* at 441.

20. *Id.* at 438.

21. *Id.*

22. *Id.* at 442 (quoting *City of Houston v. Clark*, 197 S.W.3d 314, 320 (Tex. 2006)).

23. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 654 (Tex. App.-Dallas 2010, pet. filed).

24. *Id.* at 659.

25. *Id.*

26. *Id.*

27. *Id.* at 660.

28. *Id.* at 659.

29. *Id.* at 681.

30. *Case Information*, TEX. CTS. ONLINE, <http://www.search.txcourts.gov/Case.aspx?cn=11-0024> (last visited Jul. 24, 2013).

31. See, e.g., *In re Marriage of J.B.*, 326 S.W.3d at 666; *Mireles v. Mireles*, No. 01-08-00499-CV, 2009 WL 884815 (Tex. App.—Houston [1st] Apr. 2, 2009) (mem. op.); *Kern v. Taney*, 11 Pa. D. & C. 5th 558, 576 (Berks Cnty. Ct. Com. Pl. 2010); but see *In re Estate of Dalip Singh Bir*, 188 P.2d 499 (Cal. Ct. App. 1948) (“recognizing” polyga-

Court of Appeals voided a divorce decree that had been issued for a Texas marriage between a female and a transgendered male.<sup>32</sup> According to the court, “A Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person.”<sup>33</sup>

Likewise, the Fifth Court of Appeals quoted *Mireles* in *In re Marriage of J.B.* and used the same reasoning to hold that Texas courts did not have jurisdiction to grant divorces in same-sex marriages.<sup>34</sup> The court extended the holding in *Mireles*, which was a marriage granted in Texas and presumably invalid in all jurisdictions from the outset, to valid marriages granted outside of Texas.

While the analysis might change if the marriage occurred in a non-recognizing state, courts can grant divorces without defying their state’s mini-DOMA laws. Recognizing a marriage and granting a divorce are not synonymous.<sup>35</sup> Recognizing an out-of-jurisdiction marriage in the fashion precluded by Texas law means conferring in-state marital status on a couple, with attendant rights and obligations. It does not mean “acknowledging” the marriage temporarily in order to remove a status granted outside the jurisdiction.<sup>36</sup> Any right or obligation conferred via divorce relates only to the orderly dissolution of a legal relationship and to marriage. As the United States Supreme Court noted in *Boddie v. Connecticut*, marriage is a relationship and divorce is the means to dissolve a relationship.<sup>37</sup>

The Wyoming Supreme Court followed this line of reasoning in *Christiansen v. Christiansen* when the court addressed whether Wyoming district courts could grant same-sex divorces.<sup>38</sup> Like Texas, Wyoming does not recognize same-sex marriage and defines marriage as only between a man and a woman.<sup>39</sup> In *Christiansen*, a same-sex couple, validly married in Canada, appealed a district court ruling that held Wyoming courts did not have subject-matter jurisdiction to grant same-sex divorces.<sup>40</sup> In light of Wyoming’s law limiting marriage to opposite-sex couples, the district court determined there was no marriage to dissolve.<sup>41</sup>

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mous marriage for intestate property division); *Miller v. Lucks*, 36 So. 2d 140, 142 (Miss. 1948) (“recognizing” interracial marriage for intestate property division).

32. *Mireles*, 2009 WL 884815, at \*2.

33. *Id.* (quoting in part *Templeton v. Ferguson*, 33 S.W. 329, 332 (Tex.1895)).

34. *In re Marriage of J.B.*, 326 S.W.3d at 666.

35. Divorce and marriage are also separate rights. See discussion *infra* Part IV.A.

36. For an excellent discussion of the “incidents of marriage” approach, see Barbara Cox’s article *Using An “Incidents Of Marriage” Analysis When Considering Interstate Recognition Of Same-Sex Couples’ Marriages, Civil Unions, And Domestic Partnerships*, 13 WIDENER L.J. 699 (2004).

37. *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

38. *Christiansen v. Christiansen*, 253 P.3d 153, 154 (Wyo. 2011).

39. WYO. STAT. ANN. § 20-1-101 (West 2012).

40. *Christiansen*, 253 P.3d at 154.

41. *Id.* at 155.

The Wyoming Supreme Court overturned the decision and held Wyoming's law did not apply to divorce proceedings because "[a] divorce proceeding does not involve recognition of a marriage as an ongoing relationship."<sup>42</sup> The Court also noted that "recognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages."<sup>43</sup>

Wyoming's decision is congruous with earlier cases in which courts acknowledged marriages contrary to their state's public policy for a specific purpose other than granting marital status.<sup>44</sup> In *In re Dalip Singh Bir's Estate*, a California court of appeals "recognized" a polygamous marriage solely for intestate property division.<sup>45</sup> The Pennsylvania Supreme Court in *In re Lenherr's Estate*, the Louisiana Supreme Court in *Succession of Caballero*, and the Mississippi Supreme Court in *Miller v. Lucks* all "recognized" marriages otherwise void for intestate succession.<sup>46</sup> More recently, an Iowa trial court in *In re Marriage of Brown* dissolved a Vermont civil union between two women—then unrecognized by Iowa—based in equity.<sup>47</sup>

Like these other states, Texas courts can "recognize" a same-sex marriage in a narrow fashion and for the sole purpose of granting a divorce without impermissibly recognizing the marriage in order to confer marital status to a same-sex couple.

#### IV. CONSTITUTIONAL ANALYSIS OF DENYING DIVORCE FOR SAME-SEX COUPLES

Many courts have analyzed the constitutionality of denying same-sex divorce by analyzing the constitutionality of their state's law denying same-sex marriage.<sup>48</sup> This may be an extension of the belief that a court cannot grant a divorce when it cannot recognize the underlying marriage. However, this analysis is flawed. Analyzing the constitutionality of denying same-sex marriage is not analogous to analyzing the

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42. *Id.* at 156.

