SUBJECT: Defining marriage as a union of one man and one woman

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 6 ayes — Swinford, Miller, Cook, Gattis, J. Keffer, Wong

1 nay — Farrar

2 absent — Martinez Fischer, Villarreal

WITNESSES: For — Kelly Shackelford, Free Market Foundation and Liberty Legal Institute

Against — Randall Ellis, Lesbian/Gay Rights Lobby of Texas; Hector David Garza, ALLGO; Jake Holbrook, Stand Out; Michael Holloman, Human Rights Campaign- Houston Chapter; Austin Dirk Kubala, Citizens to Restore Fairness; Candice Lewis, American Civil Liberties Union of Texas; Pamela McDonald, Social Action Committee of Congregation Beth Israel; Carol Miller, National Association of Social Workers- Texas Chapter; Bob Parsons, Parents, Family and Friends of Lesbians and Gays- Austin Chapter; Hannah Riddering, Texas National Organization for Women; Judy Watford, Blind Friends of Lesbians and Gays, Austin Council of the Blind; Mary Wilson, Church of the Savior; Elizabeth Rosa Yeats, Friends Meeting of Austin; and 75 individuals

BACKGROUND: Family Code, sec. 2.001(b) prohibits issuance of a marriage license for the marriage of people of the same sex.

In 2003, the 78th Legislature approved SB 7 by Wentworth, the Defense of Marriage Act (DOMA), which declares that same sex marriages or civil unions are contrary to Texas' public policy and are void. It prohibits the state and any agency or political subdivision from recognizing a same-sex marriage or civil union granted in Texas or in any other jurisdiction or any legal rights asserted as a result of such a marriage or union. It defines a civil union as any relationship status, other than marriage intended as an alternative to marriage or applying primarily to cohabitants and that grants the parties legal protections, benefits, or responsibilities granted to spouses in a marriage.

One of the first constitutional challenges to a state's marriage law was *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999), in which the plaintiffs alleged that Hawaii's marriage laws were unconstitutional under the equal protection clause of the state constitution. In 1997, before the case was decided, the Hawaii Legislature met and adopted a constitutional amendment, which voters ratified in 1998, reserving marriage for opposite-sex couples.

In 1999, the Vermont Supreme Court ordered the state legislature to establish a system by which same-sex couples could obtain traditional marriage benefits and protections. The case, *Baker v. State*, 744 A.2d 864 (Vt. 1999) hinged on the common benefits clause of the Vermont Constitution. The court decided that the plaintiffs — three same-sex couples who had been denied marriage licenses — could not be "deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry." In *Baker v. State*, the Vermont Supreme Court gave its legislature an opportunity to choose a remedy — either through a change in the marriage laws or a parallel system of domestic partnership. In response, the Vermont Legislature created civil unions, which became effective in July 2000.

The Massachusetts Legislature took up the issue of civil unions and same-sex marriage in 2003 and asked the Massachusetts Supreme Judicial Court to decide the constitutionality of the proposed law in light of the equal protection and due process clauses of the state constitution. The court previously had ruled, in *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003), that the state could not use its regulatory authority to deny civil marriage to same-sex couples. A proposed constitutional amendment earlier had been placed on the agenda for the legislature to consider when it convened as a Constitutional Convention in February 2004. The legislature approved a constitutional amendment that would define marriage as a union between opposite-sex couples and would establish a parallel system of civil unions for same-sex couples with the same benefits, protections, and rights as marriage. This proposal could be submitted to the voters in November 2006, if approved again by the legislature.

DIGEST:

HJR 6 would amend the Texas Constitution by adding sec. 32 to Art. 1, stating that marriage in this state shall consist only of the union of one man and one woman.

The proposal would be presented to the voters at an election on Tuesday, November 8, 2005. The ballot proposal would read: "The constitutional amendment providing that marriage in this state consists only of the union of one man and one woman."

