

The Meaning and Potential Legal Effects of North Carolina's Proposed Marriage Amendment

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April 18, 2012

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Introduction

The voters of North Carolina will decide on May 8, 2012 whether to add the following amendment to the State Constitution:

Marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.¹

There has been much conjecture regarding the potential legal effects of this provision, should it become part of the North Carolina Constitution. Maxine Eichner, a professor at the University of North Carolina School of Law, issued a 27-page statement in November 2011 detailing her views on the potentially harmful legal impact of the proposed Amendment.² She says that the Amendment would not only ban same-sex marriage, civil unions, and domestic partnerships, but also would threaten a wide range of benefits or protections given to unmarried couples, whether heterosexual or homosexual, including existing domestic violence laws. Professor Eichner's views have been widely disseminated in the media.

The reason for this paper is a narrow one. We do not endorse or oppose the proposed Amendment. There are thoughtful arguments on both sides, and we encourage a robust public debate about the Amendment. Our aim instead is to help clarify for North Carolina voters the Amendment's legal meaning and likely effects. We believe that the Amendment debate has been distorted by concerns over certain legal consequences that are highly unlikely to occur. While the apparent aim of the proposed Amendment could have been stated with greater clarity, we do not think its terms justify these concerns.

We emphasize again that it is not up to us to tell anyone how to vote on the proposed Amendment. We offer this paper only as a modest attempt to explain the meaning and likely effects of the Amendment, should it pass. We believe that North Carolina voters are best served by having accurate legal information about the Amendment, so that they can properly consider the Amendment's pros and cons and then vote their conscience.

We speak as concerned academics and the views expressed herein are our own. We do not represent the views of Campbell University School of Law or Campbell University.

The Meaning of the Proposed Amendment

The proposed Amendment provides that "[m]arriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this State." Current state statutory

¹ An Act to Amend the Constitution to Provide that Marriage Between One Man and One Woman is the Only Domestic Legal Union that Shall be Valid or Recognized in this State, Session Law 2011-409 (2011), *available at* <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S514v5.pdf>.

² Maxine Eichner, et al., *Potential Legal Impact of the Proposed Domestic Legal Union Amendment to the North Carolina Constitution* (November 8, 2011), *available at* <http://www.law.unc.edu/documents/faculty/marriageamendment/dlureportnov8.pdf>.

law restricts “marriage” to opposite-sex couples.³ The Amendment goes beyond this statutory provision to make marriage between a man and a woman the only valid or recognized “domestic legal union” in the state.

Thirty states have passed similar amendments. Ten state amendments define marriage as between only a man and woman, while one state amendment gives the state legislature the power to reserve marriage to opposite-sex couples.⁴ Seventeen state amendments not only limit marriage to opposite-sex couples, but also bar the state from creating or recognizing other marriage-like relationships—such as certain civil unions or domestic partnerships—which have the same or similar legal status, rights, or effects as marriage.⁵ Two state amendments include these broader provisions but further forbid the state from recognizing any private contractual agreements conferring or assigning the rights, benefits, obligations, or effects of marriage.⁶

We begin with a point on which we agree with Professor Eichner and other Amendment opponents: The proposed Amendment will bar not only same-sex marriages, but also recognition or validation of civil unions and domestic partnerships that constitute legal substitutes for the marriage relationship. The question is whether the Amendment will apply to other domestic relationships beyond marriage or marriage-like legal statuses.

Professor Eichner says that North Carolina’s proposed Amendment goes beyond the amendments passed in other states by “potentially bar[ring] giving any protections to unmarried couples based on their relationship.”⁷ Referring to the 17 state amendments that both limit marriage to opposite-sex couples and bar the state from creating or recognizing other marriage-like relationships, she explains that

[i]n contrast to North Carolina’s proposed Amendment, these amendments bar recognition of same-sex marriages and civil unions, but would not bar protections for unmarried couples not substantially equivalent to marriage. North Carolina’s language goes beyond this, barring the “validity” or

³ N.C. Gen. Stat. § 51-1 (“A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife”); N.C. Gen. Stat. § 51-1.2 (“Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.”).

⁴ Alaska (Alaska Const. art. I, § 25); Arizona (Ariz. Const. art. XXX, § 1); California (Cal. Const. art. I, ¶ 7.5); Colorado (Colo. Const. art. II, § 31); Mississippi (Miss. Const. art. XIV, § 263A); Missouri (Mo. Const. art. I, § 33); Montana (Mont. Const. art. XIII, § 7); Nevada (Nev. Const. art. I, § 21); Oregon (Or. Const. art. XV, § 5A); and Tennessee (Tenn. Const. art. XI, § 18). Additionally, Hawaii’s constitutional amendment grants the state legislature the power to reserve marriage to opposite-sex couples. (Haw. Const. art. I, § 23).

⁵ Alabama (Ala. Const. art. I, § 36.03(g)); Arkansas (Ark. Const. amend. LXXXIII, § 1); Florida (Fla. Const. art. I, § 27); Georgia (Ga. Const. art. I, § 4); Idaho (Idaho Const. art. III, § 28); Kansas (Kan. Const. art. XV, § 16); Kentucky (Ky. Const. § 233A); Louisiana (La. Const. art. XII, §15); Nebraska (Neb. Const. art. I, § 29); North Dakota (N.D. Const. art. XI, § 28); Ohio (Ohio Const. art. XV, § 11); Oklahoma (Okla. Const. art. II, § 35); South Carolina (S.C. Const. art. XVII, § 15); South Dakota (S.D. Const. art. XXI, § 9); Texas (Tex. Const. art. I, §32); Utah (Utah Const. art. I, § 29); Wisconsin (Wis. Const. art. XIII, § 13).

