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Shannon Alexander

Heather Schafer

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CONSTITUTION OF THE STATE OF GEORGIA

Defense of Marriage Act: Amend the Constitution of the State of Georgia to Provide That Georgia Shall Recognize as Marriage Only the Union of a Man and a Woman; Provide for Submission of This Amendment for Ratification or Rejection; and for Other Purposes

CODE SECTION: GA. CONST. art. I (amended)
RESOLUTION NUMBER: SR 595
SUMMARY: The Act sanctioned a state-wide referendum to amend the Georgia Constitution. The Act provided that the referendum will appear on the general election ballot November 2, 2004. Although Georgia Code section 19-3-3.1 contains similar language to that of the proposed constitutional amendment, proponents contend that the amendment is a necessary step given the successful court challenges occurring in other states where courts have invalidated similar statutes on state constitutional grounds. The proposed amendment constitutionally limits the recognition of marriage to unions between a man and a woman and prohibits judges from considering or ruling on any prospective rights arising from a same-sex relationship.

EFFECTIVE DATE: The Act becomes effective following ratification by a majority of the electors of the State of Georgia pursuant to Article X, Section 1, Paragraph II of the Georgia Constitution.

*History**Georgia's Statutory Ban on Gay Marriage*

In 1996, following in the steps of several other states, Georgia enacted section 19-3-3.1 of the Georgia Code.¹ Rulings by Hawaii courts holding that the State's ban on same-sex marriages violated the Hawaii Constitution's Equal Protection Clause motivated movements in other states to enact bans on gay marriage.² At the time, legislators expressed concern over the possibility that same-sex couples from Georgia could travel to Hawaii to marry and could then return home and demand that Georgia recognize their marriage.³ The 1996 Act passed with almost no opposition in both the House and the Senate.⁴ Georgia courts have not heard a direct challenge to the 1996 Act since its passage.⁵ Three Georgia cases have referenced the statute. In *Shahar v. Bowers*,⁶ the plaintiff sued Georgia's Attorney General, asserting violations of her rights of intimate and expressive association, of freedom of religion, of equal protection, and of substantive due process.⁷ The Attorney General withdrew an offer of employment to Shahar due to her participation in a lesbian marriage ceremony.⁸ The court declined to rule on the constitutional issues, holding that, even if they were valid, they were not dispositive in the case.⁹ Noting Code section 19-3-3.1 of the Georgia Code, the court reasoned that potential conflicts within the office rightfully concerned the Attorney General.¹⁰ Additionally, the court recognized the

1. See 1996 Ga. Laws 1025, § 1, at 1025 (codified at O.C.G.A. § 19-3-3.1); see Victoria Davis, *Review of Selected 1996 Georgia Legislation*, 13 GA. ST. U. L. REV. 137, 137-38 (1996).

2. See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd without opinion*, 950 P.2d 1234 (Haw. 1997); *Baehr v. Lewin* 852 P.2d 44, 74 (Haw. 1993); see also Davis, *supra* note 1, at 137-38.

3. Davis, *supra* note 1, at 143.

4. *Id.* at 142.

5. See Audio Recording of Senate Proceedings, Feb. 16, 2004 (remarks by Sen. Mike Crotts), at http://www.georgia.gov/00/channel_title/0,2094,4802_6107103,00.html [hereinafter Senate Audio]; see Interview with Rep. Jeanette Jamieson, House District No. 22, in Atlanta, Ga. (May 12, 2004) [hereinafter Jamieson Interview].

6. 114 F.3d 1097 (11th Cir. 1997).

7. *Id.* at 1101.

8. *Id.*

9. *Id.* at 1100.

10. *Id.* at 1108.

appearance of incongruity when a staff attorney working in the office charged with enforcing the statutory ban on gay marriages openly engaged in one of these marriages herself.¹¹

In *Latham v. Hestley*,¹² a court again recognized Georgia's statutory ban on gay marriage.¹³ In *Latham*, the plaintiff claimed an interest in property that his former domestic partner owned through an implied constructive trust based on improvements funded by the plaintiff.¹⁴ The trial court dismissed the case for failure to state a claim based upon an interpretation of Code section 19-3-3.1.¹⁵ The Georgia Supreme Court reversed, holding that the mere fact that the plaintiff and defendant were domestic partners did not nullify the plaintiff's grounds for claiming a constructive trust.¹⁶

Lastly, in *Burns v. Burns*, the court acknowledged Georgia's statutory gay marriage ban.¹⁷ This case involved the enforcement of a child visitation consent order that prohibited visitation while a party was cohabitating with an adult to whom the party was not legally married.¹⁸ The plaintiff and her partner traveled to Vermont and received a civil union license.¹⁹ The defendant subsequently filed a motion for contempt of the consent order.²⁰ The plaintiff argued that she was legally married in Vermont and that the marriage was valid in Georgia under the Full Faith and Credit Clause of the United States Constitution.²¹ The Georgia Court of Appeals affirmed the trial court's findings that a civil union is not a marriage, that Code section 19-3-3.1 barred any legal recognition of their marriage, and that the plaintiff had in fact violated the consent order.²²

11. *Id.* at 1105-08.

12. 514 S.E.2d 440 (Ga. 1999).

13. *Id.* at 441.

14. *Id.*

15. *Id.*

16. *Id.* at 441-42.

17. 560 S.E.2d 47, 49 (Ga. Ct. App. 2002).

18. *Id.* at 48.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 48-49.

