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## The Sky Didn't Fall: The Meaning and Legal Effects of the North Carolina Marriage Amendment

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# THE SKY DIDN'T FALL: THE MEANING AND LEGAL EFFECTS OF THE NORTH CAROLINA MARRIAGE AMENDMENT

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This is a tale about predictions of dire consequences that have yet to occur—and likely never will. North Carolina became the thirty-first state to define marriage as involving only opposite-sex couples on May 8, 2012, when voters approved the following amendment to the state constitution:

Marriage between one man and one 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.<sup>1</sup>

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\* Associate Professor, Campbell University School of Law. I am grateful to my colleagues Dick Bowser, Lynn Buzzard, and William Woodruff for their comments on earlier drafts of this article. I also thank my research assistant, Thom Robbins, for his valuable help on the article. The views expressed herein are mine alone, as are any errors.

1. N.C. CONST. art. XIV, § 6. The amendment was approved by a vote of 1,317,178 to 840,802 (61% to 39%). See *Election Results State of North Carolina*, N.C. ST. BD. OF ELECTIONS, <http://results.enr.clarityelections.com/NC/36596/85942/en/summary.html> (last visited Aug. 9, 2013).

There was much disagreement prior to the vote about the meaning and potential legal effects of this provision.<sup>2</sup> Like the fabled character Chicken Little, who believes the sky is falling after being hit by a single acorn from the tree above, opponents proclaimed that the Amendment would have “harmful unintended consequences” that would affect “hundreds of thousands of families across our state.”<sup>3</sup> In their view, the Amendment not only would ban same-sex marriage, civil unions, and domestic partnerships, but also would threaten a wide range of legal benefits and protections given to all unmarried couples, whether heterosexual or homosexual, including existing domestic violence and child custody, adoption, and visitation laws.<sup>4</sup> They claimed that the Amendment would “harm children” by taking away their health insurance benefits.<sup>5</sup> They predicted that the Amendment’s vague language would lead to a flood of litigation—as one family law attorney promised, “[w]hat we’re buying for North Carolina is hundreds and hundreds of lawsuits.”<sup>6</sup>

More than a year has passed since voters approved North Carolina’s Marriage Amendment. There has been no litigation over the meaning of

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2. See J.D. Walker, *Legal Experts Debate the Impact of Amendment One*, COURIER TRIB. (May 2, 2012), <http://courier-tribune.com/sections/news/local/legal-experts-debate-impact-amendment-one.html>.

3. *Vote Against Amendment One*, COAL. TO PROTECT N.C. FAMILIES, [http://www.protectallncfamilies.org/sites/protectncfamilies/files/AllOneSheet\\_01\\_06.pdf](http://www.protectallncfamilies.org/sites/protectncfamilies/files/AllOneSheet_01_06.pdf) (last visited Jul. 21, 2013). Opponents of the Amendment typically referred to it as “Amendment One” because it was the first (and only) proposed amendment on the ballot.

4. For descriptions of the amendment’s supposed far-reaching effects, see David Donovan, *Amendment One’s Vague Language*, N.C. LAW WKLY (Apr. 20, 2012), <http://nclawyersweekly.com/2012/04/20/amendment-one-vague-language>; Michael Hewlett, *Marriage Amendment Would Affect Many People, Panel Says*, WINSTON-SALEM J. (Apr. 16, 2012), [http://www.journalnow.com/news/local/article\\_376215af-11a5-52fb-b9d3-24efe15ad7cb.html](http://www.journalnow.com/news/local/article_376215af-11a5-52fb-b9d3-24efe15ad7cb.html); Craig Jarvis, *Marriage Amendment Debate Focuses on Domestic Violence*, NEWS & OBSERVER (Mar. 4, 2012), <http://www.newsobserver.com/2012/03/04/1902872/marriage-amendment-debate-focuses.html>; Lila Shapiro, *Same-Sex Marriage: North Carolina’s Proposed Ban, Amendment One, Could Create ‘Legal Chaos’*, HUFFINGTON POST (Apr. 9, 2012), [http://www.huffingtonpost.com/2012/04/09/-same-sex-marriage-north-carolina-amendment-1\\_n\\_1408756.html](http://www.huffingtonpost.com/2012/04/09/-same-sex-marriage-north-carolina-amendment-1_n_1408756.html); Thomas Stackpole, *Why North Carolina’s Anti-Gay Marriage Amendment Could Be Just as Bad for Straight Couples*, NEW REPUBLIC (May 7, 2012), <http://www.newrepublic.com/article/politics/103119/north-carolina-gay-marriage>.