⁶ Michigan’s amendment states that “the union of one man and one woman in marriage shall be the *only agreement* recognized as a marriage or similar union for any purpose.” (Mich. Const. art. I, § 25) (emphasis added). Virginia’s amendment provides that “only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth” and forbids creation or recognition of “a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.” It additionally prohibits creation or recognition of “another union, partnership, or other legal status to which *is assigned* the rights, benefits, obligations, qualities, or effects of marriage.” (Va. Const. art. I, §15-A) (emphasis added).

⁷ Eichner, *supra* note 2, at 3.

“recognition” of relationships of unmarried couples, even for the purposes of giving these relationships much less significant protections than those accorded married couples.⁸

Professor Eichner argues that the proposed Amendment could bar all relationship protections for unmarried heterosexual couples. She says the Amendment potentially will affect a wide range of domestic relationships, including domestic violence protections for unmarried people, existing child custody and visitation laws, and other protections for unmarried persons relating to emergency medical decisions, hospital visitation, disposition of remains, trusts, wills, and end-of-life directives.

We respectfully take a different view. While the precise phrase “domestic legal union” is neither defined in the proposed Amendment nor heretofore has been used in North Carolina law, it plainly refers to marriage or marriage imitations or substitutes. The key term is “union” – not domestic “relationships,” as Professor Eichner argues. The Amendment does not forbid the legal recognition or validity of all domestic relationships, but only of domestic “unions.” The flaw in Professor Eichner’s analysis is that she does not give the term “union” its proper effect in limiting the Amendment’s reach. (In her 27-page report, she only devotes a single sentence to the meaning of the term.⁹).

North Carolina courts frequently have used the term “union” to describe the marital relationship.¹⁰ *Black’s Law Dictionary* defines marriage as the “[t]he legal union of a couple as spouses.”¹¹ Thus, in the context of the proposed Amendment, a “domestic legal union” is a marriage or legal status resembling marriage. The Amendment bars North Carolina from recognizing or validating same-sex marriages or other similar legal statuses, such as civil unions and domestic partnerships, which are meant to embody marriage-like relationships. The state cannot condition a benefit, privilege, or right upon recognition of a legal status that approximates or replicates a marriage by treating an unmarried couple like they are spouses.

⁸ *Id.*

⁹ See Eichner, *supra* note 2, at 5 (“Finally, [the *Merriam-Webster Dictionary*] defines the word ‘union’ as: ‘an act or instance of uniting or joining two or more things into one: as (1): the formation of a single political unit from two or more separate independent units (2): a uniting in marriage.’”) (footnote omitted).

¹⁰ See, e.g., *State v. Rollins*, 363 N.C. 232, 235, 675 S.E.2d 334, 336 (N.C. 2009) (noting that the marital communications privilege “is a product of the continually evolving common law marital privileges that historically sought to promote credibility and protect the intimacy of the marital union” and “is premised upon the belief that the marital union is sacred and that its intimacy and confidences deserves legal protection”) (emphasis added); *Kornegay v. Robinson*, 176 N.C. App. 19, 23, 625 S.E.2d 805, 806 (N.C. App. 2006) (referring to “prior marriages and offspring from those unions”) (emphasis added); *Anderson v. Lackey*, 163 N.C. App. 246, 593 S.E.2d 87, 88 (N.C. App. 2004) (“Plaintiff and defendant were married on or about 6 July 1985. Colby was born of the union on 19 March 1988.”) (emphasis added); *Jeffries v. Moore*, 148 N.C. App. 364, 366, 559 S.E.2d 217, 218 (N.C. App. 2002) (addressing “the presumption of legitimacy which attaches when a child is born during a marriage union”) (emphasis added); *Harris v. Harris*, 91 N.C. App. 699, 700, 373 S.E.2d 312, 313 (N.C. App. 1988) (noting that “the plaintiff and defendant entered a union of marriage”) (emphasis added); *Cannon v. Miller*, 71 N.C. App. 460, 486, 322 S.E.2d 780, 798 (N.C. App. 1984) (declaring that “a marriage is a union of individuals”) (emphasis added); *Jackson v. Jackson*, 68 N.C. App. 499, 500, 315 S.E.2d 90, 90 (N.C. App. 1984) (“marriage union”); *Heist v. Heist*, 46 N.C. App. 521, 525, 265 N.E.2d 434, 437 (N.C. App. 1980) (“marital union”); *Woodard v. Blue*, 103 N.C. 109, 9 S.E. 492, 494 (N.C. 1889) (referring to the “offspring of a lawful union”) (emphasis added). Professor Eichner found no instances of the phrases “legal union” or “domestic union” being used in North Carolina law, but the North Carolina decisions are replete with references to “marriage union” or “marital union.”

¹¹ *Black’s Law Dictionary* 876 (9th ed. 2009) (emphasis added). As noted above, see *supra* note 10, Professor Eichner cites a modern dictionary that defines “union” as “a uniting in marriage.” Eichner, *supra* note 2, at 5.