The Status of Gay Marriage in Other States

Despite the lack of challenges to the statutory gay marriage ban, proponents of the constitutional amendment argue that the statute is open to attack.²³ Since the enactment of Georgia's statute, four other states have served as battlegrounds between state constitutional guarantees and statutory gay marriage bans.²⁴ As noted above, Hawaii courts struck down its statutory prohibition against same-sex marriage based on the State Constitution's Equal Protection Clause.²⁵ In an unreported Alaska trial court opinion, the court held that the validity of an Alaska statute that prohibited same-sex marriage required the articulation of a compelling state interest.²⁶ *Baker v. State*, the seminal Vermont case, held that the exclusion of same-sex couples from marriage violated the State Constitution's Common Benefits Clause.²⁷ The Vermont Legislature has since responded by passing a civil union statute, becoming the only state to confer statutory recognition on same-sex couples.²⁸ Additionally, Massachusetts has been at the center of a maelstrom on this issue ever since the Supreme Judicial Court of Massachusetts ruled in *Goodridge v. Department of Public Health* that the State "has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples."²⁹ Since the decision in *Goodridge*, the Massachusetts Legislature has struggled to find a way to bar the issuance of marriage licenses to same-sex couples in Massachusetts.³⁰ In December 2003, the Massachusetts Senate asked the State

23. See Senate Audio, *supra* note 5; Interview with Rep. Bill Hembree, House District No. 46, in Atlanta, Ga. (Mar. 22, 2004) [hereinafter Hembree Interview]; Jamieson Interview, *supra* note 5.

24. See Robin C. Miller & Jason Binimow, Annotation, *Marriage Between Persons of Same Sex—United States and Canadian Cases*, 2003 A.L.R. FED. 2, 2003 WL 21467103 (unpublished annotation subject to revision or withdrawal).

25. See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. 1996), *aff'd without opinion*, 950 P.2d 1234 (Haw. 1997); *Baehr v. Lewin* 852 P.2d 44 (Haw. 1993).

26. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998).

27. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

28. See VT. STAT. ANN. tit. 15, §§ 1201–1207 (2003); VT. STAT. ANN. tit 18, §§ 5160–5169; see also Miller & Binimow, *supra* note 24.

29. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

30. Associated Press, *Important Dates in Gay Marriage Debate*, NEWSDAY.COM, available at <http://www.newsday.com/news/nationworld/nation/wire/sns-ap-gay-marriage-timeline,0,6109094.story?coll=sns-ap-nation-headlines>, May 17, 2004 [hereinafter *Important Dates*].

Supreme Judicial Court whether a civil union statute would satisfy the State Constitution.³¹ In February 2004, the court responded with a resounding no, stating that “[t]he history of our nation has demonstrated that separate is seldom, if ever, equal.”³² In a last ditch effort to prevent same-sex marriage licenses in Massachusetts, opponents filed suit in the United States District Court of Massachusetts seeking an injunction against the enforcement of the Massachusetts court’s decision, alleging a violation of the Guarantee Clause of the United States Constitution.³³ The district court held that the Massachusetts Supreme Judicial Court did not overstep its bounds, stating that “[t]he [Massachusetts Supreme Judicial Court] has the authority to interpret, and reinterpret, if necessary, the term marriage as it appears in the Massachusetts Constitution.”³⁴ The Court of Appeals for the First Circuit will hear arguments in the case on June 7, 2004.³⁵ The court of appeals declined to issue an emergency order to halt the issuance of same-sex marriage licenses beginning May 17, 2004.³⁶ The United States Supreme Court also declined to intervene.³⁷ Massachusetts issued the first same-sex marriage license on May 17, 2004.³⁸ The Massachusetts Legislature then convened a Constitutional Convention with hopes of agreeing upon a constitutional amendment.³⁹ On March 29, 2004, the legislature approved a proposed constitutional amendment, which would ban gay marriage but legalize civil unions.⁴⁰

Despite an apparent trend toward the recognition of gay marriage in these states, it is important to note that in both Alaska and Hawaii “the court[s]’ decision[s were] effectively overturned through []

31. *Id.*

32. Opinions of the Justices to the Senate, 802 N.E.2d 565, 569, 572 (Mass. 2004).

33. *Largess v. Supreme Judicial Court of Massachusetts*, No. CIV.A.04-10921-JLT, 2004 WL 1068877, at *2 (D. Mass. May 13, 2004).

34. *Id.* at *4.

35. Shelley Murphy & Kathleen Burge, *Opponents Lose Bid to Halt Gay Marriage*, BOSTON GLOBE, May 15, 2004, available at http://www.boston.com/news/specials/gay_marriage/articles/2004/05/15/opponents_lose_bid_to_halt_gay_marriage/ (last visited May 17, 2004).

36. *Id.*

37. *Id.*

38. Yvonne Abraham & Rick Klein, *Free to Marry: Historic Date Arrives for Same-Sex Couples in Massachusetts*, BOSTON GLOBE, May 17, 2004, available at http://www.boston.com/news/specials/gay_marriage/articles/2004/05/17/free_to_marry?mode=PF (last visited May 17, 2004).

39. *Important Dates*, *supra* note 30.

40. *Id.*

subsequent voter-approved state constitutional amendment[s].⁴¹ Also noteworthy is the fact that none of the state courts that have examined the issue have found federal constitutional grounds to challenge state statutes banning gay marriage or states' refusals to grant licenses to gay couples, although plaintiffs have pled these grounds repeatedly.⁴² Although same-sex marriage opponents anticipated a Full Faith and Credit Clause Challenge at the time of the statute's enactment, the enactment of the federal Defense of Marriage Act in September of 1996 has since obviated that concern.⁴³ The Defense of Marriage Act added Code section 1738C to Chapter 28 of the United States Code, and it allows states to refuse to recognize same-sex relationships despite any acts of other states that purport to legally sanction these relationships.⁴⁴

Momentum

As previously noted, proponents of the Georgia resolution argued that it was necessary at this time to protect Georgia's statute from an attack on state constitutional grounds.⁴⁵ Legislatures in at least 20 states this year considered similar state constitutional amendments prohibiting the recognition of same-sex marriages.⁴⁶ In eight of those states, the proposed amendments will possibly go before voters within the next year.⁴⁷ Opponents of Georgia's bill argued that the state constitutional amendments are part of a national Republican strategy to draw conservative voters to the polls and to bolster President Bush's chances for reelection.⁴⁸ Unlike 1996, where there

41. Miller & Binimow, *supra* note 24, at n.5.

42. See generally, Miller & Binimow, *supra* note 24 (describing failed challenges brought under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the First Amendment, the Eighth Amendment, the Ninth Amendment and involving Bill of Attainder and right to privacy violation claims).