43. *Id.*

44. *See, e.g.*, JOSEPH H. BEALE, 2 A TREATISE ON THE CONFLICT OF LAWS 666 (1935); *Ortley v. Ross*, 110 N.W. 982, 983 (Neb. 1907) (recognizing polygamous marriage); *Rogers v. Cordingley*, 4 N.W.2d 627, 629 (Minn. 1942) (recognizing polygamous marriage); *Mayse v. Newman*, 118 P.2d 398, 400 (Okla. 1941) (recognizing polygamous marriage); *In re May's Estate*, 114 N.E.2d 4, 7 (N.Y. 1953) (recognizing incestuous marriage).

45. *In re Dalip Singh Bir's Estate*, 83 Cal. App. 2d 256, 262 (1948).

46. *In re Lenherr's Estate*, 314 A.2d 255, 259 (Pa. 1974); *Succession of Caballero*, 24 La. Ann. 573, 578 (1872); *Miller v. Lucks*, 36 So. 2d 140, 142 (Miss. 1948).

47. *In re Marriage of Brown*, Equity No. CDCD 119660 (Iowa Dist. Ct. Nov. 14, 2003), *appeal dismissed for lack of standing sub nom. Alons v. Iowa Dist. Court for Woodbury Cnty.*, 698 N.W.2d 858, 874 (Iowa 2005).

48. *See, e.g.*, *Rosengarten v. Downes*, 71 Conn. App. 372, 388–92 (2002); *Kern v. Taney*, 11 Pa. D. & C. 5th 558, 568–70 (Berks Cnty. Ct. Com. Pl. 2010); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 675 (Tex. App.—Dallas 2010, pet. filed).



constitutionality of denying same-sex divorce because divorce and marriage implicate different individual rights.

A. *Marriage and Divorce Implicate Different Rights*

Though the right to marry does not (yet) include same-sex marriage,<sup>49</sup> the Supreme Court has repeatedly declared marriage a fundamental right.<sup>50</sup> Marriage implicates the right of privacy and is a “vital personal right[ ] essential to the orderly pursuit of happiness . . . .”<sup>51</sup>

In contrast, divorce implicates the right to access the courts under the Due Process Clause of the 14th Amendment.<sup>52</sup> The Supreme Court made this clear in *Boddie v. Connecticut*.<sup>53</sup> In *Boddie*, the plaintiff, who was indigent, sued Connecticut because the state would not start her divorce action unless she paid the filing fee.<sup>54</sup> Instead of declaring divorce an individual right, the Court declared Connecticut’s policy unconstitutional as a restriction on access to the courts.<sup>55</sup> The Court opined that divorcing couples cannot obtain relief through any other means than the state’s judicial system.<sup>56</sup> Because of this monopoly, divorcing couples are similar to defendants who are “compelled to litigate their differences in the judicial forum” and are covered by the same due process protections.<sup>57</sup> The Court applied strict scrutiny review and held that a state may not “pre-empt the right to dissolve [marriages] without affording all citizens access to the means it has prescribed for doing so.”<sup>58</sup>

The Court did not analyze the plaintiff’s rights in obtaining a divorce in *Boddie* the same way it analyzed the plaintiffs’ rights to

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49. *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (Justice O’Connor, concurring).

50. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

51. *Loving*, 388 U.S. at 12.

52. *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (“[D]ue process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.”); *see also* Meg Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILL. L. REV. 169, 202–04 (2013).

53. L. Lynn Hogue, *The Constitutional Obligation to Adjudicate Petitions for Same-Sex Divorce and the Dissolution of Civil Unions and Analogous Same-Sex Relationships: Prolegomenon to a Brief*, 41 CAL. W. INT’L L.J. 229, 238 (2010); *see also* Ramais, *supra* note 4, at 1033–34; Mary P. Byrn & Morgan L. Holcomb, *Same-Sex Divorce in a DOMA State*, 50 FAM. CT. REV. 214, 215 (2012).

54. *Boddie*, 401 U.S. at 372.

55. *Id.* at 382–83.

56. *Id.* at 376 (“Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State’s judicial machinery.”)

57. *Id.* at 377.

58. *Id.* at 383.

marry in *Loving v. Virginia* and *Zablocki v. Redhail*.<sup>59</sup> The Court analyzed the plaintiff's right to divorce in *Boddie* as the due process right to a meaningful opportunity to be heard.<sup>60</sup> In contrast, the Court analyzed the plaintiffs' right to marry in *Loving* and *Zablocki* as a fundamental, personal right.<sup>61</sup> By its analysis, the Court distinguished the two rights by distinguishing the animating Constitutional authority behind them.<sup>62</sup>

If same-sex couples are prohibited from divorcing in Texas courts, their situation is strikingly similar to the plaintiff's situation in *Boddie* because they would be unable to obtain relief through any other means.<sup>63</sup> Contrary to Texas' argument, declaring the marriage void does not offer adequate, meaningful relief to same-sex couples.<sup>64</sup> Thus, like the plaintiff in *Boddie*, same-sex couples would be trapped in legal relationships they cannot dissolve because states have a monopoly on granting divorces to their citizens. Unlike residency requirements, which the Supreme Court upheld,<sup>65</sup> Texas' complete denial of divorce falls afoul of the holding in *Boddie*.<sup>66</sup> Like Connecticut's policy in *Boddie*, Texas' policy of denying some citizens access to the means of obtaining divorces would likely be subjected to strict scrutiny review if before the Supreme Court. Texas' policy would most certainly fail strict scrutiny review; arguably, Texas' policy would not even survive rational basis review.