SUPPORTERS SAY:

The Legislature should bring this issue before voters in November so that the citizens of Texas, rather than the courts, can have a chance to decide the definition of marriage under state law. A constitutional amendment would head off any possible legal challenge under state law to the recognition of traditional marriage between a man and a woman. Since the Massachusetts decision, 13 states have enshrined a definition of traditional marriage in their constitutions, all approved by the voters by substantial margins, joining four states that previously had adopted such protections. President Bush has endorsed a similar amendment to the U.S. Constitution.

The equal protection clause and other provisions of the Texas Constitution are not so different from those in other states and could be interpreted to permit same-sex marriage. Even if Texas courts were unlikely to interpret the Constitution to allow same-sex marriage today, future courts might reach different conclusions. Preserving marriage for unions between a man and a woman should be defined beyond doubt, not left to the whims of future judges.

This proposed constitutional amendment would ensure that the legal status of marriage was conferred only on unions involving a man and a woman. Including additional language about the status of unmarried couples could nullify living wills, powers of attorney, and other legal agreements reached by couples who were not married. The limited wording of this constitutional amendment would preserve future flexibility in allowing other types of legal arrangements short of marriage or civil unions in the future.

The amendment would not discriminate against individuals but merely would permit the voters of Texas to decide the scope of marriage in the state. Same-sex couples would not be prohibited from pursuing their lifestyle if this amendment were approved by voters – it just would not be sanctioned by the state.

A traditional marriage consisting of a man and a woman is the basis for a healthy, successful, stable environment for children. It is the surest way

for a family to enjoy good health, avoid poverty, and contribute to their community. The sanctity of marriage is fundamental to the strength of Texas' families, and the state should ensure that no court decision could undermine this fundamental value.

OPPONENTS SAY:

Amending the Texas Constitution is entirely unnecessary because, in practical terms, no case would get far enough to challenge current law prohibiting same-sex marriage. The courts in Texas are considered so unlikely to be sympathetic to arguments favoring same-sex marriage that no one has even filed a suit to start the process. Other challenges have been a part of a national campaign, with national funding and resources, to seek same-sex marriage status in certain states, but Texas is not one of them. Changing the Constitution needlessly to ban same-sex marriage, which already is prohibited by statute, would be directed more toward condemning certain individuals than establishing a legal principle.

This constitutional amendment would take the issue of same-sex marriage out of the hands of citizens even though the institution of marriage has proven dynamic. It is noteworthy that anti-miscegenation laws banning inter-racial marriage were struck down (*Loving v. Virginia*, 388 U.S. 1 (1967)) less than 40 years ago. Although same-sex marriage is not contemplated today, future generations may see value in creating alternatives to traditional marriage. Already many Texas families look different from the traditional format, either because of divorce and remarriage, single parenthood, or other circumstances. A constitutional amendment would limit future lawmakers' ability to respond to their constituents' changing needs.

This constitutional amendment essentially would determine that the state's equal protection clause did not apply to one group of people. Texas should not discriminate against a group of citizens in the state constitution. No where else in the constitution is one group of people singled out to be denied rights.

Reserving marriage for a union between a man and a woman would not have the society-saving benefits ascribed by some. Many negative acts — domestic violence, addiction, adultery — occur within the bounds of marriage between a man and a woman. Meanwhile, divorce and out-of-wedlock parenthood lead to many children raised outside of traditional marriage. The greater good to Texas would be policies that encourage commitment to healthy, stable families in whatever form they take.

OTHER OPPONENTS SAY:

This proposed constitutional amendment would not go far enough in protecting the definition of marriage because it would not ensure that civil unions and other forms of quasi-marriage would not be permitted in the future. Civil unions would be another way for same-sex couples to circumvent laws protecting marriage and gain legal protections and rights reserved for those who are married.

NOTES:

A related proposal, HJR 19 by Talton, which in addition to defining marriage as between a man and a woman also would provide that a legal status for unmarried persons that was identical or substantially similar to marital status would not be valid or recognized, has been referred to the State Affairs Committee.