43. See Davis, *supra* note 1, at 147 n.2.

44. 28 U.S.C. § 1738C (1996).

45. See Senate Audio, *supra* note 5; Hembree Interview, *supra* note 23.

46. Associated Press, *Recent Action in State Legislatures Related to Same-Sex Marriage*, BOSTON GLOBE, Mar. 16, 2004, available at http://www.boston.com/news/specials/gay_marriage/national/states_laws/ (last visited on May 17, 2004).

47. See *id.* (Alabama, Arkansas, Georgia, Massachusetts, Mississippi, Missouri, Utah, and Wisconsin).

48. See Jamieson Interview, *supra* note 5; Interview with Rep. Nan Orrock, House District No. 51, in Atlanta, Ga. (May 15, 2004) [hereinafter Orrock Interview].

were very few lobbying efforts on either side of the issue, this resolution has incited fierce reactions and intense media attention.⁴⁹

Bill Tracking of SR 595

SR 595 eventually passed both houses in its original form despite the introduction of floor amendments and an alternative, HR 1470.⁵⁰

Consideration by the Senate

The Senate read SR 595 for the first time on January 26, 2004.⁵¹ The Rules Committee favorably reported on the bill on February 12, 2004, and the Senate read it for the second time on February 13, 2004.⁵² On February 16, 2004, the Senate read the bill for the third time, debated, and then voted.⁵³

Senators introduced seven floor amendments, but none passed. Senator Mary Squires of the 5th district proposed the first two amendments. She first proposed inserting “[m]arriage after the death of a person’s spouse is permitted.”⁵⁴ The amendment failed by a vote of 24 to 30.⁵⁵ Senator Squire’s next amendment proposed striking the words “only the” and inserting the word “one” on page 1, line 2; page 1, lines 9 and 10; and page 2, line 2.⁵⁶ This amendment failed by a vote of 16 to 37.⁵⁷

Senator Valencia Seay of the 34th district introduced four floor amendments. The first proposed inserting “in keeping with the Seventh Commandment of the Ten Commandments as outlined in

49. See Jim Tharpe, *Gay Marriage Ban Amendment Passes: Georgia Voters to Decide Issue in November*, ATLANTA J. CONST., Apr. 1, 2004, at A1, available at 2004 WL 73419635 (last visited on Nov. 22, 2004) [hereinafter *Georgia Voters to Decide*]; Orrock Interview, *supra* note 48.

50. See State of Georgia Final Composite Status Sheet, SR 595, Mar. 31, 2004 (May 19, 2004). Compare SR 595, as introduced, 2004 Ga. Gen. Assem., with SR 595, as passed, 2004 Ga. Gen. Assem.

51. State of Georgia Final Composite Status Sheet, SR 595, Jan. 26, 2004 (May 19, 2004).

52. State of Georgia Final Composite Status Sheet, SR 595, Feb. 12, 2004 (May 19, 2004); State of Georgia Final Composite Status Sheet, SR 595, Feb. 13, 2004 (May 19, 2004).

53. State of Georgia Final Composite Status Sheet, SR 595, Feb. 16, 2004 (May 19, 2004).

54. Failed Senate Floor Amendment to SR 595, introduced by Sen. Mary Squires, Feb. 16, 2004.

55. Georgia Senate Voting Record, SR 595 (Feb. 16, 2004).

56. Failed Senate Floor Amendment to SR 595, introduced by Sen. Mary Squires, Feb. 16, 2004. This amendment would have changed the bill to read “this state shall recognize as marriage [one] union of man and woman.” Compare Failed Senate Floor Amendment to SR 595, introduced by Sen. Mary Squires, Feb. 16, 2004, with SR 595, as introduced, 2004 Ga. Gen. Assem.

57. Georgia Senate Voting Record, SR 595 (Feb. 16, 2004).

Exodus XX” on line 10 of page 1 after “woman.”⁵⁸ This amendment failed by a vote of 24 to 30.⁵⁹ Senator Seay then introduced an amendment to strike line 4 and replace it with “in keeping with the Seventh Commandment of the Ten Commandments as outlined in [Exodus XX].”⁶⁰ This amendment failed by a vote of 22 to 30.⁶¹ Senator Seay then introduced an amendment to insert the following on line 10 of page 1 between “woman” and “Marriage”: “Adultery among two people who are married is prohibited.”⁶² This amendment failed by a vote of 26 to 26.⁶³ Finally, Senator Seay introduced an amendment to insert between “woman” and “Marriage” on line 10 of page 1 the following: “Adultery by a married person is prohibited.”⁶⁴ This amendment failed by a vote of 27 to 27.⁶⁵

In the midst of Senator Seay’s amendments, Senator Sam Zamarripa of the 36th district proposed an amendment that would have inserted at the end of line 19 on page 1 the following: “(c) Nothing in this Paragraph shall be construed so as to prohibit the governing authority of a political subdivision of the state from recognizing civil unions or domestic partnerships between persons of the same gender.”⁶⁶ This amendment failed by a vote of 11 to 39.⁶⁷ The Senate ultimately adopted SR 595, without any amendments, by a vote of 40 to 14.⁶⁸

Consideration by the House

The House first read SR 595 on February 17, 2004.⁶⁹ The House Committee favorably reported the resolution on February 26, 2004.⁷⁰

58. Failed Senate Floor Amendment to SR 595, introduced by Sen. Valencia Seay, Feb. 16, 2004. The bill would have stated that Georgia “shall recognize as marriage only the union of man and woman in keeping with the Seventh Commandment of the Ten Commandments as outlined in Exodus XX.” Compare Failed Senate Floor Amendment to SR 595, introduced by Sen. Valencia Seay, Feb. 16, 2004, with SR 595, as introduced, 2004 Ga. Gen. Assem.