#### B. *Courts Questioning Constitutionality in Cases About Same-Sex Divorce Should Analyze Divorce—Not Marriage*

Courts questioning the constitutionality of denying same-sex divorce should analyze whether denying divorce is constitutionally suspect, not whether denying same-sex marriage is constitutionally suspect. However, most courts' analysis, if not all, is flawed because it has been the latter and not the former.<sup>67</sup> As mentioned above, divorce and marriage are separate rights and should be analyzed separately, and the appropriate question courts should be asking is whether denying divorce violates the Constitution.<sup>68</sup>

59. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); see also Hogue, *supra* note 53, at 239.

60. *Boddie*, 401 U.S. at 377.

61. *Zablocki*, 434 U.S. at 384; *Loving*, 388 U.S. at 12.

62. Hogue, *supra* note 53, at 239.

63. Petitioner's Brief on the Merits at 37, *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. filed) (No. 11-0024), 2011 WL 8584393 at \*37; see also Hogue, *supra* note 53, at 239.

64. See discussion *infra* Part V.

65. See, e.g., *Sosna v. Iowa*, 419 U.S. 393 (1975).

66. *Boddie v. Connecticut*, 401 U.S. 371, 382–83 (1971).

67. See, e.g., *Rosengarten v. Downes*, 71 Conn. App. 372, 388–92 (2002); *Kern v. Taney*, 11 Pa. D. & C. 5th 558, 568–70 (Berks Cnty. Ct. Com. Pl. 2010); *In re Marriage of J.B.*, 326 S.W.3d at 675.

68. See discussion *supra* Part IV.A.

The Fifth Court of Appeals improperly analyzed marriage and not divorce in *In re Marriage of J.B.* when the court addressed an equal protection attack on section 6.204 of the Texas Family Code.<sup>69</sup> The court decided strict scrutiny did not apply because homosexuals were not a suspect class and because same-sex marriage was not a fundamental right.<sup>70</sup>

The court then analyzed section 6.204 to determine if the law served a legitimate purpose under rational basis review.<sup>71</sup> After concluding Texas might have a rational basis to conclude that limiting marriage to opposite-sex partners furthered an “optimal” setting for child-rearing, the court held that the law did not violate the Equal Protection Clause.<sup>72</sup> Nowhere in its opinion did the court analyze whether denying same-sex divorce bore a rational relation to a legitimate state interest.<sup>73</sup> Had the court analyzed whether section 6.204 was unconstitutional as applied to same-sex divorce, the court most likely would have come to a different conclusion.

### C. Denying Same-Sex Divorce Probably Violates the Constitution

Considering the Supreme Court’s precedent in *Boddie*, laws completely precluding citizens from divorcing would probably be subject to strict scrutiny review.<sup>74</sup> In the Court’s own words, a state must have “a countervailing state interest of overriding significance” when it denies its citizens “the sole means . . . for obtaining a divorce.”<sup>75</sup> Thus, if Texas courts interpret section 6.204 of the Texas Family Code to deny divorce to same-sex couples, then the law would most likely be subject to strict scrutiny review. Like Connecticut, Texas would be violating the due process requirement of an opportunity to be heard by denying divorce to some of its citizens, and like Connecticut’s law, Texas’ law would be overturned unless Texas could produce a state interest of overriding significance. However, Texas has not produced such an interest and arguably cannot. In fact, Texas likely would be unable to produce a legitimate interest to defend section 6.204 under even the lenient standard of rational and basis review because denying divorce serves no legitimate state interest.<sup>76</sup>

Courts in Texas have not addressed whether Texas has any legitimate interest in denying same-sex couples divorce because courts

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69. *In re Marriage of J.B.*, 326 S.W.3d at 675.

70. Note that the court did not consider whether divorce was a fundamental right though there is a very good argument it is in light of *Boddie*. See discussion *supra* Part IV.A.

71. *In re Marriage of J.B.*, 326 S.W.3d at 676–78.

72. *Id.* at 677.

73. *Id.*

74. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

75. *Id.*

76. See *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

have conducted their analyses on marriage and not divorce.<sup>77</sup> Neither has the State argued that it has a legitimate interest in denying divorce to same-sex couples because courts have not distinguished divorce from marriage.<sup>78</sup> In the context of denying same-sex marriage, though, Texas has proposed legitimate interests in *encouraging responsible procreation*,<sup>79</sup> protecting tradition,<sup>80</sup> and *promoting morality*.<sup>81</sup> Courts have analyzed these interests as related to marriage, and the State has persuaded most courts that (1) these interests are valid and (2) denying same-sex marriage furthers these interests.<sup>82</sup>

As to the validity of these interests, courts nation-wide are divided over whether such interests sanction laws that discriminate against homosexuals.<sup>83</sup> In the context of other rights, courts have found no relation between such state interests and denying same-sex couples health benefits,<sup>84</sup> joint bankruptcy petitions,<sup>85</sup> or adoption.<sup>86</sup> Likewise, it would be unlikely that a court would uphold a law that denies same-sex couples divorce based on these interests.

### 1. Encouraging Responsible Procreation

*Encouraging responsible procreation* is one of Texas's primary asserted legitimate state interests in prohibiting same-sex marriage.<sup>87</sup> Abbreviated, Texas' argument is that the State should encourage couples that can "naturally" procreate to get married.<sup>88</sup> While Texas allows adoption, in vitro fertilization, and surrogate parenting, "natural" reproduction (apparently defined as the result of heterosexual intercourse) is something only opposite-sex couples can do without outside help.<sup>89</sup> Children, as a "natural" result of opposite-sex relationships, do better in stable households with opposite-sex parents.<sup>90</sup> Mar-

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77. See discussion *supra* Part IV.B.

78. *Id.*

79. Brief of the State of Texas at 17–20, *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. filed) (No. 05-09-01170-CV), 2010 WL 1367402, at \*17–\*20.

80. *Id.* at 12–17.

81. Respondent's Brief at 41, *Lawrence v. Texas*, 539 U.S. 558, 585 (2003).

82. See, e.g., *State v. Naylor*, 330 S.W.3d 434, 436 (Tex. App.—Austin 2011, pet. filed); *In re Marriage of J.B.*, 326 S.W.3d at 654.

