

NO FAULT DIVORCE REPEAL

FACT SHEET
March, 15, 2017

Bill Title:
No Fault Divorce
Repeal

Bill Number:
HB 93

Sponsor:
Matt Krause

Our Position:
Strongly Oppose
Unconstitutional

House Bill 93 seems simple enough. All they want is a repeal of no-fault divorce and a return to the 1800's. Its proponents cite all kind of great reasons and justifications for the retrenchment but they miss the simple fact that our constitution exists to limit government and to protect individual freedoms. Government simply isn't free to do whatever it wants.

No-fault divorce can easily and justifiably be rephrased as "Recognition of the Right of Free Association in Marriage." The real reason that we have no-fault divorce is the underlying recognition that requiring grounds for divorce is subject to federal constitutional challenge as a violation of the right to free association and a violation of the right to make privacy choices about one's intimate life. *Obergefell v. Hodges* and *Lawrence v. Texas* should have terminated any bill like this long before it even saw the light of day. (For those who don't know, *Obergefell* was the case on gay marriage where the court restressed a long list of family rights protections and *Lawrence* was the case that overturned sodomy laws in the U.S. establishing clearly, the right to intimate sexual association as a protected right.) Given the clear reaffirmation of so many family rights protections in *Obergefell*, it seems clear that the U.S. Supreme Court is not going to tolerate going back to 1800's concepts of family and marriage.

Proponents even make a constitutional Due Process argument to support their bill. They claim that due process must be granted to the other spouse before the court can grant the relief of a divorce. However, "granting a divorce" isn't a form of relief that is likely to stand up to a serious constitutional challenge in this day and age. The best the state can do is to recognize that a marriage has been dissolved and remove the legal privileges that go along with marriage. The state may not infringe any rights based on this choice.

Due Process is a feature of our constitution that limits government action. It doesn't apply to individuals or individual actions. The Due Process argument made for this bill is that when one spouse seeks a divorce some mysterious right of the other spouse must be protected by Due Process. This argument suffers two fatal flaws.

First, nobody has a right to maintain an association of any kind when the other person in the relationship doesn't want the relationship. In the real world, when someone attempts to maintain a relationship the other person no longer wants, we call this kind of action stalking. The Supreme Court has said that nobody has an entitlement to the rights of others and rights may not be infringed even for the benefit of other family members. Marital privileges for the unhappy ex-spouse may not be maintained at the cost of violating the other spouses fundamental rights.

Second, the state has zero constitutional authority to "grant" a divorce. Our federal constitution protects the right of free association for the purposes of intimate and expressive communication and interaction as First and Four-

teenth Amendment rights. While there are many different types of relationships that receive different levels of constitutional protection, intimate family associations receive the highest order of protection. The right to association is an individual right, which means, that it takes two people to agree to associate before there is an association and it takes only one person to terminate the association.

Individual choices regarding marriage are constitutionally protected privacy rights that also receive the highest order of protection. One individual's choice to dissolve an association must stand, must not be denied, must not be unduly burdened, and must not be punished unless the state can prove a compelling state interest that is necessary to achieve, a statute authorizing action that is precisely drawn not to infringe more rights than is absolutely necessary, and the use of least restrictive means to achieve the state's interest. While there are many legitimate state interests intimately bound up with the marital relationship, none of those interests can survive in the face of the absolute dissolution of the very concept of a marital union when one spouse refuses to continue the relationship. Forcing spouses to remain married under these conditions is tantamount to slavery, and clearly denies the protected choice to dissolve the association.

The state has zero authority under our federal constitution to "grant" any form of association between competent adults. The state is free to recognize the relationship or not recognize the relationship so long as these acts do not violate other rights but it cannot create the association.

The state is free to provide privileges to married couples, but it may not deny rights to people because they choose not to marry or because they choose to dissolve a marriage. What rights is the state denying when it forces spouses to show cause for divorcing through costly litigation?

- The state is punishing the choice and applying an undue burden on the choice by forcing the expense of litigation. The state may not place burdens such as a requirement to litigate on the choice to get married, nor can it impose such burdens on the choice to divorce. Property issues can be litigated and a very limited range of child custody issues may be litigated, but the state may not place undue burdens on constitutionally protected choices such as a choice to dissolve an association, even the marital association.
- The state insisting that it has authority to deny an individual protected choice to dissolve a marriage is an undue burden on or denial of the exercise of the right. The only constitutionally legitimate authority the state has is to legally recognize the marriage and to legally recognize that the marriage has dissolved.
- In community property states married people who live separately have no privacy or security from the other spouse. While they may establish separate houses, those houses are community property and the police cannot keep the other spouse from entering your house, even if the other spouse breaks into it. People forced by the state to remain married are denied the right of personal privacy and in some cases the right to personal safety.
- Individuals have a protected right to establish intimate non-marital relationships for all types of intimate communication purposes. Sex is of course

one of the most intimate types of communication available in any association. Persons forced to remain married are punished with the consequences of adultery by Tex. Fam. Code § 6.003 if they form one of these relationships. Such relationship can be punished under Texas law by providing a basis for “fault” divorce which may result in adverse property division settlements, in adverse child custody orders, in adverse spousal maintenance orders, and in damages through a tort claim. The state forces a choice of foregoing intimate sexual relationships altogether, having an undesirable sexual relationship with the forced spouse, or being punished for the exercise of a constitutional right.

Individual personal moral or religious views on this subject, even a majority’s, simply do not convey a legitimate interest to the state to deny any person their constitutional right to make this choice for themselves. Where there is no legitimate interest there is, of course, no compelling state interest in maintaining the privileges of marriage for one spouse by infringing the fundamental rights of the other spouse. There is one simple fact that Obergefell and Lawrence teach; which is, state regulation of marriage is not exempt from constitutional scrutiny by the federal courts.

The National Family Law Policy Center believes HB 93 to be fatally constitutionally flawed with close to zero chance of surviving a strong constitutional challenge in federal court. In *Troxel v. Granville* the Supreme Court said “the burden of litigating a domestic relations proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child’s welfare becomes implicated.’”

Requiring a spouse to litigate for the right to dissolve an association would be so disruptive of the individual privacy choice to terminate an association that the constitutional right to make that choice clearly becomes implicated.

The National Family Law Policy Center recognizes the right of free association in both establishing and dissolving the marital association as an individual privacy right protected at strict scrutiny.

Therefore, The National Family Law Policy Center strongly opposes this bill as being clearly unconstitutional