59. Georgia Senate Voting Record, SR 595 (Feb. 16, 2004).

60. Failed Senate Floor Amendment to SR 595, introduced by Sen. Valencia Seay, Feb. 16, 2004.

61. Georgia Senate Voting Record, SR 595 (Feb. 16, 2004).

62. Failed Senate Floor Amendment to SR 595, introduced by Sen. Valencia Seay, Feb. 16, 2004.

63. Georgia Senate Voting Record, SR 595 (Feb. 16, 2004).

64. Failed Senate Floor Amendment to SR 595, introduced by Sen. Valencia Seay, Feb. 16, 2004.

65. Georgia Senate Voting Record, SR 595 (Feb. 16, 2004).

66. Failed Senate Floor Amendment to SR 595, introduced by Sen. Sam Zamarripa, Feb. 16, 2004.

67. Georgia Senate Voting Record, SR 595 (Feb. 16, 2004).

68. *Id.*

69. State of Georgia Final Composite Status Sheet, SR 595, Feb. 17, 2004 (May 19, 2004).

70. State of Georgia Final Composite Status Sheet, SR 595, Feb. 26, 2004 (May 19, 2004).

Representative Bob Holmes of the 48th district sought to amend SR 595 by deleting “Subsection (b)” and renumbering subsequent lines.⁷¹ The amendment failed by a vote of 19 to 146.⁷² Representative Larry Walker of the 115th district introduced an amendment to change lines 9 through 11 on page 1 to read as follows: “Regardless of whether entered into in this state or outside this state, this state shall recognize as marriage only the union of one man and one woman. Marriages between persons of the same-sex are prohibited and shall not be recognized in this state.”⁷³ The House denied the amendment in a vote of 45 to 121.⁷⁴ The resolution failed to obtain the 120 votes necessary for a constitutional amendment to pass by three votes.⁷⁵ The final vote was 117 to 50.⁷⁶ Immediately upon the resolution’s failure, proponents sought to have the House reconsider the action.⁷⁷ The House approved the motion to reconsider by a vote of 127 to 48 on March 1, 2004.⁷⁸ The resolution remained in the Rules Committee until March 31, 2004.⁷⁹ Supporters of the constitutional amendment accused Democrats of being obstructionists and of stalling the resolution in the Rules Committee with the hope that it would kill the proposition.⁸⁰ Representative Calvin Smyre of the 111th district, chairman of the Rules Committee, was “under pressure . . . to keep the bill bottled up in his committee.”⁸¹

Representatives Jeanette Jamieson, Carl Rogers, Rob Teilhet, Pat Dooley, Doug Stoner of the 22nd, 20th, 34th, 33rd, and 34th districts, respectively, proposed House resolution 1470, an alternative proposal of the same-sex marriage ban amendment to the Georgia Constitution.⁸² House resolution 1470 lacked the provision prohibiting Georgia from recognizing same-sex marriages performed

71. Failed House Floor Amendment to SR 595, introduced by Rep. Bob Holmes, Feb. 26, 2004.

72. Georgia House of Representatives Voting Record, SR 595 (Feb. 26, 2004).

73. Failed House Floor Amendment to SR 595, introduced by Rep. Larry Walker, Feb. 26, 2004.

74. Georgia House of Representatives Voting Record, SR 595 (Feb. 26, 2004).

75. *Id.*

76. *Id.*

77. State of Georgia Final Composite Status Sheet, SR 595, Feb. 26, 2004 (May 19, 2004).

78. Georgia House of Representatives Voting Record, SR 595 (Mar. 1, 2004).

79. State of Georgia Final Composite Status Sheet, SR 595, Mar. 31, 2004 (May 19, 2004).

80. Jim Tharpe, *Democrats Take Heat for Stalled Gay Marriage Vote*, ATLANTA J. CONST., Mar. 25, 2004, at E1, available at 2004 WL 73418584.

81. *Id.*

82. HR 1470, as introduced, 2004 Ga. Gen. Assem.

in other states.⁸³ The House first read HR 1470 on March 4, 2004.⁸⁴ The House read HR 1470 a second time on March 9, 2004.⁸⁵

SR 595 came out of Rules Committee on March 31, 2004, and the House passed it after two hours of debate by a vote of 122 to 52.⁸⁶ Four members of the House Legislative Black Caucus who did not cast votes on February 26, 2004, voted for the ban on March 31, 2004.⁸⁷

The Act

The enactment of SR 595 will place a referendum on the proposed constitutional amendment on the ballot in November 2004.⁸⁸ The proposed amendment will amend Article I of the Georgia Constitution by adding a new section IV entitled "Marriage."⁸⁹ The language on the ballot will state: "Shall the Constitution be amended so as to provide that this state shall recognize as marriage only the union of man and woman?"⁹⁰ The actual amendment to the constitution, should the referendum pass by a majority vote, includes much more sweeping language not included on the ballot.⁹¹ Paragraph I (b) of the new section IV states:

No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective

83. Compare HR 1470, as introduced, 2004 Ga. Gen. Assem., with SR 595, as introduced, 2004 Ga. Gen. Assem.

84. State of Georgia Final Composite Status Sheet, HR 1470, Mar. 4, 2004 (May 19, 2004).

85. State of Georgia Final Composite Status Sheet, HR 1470, Mar. 9, 2004 (May 19, 2004).

86. State of Georgia Final Composite Status Sheet, SR 595, Mar. 31, 2004 (May 19, 2004); Georgia House of Representatives Voting Record, SR 595 (Mar. 31, 2004).

87. *Georgia Voters to Decide*, supra note 49.