83. Compare *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), and *Naylor*, 330 S.W.3d at 434, with *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006), and *In re Marriage of J.B.*, 326 S.W.3d at 654.

84. *Dragovich v. U.S. Dep't of Treasury*, 764 F. Supp. 2d 1178 (N.D. Cal. 2011); *Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010).

85. *In re Balas*, 449 B.R. 567, 569 (Bankr. C.D. Cal. 2011).

86. *Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 81, 91 (Fla. Dist. Ct. App. 2010); see also Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 LOY. L.A. L. REV. 781, 841–46 (2012).

87. See, e.g., *In re Marriage of J.B.*, 326 S.W.3d at 677–78.

88. *Id.*

89. *Id.*

90. *Id.*

riages produce more stable homes, and therefore Texas should encourage opposite-sex couples to marry.<sup>91</sup>

Opponents of same-sex marriage have awkwardly stretched the State's legitimate interest in encouraging responsible procreation into a justification for denying same-sex marriage, but it seems incomprehensible how this interest could be used as justification to deny same-sex divorce. Refusing to grant divorces to same-sex couples simply does not further the potentially legitimate state interest of encouraging responsible procreation. Divorce is unrelated to procreation because couples do not divorce each other in order to procreate with each other. Removing marital status from a same-sex couple does not interfere with encouraging opposite-sex couples to marry. In fact, refusing to grant same-sex couples divorces could deter the State's version of responsible procreation. Because some people in same-sex relationships enter opposite-sex relationships when their relationship ends, denying divorce prevents those people from ending their legal marriage (albeit from another state), remarrying, and having children. Refusing to grant a divorce decreases the likelihood more children would be raised in an opposite-sex household.

Most importantly, removing a marital status Texas refuses to recognize anyway is not related to protecting children. Instead, children of the relationship face hardship when their parents are not protected by the legal means of divorce.<sup>92</sup>

## 2. Tradition

Having asserted it in relation to denying same-sex marriage, *protecting tradition* is another interest Texas might assert to defend denying divorce to same-sex couples.<sup>93</sup> States, though, have used the interest of tradition to justify slavery,<sup>94</sup> gender discrimination,<sup>95</sup> and racial discrimination,<sup>96</sup> and as a state interest, *protecting tradition* should be viewed suspiciously when used by states to justify discriminatory laws.<sup>97</sup> Furthermore, claiming that a law furthers the legitimate interest of upholding tradition is an illogical response to an Equal Protection challenge because Equal Protection protects minorities, but

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91. *Id.*

92. See discussion *infra* Part V.B.

93. See, e.g., Brief of the State of Texas, *supra* note 79, at 30; Respondent's Brief, *supra* note 81, at 9–18.

94. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 416 (1856); see also Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 326–27 (2011).

95. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 421–22 (1908); see also Forde-Mazrui, *supra* note 94, at 327.

96. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896), *overruled by* *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954); see also Forde-Mazrui, *supra* note 94, at 326–27.

97. Forde-Mazrui, *supra* note 94, at 322.

tradition is defined by the majority.<sup>98</sup> Most importantly, the Supreme Court found *protecting tradition* unpersuasive as a legitimate state interest when the State of Texas used tradition to justify discriminatory measures against homosexuals.<sup>99</sup> In *Lawrence v. Texas*, the Court held a history and tradition of censure toward homosexuals was not a sufficient reason to uphold a law under rational basis review.<sup>100</sup>

Logically, *protecting tradition* is spurious when used to justify a ban on divorce. Tradition does serve some legitimate purpose in society, such as maintaining predictability and stability, promoting a shared identity, and avoiding the unforeseen consequences of change, but granting divorces to same-sex couples does not frustrate any of these legitimate ends.<sup>101</sup> Instead, denying same-sex couples the right to divorce undermines predictability and stability because it denies the couple a definitive end to their relationship.<sup>102</sup> Texas' jurisdictional split is a clear example of such a result.<sup>103</sup> Denying same-sex couples the right to divorce does not promote a shared identity, aside from perhaps an identity of disfavoring homosexuals, and this is impermissible prejudice as seen in *Lawrence* and *Romer*.<sup>104</sup> Denying same-sex couples the right to divorce does not avoid unforeseen consequences of change. Allowing same-sex divorces introduces almost no change into the legal system or into society as there are no greater impositions on either to declare a marriage void than to grant a divorce decree. Instead, there might be unforeseen consequences from refusing to grant a divorce because such refusal leaves same-sex couples in legal limbo—the consequences of which are yet to be fully determined.

### 3. Promoting Morality and Expressing Disapproval

Texas might claim a legitimate interest in promoting residents' sexual mores or expressive concerns, as it did in *Lawrence*.<sup>105</sup> However, *promoting morality* (and similarly, indicating moral disapproval) may not have survived as a legitimate state interest.<sup>106</sup> Of all states, Texas should know this best because it was a party in a case where the Supreme Court made it abundantly clear that moral disapproval, standing alone, is not a legitimate state interest and does not withstand

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98. *Id.* at 297 (citing Rebecca L. Brown, *Tradition and Insight*, 103 *YALE L.J.* 177, 205 (1993)).

99. See Respondent's Brief, *supra* note 81, at 41.

100. *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

101. Forde-Mazrui, *supra* note 94, at 293.

102. See discussion *infra* Part V.B.

103. Compare *State v. Naylor*, 330 S.W.3d 434, 436 (Tex. App.—Austin 2011, pet. filed), with *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 654 (Tex. App.—Dallas 2010, pet. filed).