The meaning of “domestic legal union” becomes even more apparent when compared with similar amendments from other states which not only limit marriage to opposite-sex couples, but also bar the state from creating or recognizing other marriage-like statuses such as civil unions or domestic partnerships. For example:

- The North Dakota Constitution states that “[m]arriage consists only of the *legal union* between a man and a woman. *No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.*”¹²
- The Utah Constitution states “[m]arriage consists only of the *legal union* between a man and a woman. *No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.*”¹³
- The Florida Constitution states that “[i]nasmuch as marriage is the *legal union* of only one man and one woman as husband and wife, *no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.*”¹⁴
- The Arkansas Constitution states that “[m]arriage consists only of the *union* between one man and one woman. *Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas . . .*”¹⁵
- The South Carolina Constitution states that “[a] marriage between one man and one woman is the *only lawful domestic union that shall be valid or recognized in this State*. This State and its political subdivisions *shall not create a legal status, right or claim respecting any other domestic union, however denominated.*”¹⁶
- The Kentucky Constitution states that “[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. *A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.*”¹⁷
- The Louisiana Constitution states that “[n]o official or court of the state of Louisiana shall construe this constitution or any state law to require that *marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman*. *A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.*”¹⁸
- The Ohio Constitution states that “[o]nly a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions *shall not create or recognize a legal status for*

¹² N.D. Const. art. XI, § 28 (emphasis added).

¹³ Utah Const. art. I, § 29 (emphasis added).

¹⁴ Fla. Const. art. I, § 27 (emphasis added).

¹⁵ Ark Const. amend. LXXXIII, § 2 (emphasis added).

¹⁶ S.C. Const. art. XVII, § 15 (emphasis added).

¹⁷ Ky. Const. § 233A (emphasis added).

¹⁸ La. Const. art. XII, §15 (emphasis added).

relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."¹⁹

- The Nebraska Constitution states that "[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. *The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.*"²⁰
- The South Dakota Constitution states that "[o]nly marriage between a man and a woman shall be valid or recognized in South Dakota. *The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized.*"²¹
- The Texas Constitution states that "[m]arriage 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.*"²²
- The Wisconsin Constitution states that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state. *A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.*"²³

Although the language in each amendment is stated somewhat differently, the clear intent of all is (1) to limit the benefits and protections associated with marriage to marriages between men and women, and (2) to prohibit legal validity or recognition of other types of marriage-like unions or statuses. This also is what North Carolina's proposed Amendment does when specifying that "[m]arriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this State."

In our view, then, Professor Eichner errs when she claims that "the phrase 'domestic legal union' potentially refers to *any domestic relationship* that receives any legal recognition, protection, or rights from the state."²⁴ She has not shown that North Carolina courts would apply the term "union" in the proposed Amendment to all unmarried persons who are cohabiting, dating, or just friends, nor can the term "union" reasonably be applied to parent-child, grandparent-grandchild, and sibling relationships. The plain language of the Amendment reaches only domestic *unions*—marriage and marriage imitations or substitutes—not all domestic relationships. There is no evidence that North Carolina's proposed Amendment is intended to go further than the marriage amendments *in every other state* by barring the state, as Professor Eichner claims, from giving unmarried couples "much less significant protections than those accorded married couples."²⁵ The proposed Amendment should permit a variety of

¹⁹ Ohio Const. art. XV, § 11 (emphasis added).

²⁰ Neb. Const. art. I, § 29 (emphasis added).

²¹ S.D. Const. art. XXI, § 9 (emphasis added).

²² Tex. Const. art. I, § 32 (emphasis added).

²³ Wis. Const. art. XIII, § 13

²⁴ Eichner, *supra* note 2, at 5 (emphasis added).

²⁵ *Id.* at 3; *see id.* at 1 ("In prohibiting 'domestic legal unions' besides heterosexual marriage, the proposed Amendment is significantly broader than marriage amendments that have been passed in other states.").

legal benefits and protections for unmarried couples so long as they are not treated like they are spouses.

To illustrate, suppose that the North Carolina legislature passes a law that gives a “domestic partner” the same rights as a surviving spouse in the disposition of a deceased person’s remains. The law defines domestic partner as “a person who was in a committed relationship with the deceased person,” and lists several factors that indicate when such a relationship exists. The right of the domestic partner is given priority over the protests of all members of the decedent’s family, including the decedent’s children, parents, or siblings.

Would this law be valid under the proposed Amendment? Probably not. The right to dispose of a decedent’s remains traditionally has been reserved to the surviving spouse and, if none, the next of kin.²⁶ The right of the domestic partner under this law would be given the same legal effect as that of the surviving spouse, and thus would recognize and validate the domestic partnership as a legal *union* – a marriage-like relationship that treats the partner like a surviving spouse. On the other hand, if the law only adds a domestic partner to the list of persons who may control the disposition of the decedent’s remains but does not give the partner the same or similar rights as a surviving spouse, the law likely would not be barred by the Amendment. That’s because the domestic partner is being treated like other persons whose rights under the law are not dependent upon having a marital or marital-like union with the deceased.

This illustration also provides a good example of how, when one focuses on the limiting term “union” (the word actually used in the proposed Amendment and given considerable judicial consideration in North Carolina cases), rather than on the term “relationship” (a word not found in the Amendment), the proper meaning and scope of the Amendment can be more readily determined.