88. SR 595, as passed, 2004 Ga. Gen. Assem.; *Georgia Voters to Decide*, supra note 49.

89. *Id.*

90. *Id.*

91. See *id.*; Jamieson Interview, supra note 5.

rights arising as a result of or in connection with such relationship.⁹²

Analysis

Need for the Resolution

The resolution's supporters touted SR 595 as a proactive effort to prevent activist judges from overturning Code section 9-3-3.1 and to protect Georgia from having to recognize same-sex marriages imported from other states.⁹³ After the removal of the Ten Commandments from a court house in Alabama, a ruling taking prayer out of school, and the attempt to take "God" out of the pledge of allegiance, there was concern that the law defining marriage as between a man and a woman was vulnerable to attack.⁹⁴ Senator Mike Crotts of the 17th district, the resolution's author, wanted to define clearly judges' responsibilities in Georgia through the legislative process.⁹⁵ He said that the resolution was an attempt to allow Georgia to defend the sanctity of marriage and to preserve the rights of the citizens of Georgia to make laws and set standards for Georgia.⁹⁶

Influences

"When the vote is called you cannot hide. . . . [Y]ou sense that your constituency, like the raven in Poe's poem, is perched on your desk croaking 'nevermore' as you cast the vote that stakes your political future."⁹⁷

There was pressure from many spheres of influence during the movement of the resolution through the House and the Senate.⁹⁸ The

92. SR 595, as passed, 2004 Ga. Gen. Assem.

93. See Senate Audio, *supra* note 5; Hembree Interview, *supra* note 23.

94. See Senate Audio, *supra* note 5.

95. See *id.*

96. See Hembree Interview, *supra* note 23.

97. Audio Recording of House Proceedings, Mar. 31, 2004 (remarks by Rep. Karla Drenner), at http://www.georgia.gov/00/channel_title/0,2094,4802_6107103,00.html [hereinafter House Audio Two].

98. See Orrock Interview, *supra* note 48.

strongest influences cited were the Christian Coalition, the Republican Party, the Democratic Black Caucus, and the many gay rights advocacy groups.⁹⁹ For many lawmakers, SR 595 was not a difficult issue; they were sure that SR 595 was the right thing to do for Georgia and absolutely necessary to defend the sanctity and tradition of marriage as it has existed for centuries.¹⁰⁰ Discomfort with the resolution and the strong influences that were present in their jurisdictions left other legislators torn.¹⁰¹ Some knew that they would lose their seats if they voted against the resolution.¹⁰² Defeat in their districts did not concern others, but they were nonetheless unwilling to break away from their parties' leadership.¹⁰³ Some legislators felt strongly about the issue.¹⁰⁴ Many even attempted to walk out when the vote was called because they were concerned they could not vote "no" and maintain their seats.¹⁰⁵ Christian Coalition advocates were waiting in the hall to persuade them to go back and cast their vote.¹⁰⁶ Many regretted the vote they cast on March 31, 2004.¹⁰⁷

The Christian Coalition was a highly visible proponent of SR 595.¹⁰⁸ Sadie Field, who has been head of the Christian Coalition for seven years, explained that "the coalition depend[s] on its network of pastors around Georgia to encourage church members to contact legislators."¹⁰⁹ Lawmakers commented that instruction from the pulpit misled their constituents about the issues surrounding SR 595.¹¹⁰

99. *See id.*; *Georgia Voters to Decide*, *supra* note 49.

100. *See* Hembree Interview, *supra* note 23.

101. *See* Orrock Interview, *supra* note 48.

102. *See id.*

103. *See id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* Jamieson Interview, *supra* note 5.

108. *See* Orrock Interview, *supra* note 48.

109. Andrea Jones & Patti Ghezzi, *Gay Marriage Debate: Down-to-the-Wire Lobbying, Then Tense Wait for The Vote*, ATLANTA J. CONST., Apr. 1, 2004, at 13A, available at 2004 WL 73419625.

110. *See* Jamieson Interview, *supra* note 5.

Key Issues of the Resolution

Activist Judges

“It was Alexander Hamilton who pointed out that judges should be bound down by strict rules and precedents. Bound down, that is exactly what [needs] to be done.”¹¹¹

“And if you want to talk about activist judges, let’s talk about the ones that gave us the President that we have.”¹¹²

Motivating the proposal of SR 595 was a desire to put a “wall of defense” around the sanctity of marriage and to send a clear message to judges that the people of Georgia would not have their voices muffled by activist judges.¹¹³ Senator Crotts expressed the importance of prohibiting judges in Georgia from legislating from the bench and rewriting laws.¹¹⁴ Several recent decisions regarding gay marriage rights, as well as the decision to overturn the Georgia sodomy law in 1998, indicated to Senator Crotts and his colleagues in the House and the Senate that this “legislation from the bench” was imminent in Georgia.¹¹⁵

When challenged about the speculative nature of the resolution, Senator Crotts was clear that even the gay community was vulnerable to activist judges; activist judges who do not like the gay community could do as much harm as those who are sympathetic.¹¹⁶ Representative Bill Hembree of the 46th district presented the resolution to the House and pointed out that preventive action was necessary because, in other states, activist judges moved so quickly that the legislatures did not have a chance to respond.¹¹⁷

111. Senate Audio, *supra* note 5.

112. House Audio Two, *supra* note 97 (remarks by Rep. Alisha Thomas Morgan).

113. House Audio Two, *supra* note 97 (remarks by Rep. Bill Hembree).

114. Senate Audio, *supra* note 5.

115. See Hembree Interview, *supra* note 23.

116. See Senate Audio, *supra* note 5.

117. See Audio Recording of House Proceedings, Feb. 26, 2004 (remarks by Rep. Bill Hembree), at http://www.georgia.gov/00/channel_title/0,2094,4802_6107103,00.html [hereinafter House Audio One].