104. See discussion *infra* Part IV.C.3.

105. Respondent's Brief, *supra* note 81, at 42–48.

106. Hogue, *supra* note 53, at 235.

rational basis review.<sup>107</sup> In *Lawrence*, Texas attempted to defend a law criminalizing homosexual sodomy by claiming it furthered the legitimate state interest of *promoting morality*.<sup>108</sup> The Court promptly struck down this argument by holding that “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”<sup>109</sup>

States also cannot legislate animus.<sup>110</sup> In *Romer v. Evans*, the Supreme Court—using rational basis review—struck down a Colorado law invalidating any law that prohibited anti-gay discrimination.<sup>111</sup> The Court said that the law was not rationally related to any *legitimate* state purpose and therefore the law was inferentially based in animosity toward homosexuals.<sup>112</sup> Quoting *Department of Agriculture v. Moreno*, the Court said that “a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>113</sup>

Taken together, *Lawrence* and *Romer* proscribe Texas from claiming any state interest based on moral disapproval or animosity toward homosexuals. But even if promoting a certain view of morality were a legitimate state interest, it is far too attenuated from denying divorce to same-sex couples to be a rational basis for such denial. Divorce dissolves a status and does not create one. Therefore, the State is not sanctioning a certain type of relationship by granting a divorce; it is merely putting the couple in the same position as other homosexual citizens of the state. Neither does Texas legitimize or extend the right to marry to same-sex couples by granting divorces to them because divorce is based on a right (access to the courts) other than the right to marry.<sup>114</sup> Granting a divorce does not implicate any right to marry. The marriage has already happened, and now the parties are seeking an opportunity to be heard.

## V. DECLARING THE MARRIAGE VOID

In *In re Marriage of J.B.*, Texas argued that J.B. and H.B. had the option to bring a suit to declare their marriage void and that option offered them relief significantly similar to relief obtained through divorce.<sup>115</sup> But a suit to declare a marriage void is not a divorce by another name. A suit to declare a marriage void is an inadequate

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107. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

108. *Id.* at 582.

109. *Id.* at 583 (quoting *Romer*, 517 U.S. at 633).

110. *Romer*, 517 U.S. at 634.

111. *Id.* at 635–36.

112. *Id.* at 634.

113. *Id.* at 633 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

114. See discussion *supra* Part IV.A.

115. Brief of the State of Texas, *supra* note 79, at 8–11.

substitute for a divorce, and Texas does not provide an adequate legal remedy for same-sex couples by providing them the opportunity to declare their marriage void.

A. *The State That Issued the Marriage License May Not Recognize Texas' Declaration That the Marriage Was Void*

First of all, unlike divorce cases, there is little if any litigation regarding one state recognizing a declaration that a marriage is void from another state.<sup>116</sup> There are only a few situations that give rise to void marriages, such as underage or incestuous marriages, and courts generally uphold marriages void in their own state but valid in the issuing state (same-sex marriages aside).<sup>117</sup> Thus, while case law offers precedent to extend full faith and credit to out-of-state divorces, there is no precedent to extend full faith and credit to out-of-state actions declaring a marriage void.<sup>118</sup>

In *In re Marriage of J.B.*, Texas argued that a declaration that a marriage was void would be recognized in other states, but the case Texas cited was not analogous.<sup>119</sup> In its brief, the State cited *Sutton v. Lieb* as proof that annulments, at least, were recognized across state lines.<sup>120</sup> *Sutton*, however, is distinguishable from both *State v. Naylor* and *In re Marriage of J.B.* because *Sutton* concerned a contested marriage void both in the state granting the marriage and in the state granting the annulment.<sup>121</sup> In contrast, the marriages in *State v. Naylor* and *In re Marriage of J.B.* were valid in the state granting them and void only in Texas.<sup>122</sup>

In fact, *Sutton* was distinguished from another case—*Linneman v. Linneman*—for this very reason.<sup>123</sup> In *Linneman*, the Illinois Appellate Court specifically refused to follow *Sutton* (also originally an Illinois case).<sup>124</sup> The court held an annulment granted in California was invalid because the annulment would not have been valid in Illinois, the granting state.<sup>125</sup> The court held that “unless the California decree of annulment was granted on grounds that were recognized in Illinois

116. Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73, 107–08 (2011).

117. See, e.g., *Tex. Emp'rs Ins. Ass'n v. Elder*, 282 S.W.2d 371 (Tex. 1955); *Hous. Oil Co. v. Griggs*, 181 S.W. 833 (Tex. Ct. App. 1915); *Blumenthal v. Blumenthal*, 275 P. 987 (Cal. Ct. App. 1929); *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953); see also *Byrn & Holcomb*, *supra* note 53, at 217.

118. Oppenheimer, *supra* note 116, at 106–08.

119. Brief of the State of Texas, *supra* note 79, at 9–10.

120. *Id.*

121. *Sutton v. Lieb*, 342 U.S. 402, 405–06 (1952); *Linneman v. Linneman*, 116 N.E.2d 182, 186 (Ill. App. Ct. 1953).

122. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 659 (Tex. App.—Dallas 2010, pet. filed); *State v. Naylor*, 330 S.W.3d 434, 436 (Tex. App.—Austin 2011, pet. filed).

123. *Linneman*, 116 N.E.2d at 186.

124. *Id.*

125. *Id.*



... it would not be binding on the defendant.”<sup>126</sup> Therefore, even the case Texas relied on in its brief offers no guarantee that other states will extend to Texas the full faith and credit it has refused to extend to their marriages.

Second, a state could justify ignoring Texas’ attempt to invalidate the marriage because such an attempt likely violates the granting state’s public policy. Just as Texas refuses to recognize same-sex marriages because such recognition violates its public policy, the granting state likely recognizes same-sex marriages due to state interests in equal protection, anti-discrimination, and/or household stability. Texas violates these policies when it declares a marriage granted in such a state void.