5. *Questions and Answers*, COAL. TO PROTECT N.C. FAMILIES, [http://www.protectncfamilies.org/sites/protectncfamilies/files/PNCF\\_Conversations\\_QuestionsAndAnswers.pdf](http://www.protectncfamilies.org/sites/protectncfamilies/files/PNCF_Conversations_QuestionsAndAnswers.pdf) (last visited Apr. 10, 2013).

6. Hewlett, *supra* note 4 (quoting Elise M. Whitley, Tash & Kurtz Family Law Attorneys, Winston-Salem, N.C.).

the Amendment—not one of the “hundreds and hundreds” of lawsuits anticipated by Amendment opponents has been filed. No court has withheld or invalidated a domestic violence protection order because of the Amendment. No insurance benefits have been withdrawn from domestic partners and their children. So far, the doomsday predictions of the Marriage Amendment opponents have failed to materialize. The sky has not fallen.<sup>7</sup>

This Article examines the meaning and legal effects of the controversial North Carolina Marriage Amendment. My aim is two-fold: first, to explain why claims about the Amendment’s far-ranging consequences were never likely to occur in North Carolina; and, second, to provide a guide for resolving Amendment-related legal issues should they arise in litigation in North Carolina or other states with (or considering) similar amendments. The first section discusses the debate over the Amendment prior to its adoption, with a particular focus on the arguments made by legal academics about the Amendment’s meaning and potential effects.<sup>8</sup> The second section examines the language of the Amendment and considers the meaning and scope of key terms such as “domestic legal union.”<sup>9</sup> The third section addresses the Amendment’s application to domestic violence protections, domestic partner benefits provided by public employers, custody and visitation laws for unmarried parents, granting domestic partners property through a will or trust, hospital visitation privileges, emergency medical decisions, and end-of-life decisions—areas that Amendment opponents predicted would be significantly affected.<sup>10</sup>

This Article is not about gay marriage. My view of gay marriage has

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7. After the Supreme Court’s decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the constitutionality of the North Carolina Marriage Amendment has been challenged in *Fisher-Borne v. Smith*, No. 1:12-cv-589 (M.D. N.C. filed June 13, 2012). *Fisher-Borne* was filed in June 2012 challenging the constitutionality of North Carolina’s ban on second-parent adoptions. On July 9, 2013, the American Civil Liberties Union (ACLU) asked North Carolina Attorney General Roy Cooper to consent to the filing of an amended complaint adding the additional claim challenging the state’s ban on same-sex marriage. See *Fisher-Borne v. Smith*, ACLU, <http://www.aclu.org/lgbt-rights/fisher-borne-v-smith> (last visited Aug. 19, 2013). Cooper agreed and the district court allowed the complaint to be amended to include the challenge to the Amendment’s constitutionality. See *N.C. Attorney General Consents to ACLU Amending Lawsuit to Challenge State’s Ban on Marriage for Same-Sex Couples*, ACLU, <http://www.aclu.org/lgbt-rights/nc-attorney-general-consents-aclu-amending-lawsuit-challenge-states-ban-marriage-same> (last visited Aug. 19, 2013).