Many opponents believed that politics motivated the resolution.¹¹⁸ They felt that the initiative to put a constitutional amendment regarding gay marriage on the ballot in November was a carefully calculated national strategy to increase voter turn out, particularly within the Republican Party, and to assist President Bush in his reelection.¹¹⁹ Representative Alisha Thomas Morgan was skeptical of the alleged vulnerability of the gay marriage law, stating that there are no judges in Georgia that would overturn any laws to allow gay marriage in the State.¹²⁰

Sanctity of Marriage

“Think of how you would feel if this State told you that you were worthless and a destroyer of society.”¹²¹

A fundamental disagreement about how the law should define marriage divided the resolution’s opponents and supporters. Some lawmakers brought dictionaries to emphasize the long standing recognition of marriage as “[t]he act of uniting a man and woman for life.”¹²² Others brought their Bibles to the well or quoted the words of Jesus regarding the “sacred lifelong bond between one man and one woman.”¹²³

Lobbyists such as American Civil Liberties Union (“ACLU”) lawyer Beth Littrell proposed a broader definition of marriage.¹²⁴ Littrell defined marriage as love, commitment, and a contract between two people.¹²⁵ She called for an evolution of the idea of marriage, freeing it from rigid gender roles and patriarchal roots, and restoring it to what it should have always been—“the joining of two souls based on the glorious magical mystery of love.”¹²⁶

118. See Orrock Interview, *supra* note 48.

119. See Jamieson Interview, *supra* note 5; Orrock Interview, *supra* note 48.

120. House Audio Two, *supra* note 97 (remarks by Rep. Alisha Thomas Morgan).

121. *Id.* (remarks by Rep. Karla Drenner).

122. *Id.* (remarks by Rep. Tommy Smith).

123. *Id.* (remarks by Rep. Hinson Mosely).

124. Beth Littrell, Georgia American Civil Liberties Union Attorney, Speech at the Celebration of Marriage Equality in Atlanta, Georgia (May 15, 2004) (on file with the Georgia State University Law Review) [hereinafter Littrell Speech].

125. *Id.*

126. *Id.*

Proponents of SR 595 sought to prevent the “evolution” of marriage by declaring that marriage is a union between a man and a woman. Citing “faith based conservative values,” proponents argued that the institution of marriage between a man and a woman has been the backbone of society for thousands of years and that it continues to sustain the structure and stability of society.¹²⁷

Some opponents criticize the “traditional marriage” arguments as viewing the past 60 to 100 years as the norm for over 3000 years of human history.¹²⁸ Reverend Paul M. Turner of the Gentle Spirit Christian Church of Atlanta said that all we have to do is go back to the Old Testament to see that marriage was solely about property and inheritance.¹²⁹ Women were merely the “carriers of the seed,” and the requirement that a man bear children with the widow of his brother if his brother died without heirs maintained familial property.¹³⁰ Lawmakers that opposed the resolution embraced the idea that marriage is a fluid concept in human history, as illustrated by the history of polygamy in religious heritage.¹³¹

The Right to Family

“I am not going to amend my Constitution to take away rights that I don’t have now.”¹³²

Some estimated that there are 1049 federal rights for married couples to which same-sex couples do not have access.¹³³ These rights include visitation rights to a sick or dying partner in an emergency room, the right to recognition of a health care power of attorney, and the right to domestic partner health benefits.¹³⁴

127. Senate Audio, *supra* note 5.

128. See Interview with Reverend Paul M. Turner, Senior Pastor, Gentle Spirit Christian Church of Atlanta, in Atlanta, Ga. (Mar. 25, 2004) [hereinafter Turner Interview].

129. *Id.*

130. *Id.*

131. See House Audio Two, *supra* note 97 (remarks by Rep. Tom Bordeaux and others).

132. Representative Karla Drenner, Speech at the Celebration of Marriage Equality in Atlanta, Georgia (May 15, 2004) (on file with the Georgia State University Law Review) [hereinafter Drenner Speech].

133. Interview with Jack Senterfitt, Senior Staff Attorney Lambda Legal, in Atlanta, Ga. (Apr. 1, 2004) [hereinafter Senterfitt Interview].

134. See Professor Ellen Taylor, Panel Discussion at the Same-Sex Marriage Symposium: Same-Sex Marriage and the Law at the Georgia State University College of Law (Mar. 23, 2004) (on file with the Georgia State University Law Review) [hereinafter Taylor Panel Discussion].

Although Georgia law as it stands today does not recognize the rights of participants in same-sex unions, the language on the constitutional amendment could further limit the ability of same-sex partners to enforce the expensive legal protections they have put in place.¹³⁵ Under the language of subsection (b) of the resolution, Georgia courts will not have jurisdiction to recognize or to preside over any domestic cases arising from same-sex unions.¹³⁶ For instance, on the death of a domestic partner, if that person's family challenged the deceased's wishes regarding child custody, a Georgia court would not have authority to award custody to the deceased's domestic partner.¹³⁷ Representative Hembree characterized fears that same-sex couples cannot pass property to a same-sex partner as unfounded.¹³⁸ He suggested that the deceased can establish wills and estate plans to leave the property to whomever they want.¹³⁹ Beth Littrell, pointing to the long record of challenged, lost, and invalidated powers of attorney and living wills that she has encountered while with the ACLU, asserted that an attorney cannot provide same-sex couples the same legal rights and protections that come with marriage.¹⁴⁰ Only an extension of the right to marry to same-sex couples can provide the needed legal protection.¹⁴¹

Legal rights denied to same-sex couples are a large part of the mental and physical well-being nurtured by the right to enter into a marriage. Professor Ellen Taylor of the Georgia State University College of Law stressed the emotional and societal benefits that emerge from the central expectations that marriage creates.¹⁴² These expectations permit individuals to invest more into their relationships because it is more likely that the relationship will be eternal if the law recognizes it.¹⁴³ Senator Crotts argued, however, that gay people have the same rights to marry and to reap the benefits of marriage as straight people if they choose partners condoned by law.¹⁴⁴

135. See Jamieson Interview, *supra* note 5.

136. See *id.*; Orrock Interview, *supra* note 48.

137. See Jamieson Interview, *supra* note 5.

138. House Audio Two, *supra* note 97 (remarks by Rep. Bill Hembree).

139. *Id.*

140. Littrell Speech, *supra* note 124.

141. *Id.*

142. Taylor Panel Discussion, *supra* note 134.

143. *Id.*

144. Senate Audio, *supra* note 5.

The rights of children in same-sex relationships are also a point of concern for opponents of the same-sex marriage amendment. Professor Taylor estimated that there are between two million and fourteen million children in the United States being raised by same-sex parents.¹⁴⁵ The financial and emotional interests of these children are a concern shared by those debating the issue in the Georgia Legislature.¹⁴⁶ Representative Jamieson pointed to this issue as one of the most decisive.¹⁴⁷ Citing over 25 years of involvement in children's issues, Representative Jamieson felt that the battle over the validity of same-sex relationships threatens the security of children in these relationships because their future is uncertain under a constitutional amendment that does not allow judges to adjudicate their rights.¹⁴⁸ She said that these children's security is critical to developing feelings of personal value and civic responsibility.¹⁴⁹