More pragmatically, a state might refuse to recognize Texas’ declaration that a marriage granted in its jurisdiction was void because doing so could create havoc both for the couple and for any business that relied on the couple’s married status. A void marriage is void *ab initio*.<sup>127</sup> This means that all the actions the couple took in the granting state based on their marital status are now called into question. Retroactively changing the couple’s status drastically alters the legal landscape of the couple’s mutual property and mutual obligations. When dealing with opposite-sex couples, creditors may use joint assets in community property states to satisfy joint obligations or may argue the doctrine of necessities to obligate spouses.<sup>128</sup> But if the couple’s marriage can be declared void overnight, creditors would not be able to rely on either to satisfy debts.<sup>129</sup> Furthermore, in community property states, property attained as a couple would no longer be joint property to be divided by court order because the marriage never existed.<sup>130</sup> Granting states could very easily justify ignoring Texas’ declaration that the marriage is void just to prevent such uncertainty.

#### B. *Declaring the Marriage Void Is an Inadequate Substitute for Divorce*

Contrary to the State’s argument, a declaration that a marriage is void is not commensurate with a divorce decree.<sup>131</sup> Declaring a marriage void is inferior to a divorce proceeding in many respects. First, a suit to declare a marriage void does not protect property rights as well as a divorce proceeding.<sup>132</sup> Premarital agreements are generally en-

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126. *Id.* at 184–85.

127. *Simpson v. Neely*, 221 S.W.2d 303, 308 (Tex. Civ. App.—Waco 1949, writ ref’d) (“A void marriage is one that is absolutely null, having no force or effect for any purpose, at any place or time . . .”).

128. Jill C. Rush, *Unequal Treatment and Creditor Frustrations: The Limited Impact of Legalizing Same Sex Marriage*, 21 EMORY BANKR. DEV. J. 743, 748 (2005).

129. *Id.* at 748–49.

130. TEX. FAM. CODE ANN. § 3.002 (West 2012).

131. Brief of the State of Texas, *supra* note 79, at 10.

132. Oppenheimer, *supra* note 116, at 107–08.

forced in divorce proceedings, but premarital agreements are enforced only in suits to declare a marriage void on equitable principles.<sup>133</sup> Also, Texas is a community property state.<sup>134</sup> According to section 3.003 of the Texas Family Code, property acquired during marriage “by either spouse” is presumptively community property.<sup>135</sup> Courts would be unlikely to apply the community property presumption in a case, such as a suit to declare a marriage void, in which the parties are not “spouses” under Texas law.<sup>136</sup> Instead, courts divide property such that the parties only “own the property acquired in proportion to the value of his labor contributed to the acquisition of it.”<sup>137</sup> This puts the divorcing parties at a disadvantage because property division then requires proof of contribution, and proof of contribution may not lead to equitable division. If one of the parties was the primary earner, division by proof of contribution could be biased toward the income earner, and proof of contribution can also be difficult, if not impossible, if the couple has been married for a long time.

Second, divorce adjudication protects a greater number of rights.<sup>138</sup> Divorces—and not suits to declare a marriage void—provide the following protections: (1) a party is restricted from transferring community property or incurring debt while a divorce action is pending; (2) the court can order name changes if necessary; (3) the court determines how property should be divided; (4) the court can order maintenance; and (5) the court enforces the parties’ agreements concerning property division, liabilities, child custody, and maintenance.<sup>139</sup>

Third, a declaration that a marriage is void may provide no protection at all outside of the state that granted the declaration. The granting state may not recognize the declaration, and if so, the couple remains legally married and could have serious problems.<sup>140</sup> For example, remarriage would be fraught with uncertainty because the marrying party could face criminal charges for bigamy.<sup>141</sup> Even if no criminal charges were filed, subsequent marriages would be void because the marrying party was already married. As discussed above, void marriages incur numerous problems with legal obligations and property rights.<sup>142</sup> In particular, a person could be unsuspectingly obligated or be subjected to property claims by his or her estranged spouse.<sup>143</sup> An estranged spouse could also assert spousal inheritance

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133. FAM. § 4.007.

134. See §§ 3.001–.008.

135. See, e.g., § 3.003.

136. § 6.204.

137. Hayworth v. Williams, 116 S.W. 43, 46 (Tex. 1909).

138. Oppenheimer, *supra* note 116, at 106–08.

139. 39 TEX. JUR. 3d, *Family Law* § 313 (2011).

140. See discussion *supra* Part V.A.

141. See, e.g., TEX. PENAL CODE ANN. § 25.01 (West 2012); MASS. GEN. LAWS ch. 272, § 15 (West 2000).

142. See discussion *supra* Part V.B.

143. Rush, *supra* note 128, at 758–59.

rights, trumping the wishes of the deceased and the needs of the deceased's current family.<sup>144</sup> Couples seek a legal dissolution to avoid these types of uncertainties, and declaring a marriage void does not guarantee that relief.

Lastly, a declaration that the marriage was void stigmatizes the parties to the marriage.<sup>145</sup> Suits to declare marriages void imply the legally valid marriage between the couple was neither legal nor valid when it was effectuated. Texas law implies same-sex marriages are illicit because the law offers only same-sex couples the option to declare their marriage void. Thus, same-sex marriages fall into the same category as incestuous, bigamous, and underage marriages.<sup>146</sup> Declaring the marriage void also forces the couple to officially concede their relationship was (1) undeserving of legal recognition because void marriages receive no legal recognition and (2) inherently unequal to opposite-sex marriage because opposite-sex marriage, in contrast, is presumed valid.<sup>147</sup>

## VI. IF TEXAS LAW CAN BE INTERPRETED TO ALLOW SAME-SEX DIVORCE, IT SHOULD

If access to divorce is based on due process rights, and Texas advances no legitimate interest by prohibiting same-sex divorce, then section 6.204 of the Texas Family Code is constitutionally suspect to the extent the law prohibits same-sex divorce. However, section 6.204 does not specifically prohibit courts from granting divorces to same-sex couples.<sup>148</sup> Texas courts, then, are not required to rule on whether Texas' mini-DOMA law or section 6.204 are unconstitutional.<sup>149</sup> Instead, Texas courts can simply apply appropriate statutory construction principles and interpret section 6.204 as pertaining to marriage and not to divorce.