Current North Carolina law allows control over the disposition of a deceased person’s remains by “a person who has exhibited special care and concern for the decedent and is willing and able to make decisions about the disposition.”²⁷ That person is placed in order of priority behind the deceased’s surviving spouse, children, parents, siblings, and certain other relatives. Professor Eichner construes the proposed Amendment to reach *any domestic relationship*. She claims that “courts could deem the empowerment of a domestic partner unconstitutional even in this last category if the Amendment were passed on the ground that the disposition of remains is considered a spousal right. Giving rights to a partner based on their *relationship* would therefore constitute unconstitutional recognition of the *relationship*.”²⁸

To the contrary, the disposition of remains is not an exclusively spousal right—other persons also may direct the disposition in order of priority under the law. Like those persons, the domestic partner’s empowerment in the last category does not depend upon having a marital or marital-like *union* with the deceased, but rather on the partner’s display of “special care and concern” for the deceased, which is a category that may include cohabiting partners of the same or opposite sex, friends, co-workers and others who are not married or related to the deceased. The Amendment would not keep a domestic partner from qualifying under this

²⁶ See N.C. Gen. Stat. §130A-420 (2009).

²⁷ N.C. Gen. Stat. §130A-420(b)(6).

²⁸ Eichner, *supra* note 2, at 24 (emphasis added).

category because the Amendment bars legal recognition or validation of domestic *unions*, not *relationships* of special care and concern.²⁹

We finally note that the State of Idaho adopted in 2006 a marriage amendment with the exact same wording as North Carolina's proposed Amendment.³⁰ The Idaho legislature's joint resolution on the amendment contains a section describing the "Effect of Adoption" of the amendment, which reads:

It is intended to prohibit recognition by the State of Idaho, or any of its political subdivisions, of civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage, no matter how denominated. The language is further intended to prohibit the State of Idaho, or any of its political subdivisions, from granting any or all of the legal benefits of marriage to civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage.³¹

This legislative explanation is consistent with our understanding of the meaning and potential legal effect of North Carolina's proposed amendment. So understood, North Carolina's amendment should not reach beyond marriages and marriage imitations or substitutes to any relationship between unmarried people.

The Potential Effects of the Proposed Amendment

Predicting with any certainty how a court might decide a case involving the proposed Amendment is impossible. We must emphasize, however, that courts generally are reluctant to strike down laws as unconstitutional. Under North Carolina law, it is well settled that "a statute enacted by the General Assembly is presumed to be constitutional."³² A statute will not be declared unconstitutional "unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground."³³ It is unlikely, therefore, that adoption of the proposed Amendment will result in a widespread invalidation of existing or future North Carolina laws.

²⁹ Our hypothetical illustration about a decedent's remains is based on a question posed to the Nebraska Attorney General. See *Compatibility of Legislation to Vest Rights in Domestic Partners and Neb. Const. Art. I, Section 29*, Neb. Op. Att'y Gen. No. 03004 (2003 WL 21207498). Professor Eichner places the Nebraska Attorney General's opinion under the heading of authorities showing "that the Proposed Amendment Would Be Construed Broadly to Prohibit Any Relationship Protections for Unmarried Couples." See Eichner, *supra* note 2, at 6, 10. The Nebraska attorney general's opinion specifically addressed proposed legislation that would give a domestic partner *the same rights* as a surviving spouse in directing the disposition of a deceased person's remains, as depicted in our illustration. The opinion did not address, and therefore cannot support, Professor Eichner's contention that the proposed Amendment could bar a domestic partner from directing the disposal of remains solely because of *any relationship* with the deceased.

³⁰ Idaho Const. art. III, § 28 ("Marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this State.").

³¹ http://www.sos.idaho.gov/elect/inits/06_hjr2_stmnt_effect.htm.

³² *Wayne County Citizens Ass'n for Better Tax Control v. Wayne County Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991).

³³ *Id.* (citing *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 63, 366 S.E.2d 697, 698 (1988)).

1. Will the Amendment lead to numerous lawsuits to determine what it means?

Nobody knows for sure, but that typically has *not* occurred in other states with marriage amendments.

While Amendment opponents suggest that adopting the proposed Amendment will lead to frequent litigation over its meaning, marriage amendments in 30 other states have not produced a dramatic increase in litigation. For example, Idaho adopted a marriage amendment in 2006 that is worded exactly the same as the proposed North Carolina amendment.³⁴ To date—some *six years* later—there has not been one reported appellate court decision clarifying the amendment’s meaning. Professor Eichner concedes as much when she observes that “Idaho courts have yet to interpret that statute.”³⁵ South Carolina also passed a marriage amendment in 2006, which Professor Eichner says “approach[es] the breadth of North Carolina’s proposed language.”³⁶ Again, as Professor Eichner concedes, some six years later “[i]ts scope also has not yet been interpreted by South Carolina courts.”³⁷

Thus, you have marriage amendments in two other states, one with language exactly like the proposed North Carolina amendment and the other with language just as broad, both of which were enacted six years ago, and there has been *no court decision* in either state interpreting the meaning of those amendments. In fact, in the majority of the 30 states which have marriage amendments, there are no reported appellate cases. There’s nothing to suggest that North Carolina’s experience will be different than other states.