Constitutional Challenge

"I contend that in the law today that those that are arguing against this issue have the same right to marry as you and I do under the current law. The only thing is that they need to find the right partner."¹⁵⁰

"I think that we have to, in fact, be aware that this dog will not hunt."¹⁵¹

Many have expressed certainty that the resolution will face a constitutional challenge on equal protection or other constitutional grounds.¹⁵² The debate turns on whether the issue of gay marriage is a civil rights issue. Those that support the resolution draw a distinction between historic subjects of the Civil Rights Movement

145. Taylor Panel Discussion, *supra* note 134.

146. See Jamieson Interview, *supra* note 5.

147. *Id.*

148. *See id.*

149. *Id.* ("Either these kids are going to be in a situation that gives them value or we will see them in the judicial system some time down the line because they were not given that feeling.")

150. Senate Audio, *supra* note 5.

151. House Audio One, *supra* note 117 (remarks by Rep. Bob Holmes).

152. See Senterfitt Interview, *supra* note 133.

and the rights of same-sex couples.¹⁵³ They feel that homosexuality, unlike race or sex, is the expression of a lifestyle choice that people can control.¹⁵⁴ They assert that there is no violation of the civil rights of homosexuals because they have the same rights to marry as heterosexuals.¹⁵⁵ Representative Tom Rice of the 64th district referred to the equality efforts of the homosexual community as an “attempt to embroider [] sin into a lifestyle that [they] want other people to accept which tends to avert traditional ways of doing things like marriage.”¹⁵⁶ Proponents refuse to allow “special privileges” to accrue to those who make a choice to participate in a lifestyle that is contrary to tradition.¹⁵⁷

However, Representative Nan Orrock noted that opponents could not overlook the similarity between the rhetoric supporting the gay marriage amendment and the rhetoric that supported slavery, segregation, and the marginalization of women.¹⁵⁸ Beth Littrell asserted that the right to marry is a fundamental civil right that the Court has not yet extended to gays but that the Supreme Court has declared a fundamental civil right in three different cases.¹⁵⁹ Opponents of the resolution took issue with the assertion that homosexuals want special rights and declared that the amendment is outright discrimination against a segment of society.¹⁶⁰ Greg Nevins of Lambda Legal expressed the fundamental unfairness of excluding same-sex families from an institution that the government established and endowed with rights and privileges.¹⁶¹ He asserted that it constitutes a denial of equal protection and equal rights under the law.¹⁶²

Proponents of the resolution focus their arguments on a desire to allow the people of Georgia to vote and to have their voice heard on

153. See Hembree Interview, *supra* note 23.

154. See *id.*

155. See Senate Audio, *supra* note 5.

156. House Audio Two, *supra* note 97 (remarks by Rep. Tom Rice).

157. See Senate Audio, *supra* note 5.

158. See House Audio Two, *supra* note 97 (remarks by Rep. Nan Orrock).

159. Littrell Speech, *supra* note 124.

160. See House Audio One, *supra* note 117 (remarks by Rep. Bob Holmes); see also Drenner Speech, *supra* note 132; Greg Nevins, Lambda Legal Attorney, Speech at the Celebration of Marriage Equality in Atlanta, Georgia (May 15, 2004) (on file with the Georgia State University Law Review) [hereinafter Nevins Speech].

161. Nevins Speech, *supra* note 160.

162. *Id.*

the issue of recognition of same-sex marriage.¹⁶³ Representative Hembree believed that the amendment is not vulnerable to constitutional challenge because there has been no challenge of similar language in Hawaii or Alaska.¹⁶⁴ He felt that allowing the people of Georgia to vote on the referendum would protect the amendment from any federal challenges.¹⁶⁵ Representative Hembree said that if the ban is challenged, the constitutional amendment will send a powerful message to the courts regarding how Georgia feels about the issue.¹⁶⁶ Senator Crotts agreed that the constitutional amendment will put a “wall of defense” around the sanctity of marriage that will allow the people’s voices to be heard over the voice of the judges.¹⁶⁷ Some see the resolution as critical to allowing Georgia voters to participate in the national dialogue about gay marriage.¹⁶⁸ Hembree stated that it allows all of his constituents, gay and straight, to participate in that dialogue by voting.¹⁶⁹

Opponents of the resolution feel that this line of reasoning is misleading people. They point out that only a portion of the resolution will be on the ballot.¹⁷⁰ The controversial section (b), which will become part of the constitution, will not appear on the ballot.¹⁷¹ The ballot will read: “Shall the Constitution be amended so as to provide that this state shall recognize as marriage only the union of man and woman?”¹⁷² The ballot will likely make people believe that if they vote for this amendment they will prevent two gay people from marrying in Georgia.¹⁷³ However, according to some opponents, section (b) makes the amendment vulnerable to constitutional challenge.¹⁷⁴ Representative Jamieson believes that opponents and proponents alike are certain that a court will strike down the amendment in a constitutional challenge, and that Georgia will be left with no protection because the decision might jeopardize the existing

163. See, e.g., House Audio One, *supra* note 117 (remarks by Rep. Bill Hembree).

164. Hembree Interview, *supra* note 23.

165. House Audio Two, *supra* note 97 (remarks by Rep. Bill Hembree).

166. *Id.*

167. See Senate Audio, *supra* note 5 (remarks by Sen. Mike Crotts).

168. Hembree Interview, *supra* note 23.

169. See *id.*

170. Jamieson Interview, *supra* note 5.

171. *Id.*

172. SR 595, as passed, 2004 Ga. Gen. Assem.

173. See *id.*; Jamieson Interview, *supra* note 5.

174. Jamieson Interview, *supra* note 5.

gay marriage law.¹⁷⁵ Representative Orrock of the 51st district pointed out that it only takes a 51% vote in the House to maintain the language of the statute.¹⁷⁶ Based on the current political climate, she does not see a change happening over night, but is quite certain a change will eventually occur.¹⁷⁷