### A. *Statutory Construction*

The Fifth Court of Appeals held that Texas courts do not have subject-matter jurisdiction to adjudicate same-sex divorce petitions based on interpreting section 6.204 as prohibiting such divorces.<sup>150</sup> Because section 6.204 states that courts may not "give effect to a . . . public act, record, or judicial proceeding that creates, recognizes, or validates" a

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144. See, e.g., TEX. PROB. CODE ANN. § 38 (West 2012).

145. Petitioner's Brief on the Merits, *supra* note 63, at 37.

146. TEX. FAM. CODE ANN. §§ 6.201–.206 (West 2012).

147. FAM. § 1.101. Christopher S. Krimmer, *The Gay Divorcée: When Same-Sex "Marriages" Dissolve*, 85 WIS. LAW. 28, 31 (2012).

148. FAM. § 6.204(c).

149. Other states' courts have held similar laws unconstitutional. See, e.g., *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

150. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 665 (Tex. App.—Dallas 2010, pet. filed).

same-sex marriage, the court held that recognizing the underlying same-sex marriage impermissibly gave effect to the marriage.<sup>151</sup> However, careful statutory construction suggests the court erred in interpreting the statute to prohibit adjudicating same-sex divorces.

Statutory construction begins with the language of the statute itself.<sup>152</sup> The plain language of the Texas Constitution defines marriage as *only a union*.<sup>153</sup> On its face, the statute does not include a *disunion* in the definition of marriage.<sup>154</sup> The plain language of section 6.204 also undeniably prohibits same-sex marriages in Texas but does not plainly prohibit same-sex divorce. Instead, the statute forbids courts from giving effect to a same-sex marriage.<sup>155</sup> A court can grant a divorce without giving effect to the underlying marriage. As both the Third Court of Appeals and the Wyoming Supreme Court acknowledged, *giving effect* can mean only on a “going forward basis” and may be interpreted to allow recognition for the sole purpose of divorce.<sup>156</sup>

Section 6.204 of the Texas Family Code also forbids courts from giving effect to any right arising from a same-sex marriage. Divorce is not a benefit of marriage; divorce is a legal action to dissolve a marriage. The Wyoming Supreme Court noted the distinction in *Christiansen* when the court stated the couple was not “seeking to enforce any right incident to the status of being married,” but instead was “seeking to dissolve a legal relationship.”<sup>157</sup>

Legislative intent is the second-most-important issue in statutory construction.<sup>158</sup> To the degree courts can determine the legislature’s intent, courts should attempt to effectuate such intent.<sup>159</sup> Courts use legislative history to determine the legislature’s intent.<sup>160</sup> Nothing in the legislative history for Texas Family Code section 6.204 or Texas Constitution, Article 1, Section 32 suggests the laws were intended to prevent same-sex couples from divorcing.<sup>161</sup> In fact, as stated in Part

151. *Id.*; FAM. § 6.204(c).

152. *Ex parte* Evans, 964 S.W.2d 643, 646 (Tex. Crim. App. 1998) (“The starting point in analyzing the meaning of a statute is the language of the statute itself.”).

153. TEX. CONST. art. 1, § 32; Appellee Angelique Naylor’s Brief at 17, *State v. Naylor*, 330 S.W.3d 434 (Tex. App.—Austin 2011, pet. filed) (No. 03-10-00237-CV), 2010 WL 4360130, at \*17.

154. Appellee Angelique Naylor’s Brief, *supra* note 153, at 17.

155. FAM. § 6.204(c).

156. *State v. Naylor*, 330 S.W.3d at 442; *Christiansen v. Christiansen*, 253 P.3d 153, 156 (Wyo. 2011); *see also* Appellee Angelique Naylor’s Brief, *supra* note 153, at 17; *Byrn & Holcomb*, *supra* note 53, at 12.

157. *Christiansen*, 253 P.3d at 156; *see also* *Byrn & Holcomb*, *supra* note 53, at 217.

158. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999) (“Legislative intent remains the polestar of statutory construction.”).

159. *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000).

160. *Id.*; TEX. GOV’T CODE ANN. § 311.023 (West 2012).

161. S. Comm. State Affairs, Bill Analysis, Tex. S.B. 7, 78th Leg., R.S. (2003); Tex. Legis. Council, Analysis of Proposed Constitutional Amendments 17 (2005), available at [http://www.lrl.state.tx.us/scanned/Constitutional\\_Amendments/amendments79\\_tlc\\_2005-11-08.pdf](http://www.lrl.state.tx.us/scanned/Constitutional_Amendments/amendments79_tlc_2005-11-08.pdf).

II, the analyses for the laws contained sections stating non-recognition of same-sex marriage did not infringe on rights of people in same-sex relationships due to other means of protecting those rights.<sup>162</sup> In the case of divorce, though, there are no other means to protect some of the rights divorce adjudicates.<sup>163</sup> Furthermore, divorces protect the rights of people in same-sex relationships more consistently.<sup>164</sup> Denying same-sex couples the means to protect their rights by denying them divorce infringes on their rights and is incongruous with the legislature's stated intent.