The only exception is Ohio, where several lower courts considered whether that state’s marriage amendment rendered existing domestic violence laws unconstitutional. As we explain below, the Ohio Supreme Court resolved the question by *not* applying the marriage amendment to domestic violence laws. While there might be some cases in North Carolina on that issue should the proposed Amendment pass, the state’s appellate courts likely will resolve the matter by following the reasoning of the Ohio Supreme Court.

2. Will the Amendment invalidate existing domestic violence protections for unmarried couples?

Probably not. The Ohio Supreme Court *State v. Carswell*³⁸ held that the state’s marriage amendment *does not* affect domestic violence protections. Although North Carolina courts are not required to follow the decisions of other state courts, they often rely on those decisions when deciding questions of first impression.³⁹ The Ohio Supreme Court’s decision should put the issue to rest.

Professor Eichner argues to the contrary. She begins by claiming that Ohio’s marriage amendment is more narrowly worded than North Carolina’s amendment. Here is the wording of the two provisions:

³⁴ Idaho Const. art. III, § 28 (“Marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this State.”).

³⁵ Eichner, *supra* note 2, at 3.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007).

³⁹ *See, e.g., Conner v. North Carolina Council of State*, 365 N.C. 242, 251, 716 S.E.2d 836, 842 (N.C. 2011).

Ohio: “Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”⁴⁰

North Carolina: “Marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this State.”⁴¹

Professor Eichner told *Talking Points Memo* (TPM) that “[The Ohio amendment] prohibits anything that ‘approximates’ marriage. Our amendment is much broader. It says you can’t recognize or validate these relationships at all.”⁴² But that’s not what North Carolina’s proposed Amendment says. The Amendment bars validation or recognition of any legal *union* other than heterosexual marriage. A “domestic legal union” is a marriage or marriage-like relationship, not any relationship between two unmarried persons. Thus, while worded differently, both amendments bar the same thing: any legal relationship between unmarried persons *in which they are treated like they are in a marital union*.

Initially in Ohio, several lower courts read Ohio’s marriage amendment to bar the state from giving any domestic violence protections to unmarried partners. Ohio’s domestic violence law recognized a large class of potential domestic violence victims to whom the law offered protection: spouse, person living as a spouse, former spouse, parent, child, blood relative, in-law, parent of a spouse or former spouse, child of a spouse or former spouse, blood relative of a spouse or in-law of a spouse or former spouse, and natural parent of a child that also is the issue of the offender. The lower courts held that giving protection to a “person living as a spouse” (i.e., a person cohabiting with the offender) was unconstitutional under the amendment because it conferred upon that person an effect of marriage.⁴³

The Ohio Supreme Court overruled these decisions and held that the domestic violence protections *do not* violate Ohio’s marriage amendment.⁴⁴ The court noted that Ohio’s marriage amendment was meant to prevent the state “from creating or recognizing a legal status deemed to be the equivalent of a marriage of a man and a woman.”⁴⁵ The domestic violence statute, however, only designated the cohabiting partner as one member of a set of possible domestic violence victims—it did not treat the partner as if he or she was married to the offender. The court explained:

[T]he term “person living as a spouse” . . . merely identifies a particular class of persons for the purposes of the domestic-violence statutes. It does not create or

⁴⁰ Ohio Const. art. XV, § 11 (emphasis added).

⁴¹ An Act to Amend the Constitution to Provide that Marriage Between One Man and One Woman is the Only Domestic Legal Union that Shall be Valid or Recognized in this State, Session Law 2011-409 (2011), *available at* <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S514v5.pdf>.

⁴² Quoted in Tom Kludt, “Beyond Gay Marriage: NC Amendment Carries Massive Implications,” *TPM* (Apr. 10, 2012), *available at* <http://2012.talkingpointsmemo.com/2012/04/north-carolina-gay-marriage-amendment.php>.

⁴³ See, e.g., *State v. Ward*, 849 N.E.2d 1076 (Ohio App.2d 2006), *rev’d*, *In re Ohio Domestic-Violence Statute Cases*, 114 Ohio St.3d 430, 872 N.E.2d 1212 (Ohio 2007).

⁴⁴ *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007).

⁴⁵ *Id.* at 551.

recognize a legal relationship that approximates the designs, qualities, or significance of marriage as prohibited by the [marriage amendment]. Persons who satisfy the “living as a spouse” category are not provided any of the rights, benefits, or duties of a marriage. A “person living as a spouse” is simply a classification with significance to only domestic-violence statutes. Thus, [the Ohio domestic violence law] is not unconstitutional and does not create a quasi-marital relationship in violation of the [marriage amendment].⁴⁶

The Kansas Court of Appeals also rejected a challenge to the state’s domestic violence laws, similarly reasoning that the protection a person receives under the such laws is not predicated on the state recognizing that the person’s relationship with the offender bears the hallmarks of a conventional marriage.⁴⁷

North Carolina civil and criminal domestic violence laws protect people who are in a “personal relationship,”⁴⁸ including (1) current or former spouses, (2) persons of the opposite sex who live together or have lived together, (3) parents, children, grandparents, grandchildren, persons acting in loco parentis to a minor child, (4) people who have a child in common, (5) current or former household members, and (6) people of the opposite sex who are in a dating relationship or have been in a dating relationship.⁴⁹ According to Professor Eichner, North Carolina courts have extended the protections of the law to unmarried opposite-sex couples under (2), (4), and (6), and to unmarried same-sex couples under (5).⁵⁰