The Reputation of Georgia

“While we were debating whether the fence post could be married to the mud puddle”¹⁷⁸

The idea of amending the constitution to include the language of SR 595 appalled many lawmakers because they described it as discriminatory.¹⁷⁹ These lawmakers felt that the resolution threatens the reputation for tolerance and inclusion that has come to characterize Georgia and particularly Atlanta.¹⁸⁰ They attributed the growth of Atlanta’s business sector, the attractiveness of Atlanta to Fortune 500 companies, and the international honor of hosting the Olympics in 1996 to this reputation.¹⁸¹ Many felt that the amendment will enshrine bigotry and write “graffiti” into the constitution of this State.¹⁸² Some see the amendment as antithetical to the idea that a constitution provides rights and protects freedom.¹⁸³ An amendment of this kind has never existed in the Georgia Constitution.¹⁸⁴ Representative Orrock repeatedly warned lawmakers that they would look back on this decision with shame and regret.¹⁸⁵ However, when asked if his support of the resolution in the House humiliated him,

175. *Id.*

176. Orrock Interview, *supra* note 48.

177. *Id.*

178. Jamieson Interview, *supra* note 5.

179. *See* House Audio One, *supra* note 117 (remarks by Rep. Bob Holmes).

180. *Id.* (remarks by Rep. Nan Orrock).

181. House Audio Two, *supra* note 97 (remarks by Rep. Nan Orrock).

182. *Id.* (remarks by Rep. Nan Orrock); Drenner Speech, *supra* note 132.

183. *See* Interview with Sen. Mary Squires, Senate District No. 5, in Atlanta, Ga. (May 15, 2004) [hereinafter Squires Interview]; Senterfitt Interview, *supra* note 133.

184. Jack Senterfitt, Address at the Lesbian Gay Law Student Association, Law Week Event at Georgia State University College of Law (Apr. 1, 2004) (on file with the Georgia State University Law Review).

185. House Audio Two, *supra* note 97 (remarks by Rep. Nan Orrock).

Representative Hembree replied that giving the people of Georgia the right to voice their opinion would never make him ashamed.¹⁸⁶

There is a fear that, along with the loss of reputation, there will be a concomitant reluctance of Fortune 500 businesses to enter Georgia.¹⁸⁷ Fortune 500 companies strongly opposed the amendment because of the implications it would have on employee relations and on the ability to attract highly qualified applicants.¹⁸⁸ These companies feared that the language in section (b) would threaten their ability to provide domestic partner benefits to same-sex couples.¹⁸⁹ Jack Senterfitt, Senior Staff Attorney at Lambda Law, stated that the language of section (b) does not automatically result in a denial of domestic benefits, but there are certainly some people who will argue that section (b) prohibits employers from offering those benefits.¹⁹⁰

Representative Hembree said that section (b) will not effect the movement of Fortune 500 companies into Georgia.¹⁹¹ He stressed the distinction between public policy and the right of private organizations to do what they want regarding their domestic partner benefits.¹⁹² He stated that private companies like Delta and Coke establish their own employee benefit guidelines that the State Constitution does not affect.¹⁹³ Representative Orrock responded to this assertion by pointing out that judicial and legal decisions do not occur in a vacuum but that the political climate affects these decisions.¹⁹⁴ The constitutional amendment alters that climate by promoting the view that homosexuality is an unacceptable behavior in society.¹⁹⁵ By disallowing the full participation of gay people in society, the amendment will invariably influence decisions about domestic partner benefits both in the public and in the private sectors.¹⁹⁶

186. Hembree Interview, *supra* note 23.

187. House Audio Two, *supra* note 97 (remarks by Rep. Nan Orrock).

188. *Id.*

189. *See id.*

190. Senterfitt Interview, *supra* note 133.

191. Hembree Interview, *supra* note 23.

192. *Id.*

193. *Id.*

194. Orrock Interview, *supra* note 48.

195. *Id.*

196. *Id.*

The resolution received sharp criticism for misappropriating time that the legislature should have allotted to other important challenges facing Georgia this year.¹⁹⁷ Representative Jamieson stated that Georgia entered the legislative session with an unbalanced budget, a Medicaid disaster, and an educational funding situation that could lead to the loss of teachers.¹⁹⁸ SR 595 diverted both public and legislative attention from these issues.¹⁹⁹ Representative Morgan shared Jamieson's irritation, stating that the gay marriage amendment paled in importance to the 12,000 pregnant women who may not have Medicaid next year and the \$400 million dollars that the Governor was proposing to cut from the Department of Education.²⁰⁰

Senator Crotts did not agree that the resolution was a waste of time.²⁰¹ He stated that this amendment was of highest importance because of the "deficit of decency" in this country.²⁰² He felt that the resolution was timely and that it was necessary for legislators in Georgia to tell activist judges their stance on the issue of gay marriage before the "tyranny of some of these decisions that are being made from the bench" leads judges to permit the issuance of marriage licenses to same-sex couples in Georgia.²⁰³ He argued that the "other side" in Massachusetts, California and Alabama forced the issue to the surface and that lawmakers must correct it.²⁰⁴

*Shannon Alexander
Heather Schafer*

197. Jamieson Interview, *supra* note 5; House Audio Two, *supra* note 97 (remarks by Rep. Alisha Thomas Morgan).

198. Jamieson Interview, *supra* note 5.

199. *Id.*; House Audio Two, *supra* note 97 (remarks by Rep. Alisha Thomas Morgan).

200. House AudioTwo, *supra* note 97 (remarks by Rep. Alisha Thomas Morgan).

201. Senate Audio, *supra* note 5.

202. *Id.*

203. *Id.*

204. *Id.*