By statute, the Texas Legislature is presumed to have intended a just and reasonable result.<sup>165</sup> A just and reasonable result is further defined by case law as a result that does not cause great public inconvenience, unjust discrimination, or inequity.<sup>166</sup> Denying same-sex couples divorce, however, is greatly inconvenient, unjustly discriminatory, and inequitable. Denying divorce is greatly inconvenient because same-sex couples must either forgo divorce and risk remaining married or leave Texas, move to a state that grants same-sex divorce, and meet that state's residency requirements. Denying divorce is discriminatory because some couples validly married out-of-state are treated differently than other couples validly married out-of-state. Denying divorce creates an unjust result because some citizens are denied access to Texas courts—the only avenue of relief available to obtain a divorce. Lastly, denying divorce creates an unfair result because the alternative option of declaring marriages void does not adequately protect the couples' rights.<sup>167</sup>

Texas courts are also required to construe statutes so that the statutes are constitutionally sound if it is possible to do so.<sup>168</sup> As discussed above, any interpretation of Texas Family Code Section 6.204 or Texas Constitution, Article 1, Section 32 rendering them a prohibition of same-sex divorce is constitutionally suspect.<sup>169</sup> Therefore, if it is possible, Texas courts should not interpret either law to apply to divorce.

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162. S. Comm. State Affairs, Bill Analysis, Tex. S.B. 7, 78th Leg., R.S. (2003) (“[T]he legislature finds that through the designation of guardians, the appointment of agents, and the use of private contracts persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legally recognized familial relationship between the persons.”).

163. See discussion *supra* Part V.B.

164. *Id.*

165. GOV'T § 311.021; *Cole v. Tex. Emp't Comm'n*, 563 S.W.2d 363, 367 (Tex. Civ. App. 1978, writ *dism'd*).

166. Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 404 (2012) (quoting *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 322 (Tex. 1994), *overruled on other grounds by Battaglia v. Polk*, 177 S.W.3d 893, 909 (Tex. 2005); *State v. Mauritz-Wells Co.*, 175 S.W.2d 238, 242 (Tex. 1943)).

167. See discussion *supra* Part V.B.

168. *Blair v. Razis*, 926 S.W.2d 784, 787 (Tex. App.—Tyler 1996, no *pet.*) (citing *Brady v. Fourteenth Ct. App.*, 795 S.W.2d 712, 715 (Tex. 1990)).

169. See discussion *supra* Part V.B.

As in the opinions of the trial court in *In re Marriage of J.B.* and the Third Court of Appeals in *State v. Naylor*, it is possible to interpret Texas Family Code Section 6.204 to apply only to marriage, and other Texas courts should follow these courts' example.

B. *Granting Same-Sex Divorce Furthers Legitimate Interests of the State*

Rather than detracting from Texas' legitimate interests, granting same-sex divorce furthers Texas' legitimate interests.<sup>170</sup> Texas grants divorces.<sup>171</sup> Therefore, Texas has an expressed interest in the legal dissolution of marriages. Any reason for Texas' policy—such as dividing property or determining child custody—applies equally to legally married same-sex couples.

Furthermore, allowing same-sex couples to divorce promotes stability and predictability. Texas has a legitimate interest in the certainty of its citizens' marital status not only for its citizens' general well-being but also for economic stability. As discussed above, only divorce decrees provide certainty of dissolution on which creditors can rely.<sup>172</sup>

Texas also has a legitimate interest in providing its citizens access to its courts to resolve their legal disputes. Refusing to grant divorces to same-sex couples precludes them from the only avenue in which they can obtain relief.<sup>173</sup>

Texas has a legitimate interest in protecting its laws against constitutional attack. If Texas interprets its current law to preclude divorce for same-sex couples, Texas invites constitutional challenge on due process and equal protection grounds. And Texas would most likely lose. Denying divorce to a segment of the population violates the due process doctrine under *Boddie* because divorce implicates due process access to courts<sup>174</sup> and violates the equal protection doctrine under *Romer* because it completely denies one group of citizens protection under the law.<sup>175</sup> As the Supreme Court held in *Romer*, "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."<sup>176</sup> And the State of Texas should take note. In the State's appellate brief to the Texas Supreme Court in *In re Marriage of J.B.*, Texas admitted

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170. See Byrn & Holcomb, *supra* note 53, at 216.

171. See TEX. FAM. CODE ANN. §§ 6.001–.008 (West 2012).

172. See discussion *supra* Part V.

173. See *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

174. *Id.*

175. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

176. *Id.* at 633.

that limiting the “robust protections of divorce” was “precisely the point” of denying divorce to same-sex couples.<sup>177</sup>

On a pragmatic note, Texas also has a legitimate interest in promoting administrative convenience in the event Texas decides to recognize same-sex marriage. The Supreme Court might rule that prohibiting same-sex marriage is unconstitutional.<sup>178</sup> Alternatively, Texas may choose to recognize same-sex marriage in the future as have other states.<sup>179</sup> In either case, Texas should exercise caution and grant legal relief when possible in order to prevent potentially complicated legal situations in the future.

## VII. CONCLUSION

Ultimately, a decision to refuse to grant same-sex divorces accomplishes very little at a potentially high price. To the extent Texas refuses to grant same-sex divorces, Texas most likely violates the Equal Protection and Due Process clauses by denying some residents equal access to the courts and resolution to their claims. Texas cannot defend this violation with the same arguments it has used to defend its ban on same-sex marriage because divorce implicates rights independent of marriage. Texas also cannot defend a ban on same-sex divorce by pointing to the opportunity same-sex couples have to declare their marriage void because declaring a marriage void is inherently unequal to issuing a divorce decree. Therefore, Texas exposes itself to constitutional attack if it decides to deny same-sex divorce and in return furthers no legitimate interest yet espoused. Instead, Texas creates difficulties for other states and for its own citizens.

Whether Texas is ready to embrace an equal right of marriage for all of its citizens or not, Texas should be ready to embrace the legal equality of all of its citizens by protecting the right of each to access Texas courts to adjudicate his or her legal issue.

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177. Brief of the State of Texas, *supra* note 79, at 24. *See also* Petitioner’s Brief on the Merits, *supra* note 63, at 28.

178. The Supreme Court has a history of overturning state-imposed restrictions on marriage. *See, e.g.,* Loving v. Virginia, 388 U.S. 1, 2 (1967).

179. Particularly, California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Washington, Vermont, and the District of Columbia. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated June 26, 2013).