There is every reason to believe that North Carolina courts, if presented with the question, will follow the same reasoning as the Ohio and Kansas courts in concluding that our domestic violence laws do not violate the Amendment. Professor Eichner, however, claims that because North Carolina’s proposed amendment does not limit its scope to marriage and marriage-like statuses, “a North Carolina court following the Ohio Supreme Court’s rationale would find unconstitutional *any* legal protections accorded to unmarried couples under our more broadly-worded language, including domestic violence protections.”⁵¹

We respectfully disagree. The North Carolina amendment only bars domestic legal *unions*, not every relationship between unmarried couples. The state’s domestic violence laws apply to a wide range of persons, including those who are living together, household members, and even couples who are dating, whose status under the laws does not depend upon having a marital or marital-like union with the offender. Unmarried couples do not have to meet criteria creating or recognizing a status similar to marriage to qualify for protection under the law; in fact, the law *distinguishes* them categorically from current or former spouses. Protecting unmarried couples who are dating or living together, or who have had a child together, does not confer on them the legal status of a “domestic union” and grant them the benefits, rights, and obligations of marriage (e.g., spousal support, inheritance rights, or the marital privilege). Thus, opposite-sex and same-sex couples should not lose their protections under the state’s domestic violence laws if the Amendment passes.

⁴⁶ *Id.* at 554.

⁴⁷ *State v. Curreri*, 213 P.3d 1084, 1090 (Kan. App. 2009).

⁴⁸ N.C. Gen. Stat. 50B-1 (2009).

⁴⁹ *Id.*

⁵⁰ Eichner, *supra* note 2, at 14.

⁵¹ Eichner, *supra* note 2, at 10 (emphasis in original).

3. *Will the Amendment bar public employers from offering insurance benefits to their employees' domestic partners?*

It depends on how “domestic partner” is defined. The Michigan Supreme Court answered yes in *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008), the leading case on the issue, but the insurance benefits in that case were premised upon the recognition of a narrowly-defined status (“domestic partner”) that was substantially similar to marriage. If “domestic partner” is defined in a way that does not create a status similar to marriage, North Carolina’s proposed marriage amendment would not prevent public employers from offering such coverage.

The insurance policies in *National Pride at Work* required that a couple meet certain criteria to qualify as “domestic partners” entitled to benefits under the policies. For example, they were required to be of the same gender as the other partner and they could not be related by blood in a manner that would bar their marriage to one another.⁵² The court noted that “[a]lthough there are . . . many different types of relationships in Michigan that are accorded legal significance— e.g., debtor-creditor, parent-child, landlord-tenant, attorney-client—marriages and domestic partnerships appear to be the only such relationships that are defined in terms of *both* gender and the lack of a close blood connection.”⁵³

The court noted other similarities as well between the criteria for domestic partners under the policies and marriage. Domestic partnerships were relationships that only two persons could enter (the policies prohibited domestic partners from having another domestic partner relationship within the previous 6 months). They were required to undertake obligations of mutual support, have a partnership contract, be at least 18 years old, continue indefinitely until one of the partners takes affirmative action to terminate, and share a common residence.⁵⁴ One of the policies specifically stated that it was intended “to provide insurance coverage and other benefits to domestic partners . . . identical to those provided to *spouses* of City employees,” and the other policies also invoked marriage as an analogous or comparable institution.⁵⁵

The Michigan marriage amendment states that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”⁵⁶ Given the qualities that domestic partnerships, as defined by the insurance policies, held in common with marriages, the court in *National Pride at Work* concluded that “domestic partnerships are unions similar to marriage,”⁵⁷ and thus the recognition of such partnership agreements in the insurance policies violated the marriage amendment:

[G]iven that the marriage amendment prohibits the recognition of unions similar to marriage “for any purpose,” the pertinent question is not whether these unions give rise to all of the same legal effects; rather, it is whether these unions are being recognized as unions similar to marriage “for any purpose.”

⁵² 748 N.W.2d at 535.

⁵³ *Id.* at 535-36.

⁵⁴ *Id.* at 536-37 n.14.

⁵⁵ *Id.* at 537 n.15.

⁵⁶ Mich. Const. art. I, § 25.

⁵⁷ 748 N.W.2d at 537.

Recognizing this and concluding that these unions are indeed being recognized as similar unions “for any purpose,” the Court of Appeals reversed. We affirm its judgment. That is, we conclude that the marriage amendment . . . prohibits public employers from providing health-insurance benefits to their employees’ qualified same-sex domestic partners.⁵⁸

Professor Eichner claims that the Michigan high court in *National Pride at Work* held that “any benefits accorded to a relationship by the state or its affiliates would constitute recognition in violation of the amendment, so long as the relationship at stake was a non-marital conjugal relationship.”⁵⁹ To the contrary, as explained above, the court’s decision rested on the insurance policies providing legal significance to the relationship of “domestic partner” in a way that made it substantially similar to marriage—that is, defining it in terms of both gender and the lack of a close blood connection plus requiring only one domestic partner at a time and that the partners have mutual financial obligations, a partnership contract, a minimum age, a commitment to a relationship of indefinite duration, and a common residence. The court *did not* hold, as Professor Eichner says, that recognition of any non-marital conjugal relationship violated the Michigan marriage amendment.

The Kentucky Attorney General reached the same conclusion as the Michigan Supreme Court in *National Pride at Work* case when asked whether a state university’s offering health insurance coverage for “domestic partners” of its employees violated the Kentucky marriage amendment.⁶⁰ The insurance policies at issue in Kentucky defined eligibility for coverage as a “domestic partner” to include criteria such as not being currently married to or legally separated from another person, being at least 18 years of age and mentally competent, and not being related by blood to a degree that would prohibit legal marriage. The attorney general’s opinion observes that “[a]ll of these criteria . . . expressly define ‘domestic partner’ in terms closely resembling the legal conditions for the status of marriage.”⁶¹ One of the policies also required “living together as a couple.” The opinion adds that “if ‘living together as a couple’ (emphasis added) is recognized as part of a legal status for unmarried individuals, in conjunction with the other elements resembling marriage [identified above], it further indicates an intent on the part of the university to recognize an imitation or substitute for marriage.”⁶² The opinion concludes:

The contours of the definition, far from suggesting a broad and inclusive availability of health insurance for a *bona fide* member of the employee’s household, instead indicate a narrowly focused attempt to recognize in “domestic partnership” an imitation or substitute for the marital relationship. In effect, the universities have place unconstitutional conditions on health insurance coverage for domestic partners, since the benefit is premised upon the

⁵⁸ *Id.* at 543 (footnote omitted).

⁵⁹ Eichner, *supra* note 2, at 7 (emphasis added to last clause).

⁶⁰ Ky. OAG 07-004 (2007 WL 1652597).

⁶¹ *Id.* at *7.

⁶² *Id.* at *8. The opinion further notes that the additional requirements of exclusivity and quasi-permanence (being each other’s sole domestic partner and intending to remain so indefinitely), when taken together with other elements of the definition of that relationship which already bore a substantial resemblance to the legal status of marriage, “merely serve as added indicia of the recognition of a similar legal status.” *Id.* at *9.

recognition of a legal status in the two individuals that is substantially similar to marriage.⁶³

The reasoning used by the Michigan Supreme Court and Kentucky attorney general would not bar North Carolina public employers from covering domestic partners in a way that does not define their relationship in terms of a status similar to marriage. The Kentucky attorney general's opinion explains that

[i]f "domestic partner" were defined in a more general manner, not so delimited as to resemble a tailored alternative to the legal status of marriage, there would be nothing in [Kentucky's marriage amendment] to prevent Kentucky's public universities from offering this coverage. Alternatively, the universities could elect to offer health insurance benefits to all of an employee's dependents, or to use any other approach that would not involve the unconstitutional recognition of a legal status resembling that of marriage.⁶⁴

Thus, even if the proposed Amendment passes, same-sex partners still may be able to receive health insurance benefits from public employers.

The proposed Amendment also does not prevent *private employers* from extending health insurance benefits to domestic partners, no matter how those relationships are defined. The amendment specifically provides that it "does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts."⁶⁵

4. Will the Amendment alter custody and visitation laws for unmarried parents?

Again, it's unlikely this would happen. The proposed Amendment does not change the "best interests of the child" standard⁶⁶ that North Carolina courts use for determining custody and visitation.

Professor Eichner argues that if the Amendment passes, "judges may interpret it as an expression of public policy against all non-marital relationships" and use the fact that a parent is living with a same-sex or opposite-sex partner without being married to them as a reason to deny the parent custody or visitation.⁶⁷ The Amendment's plain language, however, does not disapprove of cohabitation or make illegal non-marital relationships; rather, it bars the state from creating or recognizing a legal status for unmarried couples that resembles marriage. Simply acknowledging the fact that two persons are living together does not recognize a legal status that resembles marriage. Once again, Professor Eichner assumes that the proposed

⁶³ *Id.* at *10. Although focusing primarily on what constitutes "recognition" of a status that approximates marriage, the Idaho Attorney General used essentially the same reasoning to conclude that a city could not extend health care benefits to the domestic partners of its employees. For a copy of the opinion, see www.alliancedefensefund.org/UserDocs/IdahoAGOpinion.pdf.

⁶⁴ Ky. OAG 07-004, *supra* note 63, at *10.

⁶⁵ An Act to Amend the Constitution to Provide that Marriage Between One Man and One Woman is the Only Domestic Legal Union that Shall be Valid or Recognized in this State, Session Law 2011-409 (2011), *available at* <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S514v5.pdf>.

⁶⁶ See generally Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.3 (5th ed. 2002).

⁶⁷ Eichner, *supra* note 2, at 19.

Amendment broadly applies to all domestic relationships rather than just domestic unions (i.e., marriages or marriage substitutes).

Professor Eichner also argues that the proposed Amendment could bar application of the best-interest test to custody or visitation disputes between an unmarried parent and nonparent in cases such as *Boseman v. Jarrell*,⁶⁸ where the parent gives up her paramount parental status by creating a family unit with the nonparent in which the nonparent also acts as a parent of the child.⁶⁹ These cases, however, turn upon recognition of a “de facto” parent status between the nonparent and the child, and not upon the existence of any marriage-like status between the parent and nonparent.

The *Boseman* case involved a same-sex couple. The North Carolina Supreme Court upheld awarding the former partner joint custody with the biological mother. If approving the use of the best-interest test in this case depended upon treating the same-sex couple as if they were married, then the court could have held that public policy bars such an outcome, since same-sex marriage currently is prohibited under state law.⁷⁰ The court *did not* so hold, and there is no reason to believe that it would rule differently if the proposed Amendment is adopted. Thus, even if the Amendment passes, the custody and visitation rights of same-sex partners in circumstances similar to *Boseman* should remain unaffected.

5. Will the Amendment limit protections for unmarried couples by restricting hospital visitation privileges, emergency medical decisions, end-of-life decisions, financial decisions, or the ability to grant their partners property through a will or trust?

No, so long as the unmarried couple’s privileges, decisions, or other benefits are not based on the creation or recognition of a legal status resembling marriage. As North Carolina has done with its domestic violence laws, the state could provide such rights or privileges to unmarried partners by including them in classes or categories of persons that are not defined by criteria or a status resembling marriage. Thus, North Carolina could add unmarried partners to existing lists of persons who can be given hospital visitation privileges, designated as surrogate medical decision makers, and appointed to administer estates.

While conceding that such a result would be “far-reaching,” Professor Eichner claims that a court might refuse to enforce a will or trust that “arose from an unmarried cohabitant relationship that constituted a ‘domestic legal union’ other than marriage,” especially if “the will or trust made clear on its face that it was based on a non-marital relationship.”⁷¹ Again, Professor Eichner’s claim depends on her view that the Amendment applies to any non-marital relationship, not just unions that constitute or resemble marriage.

There’s almost no chance that the proposed Amendment would interfere with unmarried couples’ ability to grant their partners property through a will or trust. For Professor Eichner’s “far-reaching” outcome to take place, two things would have to occur: (1) someone would have to object to the transfer of property to the unmarried partner; and (2) if such an objection occurs,

⁶⁸ 704 S.E.2d 494 (2010).

⁶⁹ Eichner, *supra* note 2, at 20.

⁷⁰ See N.C. Gen. Stat. § 51-1 (“A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife . . .”).

⁷¹ Eichner, *supra* note 2, at 24.

a court would have to refuse to enforce the will or trust provision in favor of the cohabitant because such a transfer would violate the public policy of the State of North Carolina. The first of these is, itself, highly unlikely. The overwhelming majority of transfers at death or in trust proceed without any objection. The interested parties know of and respect the transferor's wishes and do not attempt to use the courts to substitute their own preferences for those the transferor.

As to the second, there is no basis in North Carolina law to assert that a court, when faced with an objection to a transfer in favor of a cohabitant, would refuse to enforce the terms of the transfer because the transfer to the cohabitant would violate the public policy of North Carolina. As Professor Eichner points out, the North Carolina courts have repeatedly affirmed a testator's freedom of testation⁷²—the ability to dispose of one's property as one wishes. There are two public policy exceptions to that principle (both of them statutorily provided). The first is the so-called "Slayer Statute" which prevents from enforcement a provision in a will in favor of one who willfully and unlawfully takes the life of the testator.⁷³ The public policy justification for this is that a wrongdoer should not profit from his/her wrongdoing. The second public policy exception to freedom of testation is the "Elective Share" statute,⁷⁴ which effectively prevents a testator from disinheriting a surviving spouse.

There is no decision in North Carolina where the court has refused to enforce, on public policy grounds, a transfer provision in favor of a cohabitant. There is no reason to believe that that would change upon the adoption of the amendment. First, the Amendment arguably does not alter the public policy of North Carolina. Instead, it simply makes it explicit. North Carolina has never recognized alternatives to marriage as marriage and yet it has not struck down as violating public policy a transfer in favor of a cohabitant. Second, the amendment itself affirms that it "does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts."⁷⁵ There is no reason to assume that testamentary freedom would not be accorded the same or even greater protection than contractual freedom.

Even Professor Eichner admits that such an interpretation of the proposed Amendment "could have nonsensical results, such as invalidating wills and trusts naming an unmarried partner as a beneficiary, but upholding identical conveyances that name a dog or cat as the primary beneficiary."⁷⁶ North Carolina courts, however, do not interpret the meaning of legal texts in ways that lead to nonsensical results.⁷⁷

⁷² *Id.* at 26, citing *Clark v. Conner*, 253 N.C. 515, 520 (1960)).

⁷³ N.C. Gen. Stat. §31A-3 through §31A-12.1.

⁷⁴ N.C. Gen. Stat. §30-3.1 through §30-3.6.

⁷⁵ An Act to Amend the Constitution to Provide that Marriage Between One Man and One Woman is the Only Domestic Legal Union that Shall be Valid or Recognized in this State, Session Law 2011-409 (2011), available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S514v5.pdf>.

⁷⁶ Eichner, *supra* note 2, at 26.

⁷⁷ See, e.g., *In re A.C.F.*, 176 N.C.App. 520, 525, 626 S.E.2d 729, 733 (2006).

Conclusion

Professor Eichner presumes that the proposed Amendment bars any legal protections for unmarried couples, while we think it bars only same-sex marriages and other legal statuses resembling marriage (i.e., marriage imitations or substitutes). We think the much broader view of the Amendment and its consequences has little support in the Amendment's language or context, or in court decisions from North Carolina or other states.

We invite you to read and consider Professor Eichner's arguments as well as the arguments we have made here, and then make up your own mind about which arguments are the most sensible and persuasive. As we said at the outset, it is not up to us to tell anyone how to vote on the proposed Amendment. We simply offer for your consideration a different view than Professor Eichner as to the Amendment's legal meaning and potential effects.

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April 18, 2012