8. See *infra* Part I.

9. See *infra* Part II.

10. See *infra* Part III.

little to do with the legal arguments advanced by Amendment opponents, because those arguments were not about the merits of gay marriage, civil unions, or domestic partnerships—rather, they concerned the broader legal consequences of the Amendment once approved.<sup>11</sup> There was much to be gained by an honest and forthright public discussion of marriage equality preceding the Amendment vote. Legal academics, along with their fellow Amendment opponents, chose to frame the debate about the Amendment's supposed "unintended consequences" for all unmarried couples. That strategy was designed to appeal broadly to the self-interest and emotion of voters—especially unmarried heterosexual couples—who might not otherwise favor gay marriage.<sup>12</sup> The strategy ultimately failed and ended up distorting public debate about the real effects of the Amendment.

### I. THE AMENDMENT DEBATE

Throughout the year preceding the vote, legal academics confirmed predictions of the Amendment's broad "unintended consequences." Three faculty members at the University of North Carolina School of Law, including Maxine Eichner, a prominent family law expert, issued a white paper declaring that the Amendment "is significantly broader than marriage amendments that have been passed in other states" and detailed how it would restrict legal benefits and protections for all unmarried couples—both heterosexual and homosexual—including laws involving domestic violence, child custody and visitation, financial decisions, disposition of a deceased partner's remains, hospital visitation, and emergency medical decisions.<sup>13</sup> Professor Eichner frequently spoke out against the Amendment on these grounds, both while it was under consideration in the

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11. While I favor opposite-sex marriage, my views are more complicated than can be explained here.

12. For an extended description of the political strategy by Amendment opponents to emphasize the Amendment's "unintended consequences," see Karen Ocamb, *Celinda Lake: North Carolina Anti-Amendment-One Win Could Change the LGBT Rights Movement Forever*, HUFFINGTON POST (Mar. 30, 2012), [http://www.huffingtonpost.com/karen-ocamb/celinda-lake-amendment-one\\_b\\_1392539.html](http://www.huffingtonpost.com/karen-ocamb/celinda-lake-amendment-one_b_1392539.html).

13. See Maxine Eichner et al., *Potential Legal Impact of the Proposed Domestic Legal Union Amendment to the North Carolina Constitution*, U. OF N.C. SCH. OF L. 1 (Nov. 8, 2011) (not formally published manuscript), available at <http://www.law.unc.edu/documents/faculty/marriageamendment/dlureportnov8.pdf> [hereinafter "Eichner Paper"]. Similar arguments were raised in a legal memorandum produced in 2006 by Arnold & Porter, LLP, regarding the proposed Virginia marriage amendment. See Melissa Glidden, Brenda Jackson-Cooper & Leslie Nickel, *Potential Impact of the Proposed Marshall/Newman Amendment to the Virginia Constitution* (Aug. 11, 2006) (unpublished legal memorandum) (on file with author).

North Carolina legislature and once it was placed on the ballot.<sup>14</sup> Shannon Gilreath, a law professor at Wake Forest University School of Law, similarly announced that “the reality is that more heterosexuals will be affected by this amendment than homosexuals.”<sup>15</sup> He explained:

Amendment One will first mean that unmarried heterosexuals receiving partner benefits from public employees can no longer receive those benefits . . . .

Amendment One also limits your ability to contract around marriage should you choose to do so. So let's imagine that Bob and Sue love each other and live together for many years but do not marry. Nevertheless, they want to execute agreements about how their assets will be divided should their relationship end. Currently, under North Carolina law, they can do so. If Amendment One becomes law, it is likely that they cannot. Similarly, Bob may want to give Sue his health care power of attorney. Currently, he can do so. After Amendment One, he cannot.

Or let us imagine that Bob and Sue have lived together for many years and Bob wants to leave Sue a piece of property in his will, perhaps the very house they shared during their lives together. Let's also imagine that Bob has relatives who would like to have his house after he dies. Currently, these relatives would have a difficult time setting aside Bob's bequest to Sue. But in a North Carolina where Amendment One is law, Bob's relatives need only claim that Bob made his bequest to Sue because he loved her. A court could then void the bequest because it was the result of a domestic union that was not a marriage, the recognition of which would violate North Carolina's (new) public policy. In this new North Carolina, Bob would have an easier time leaving his house to his cat than to the woman he loved.

These scenarios may seem absurd to you; yet this is the North Carolina that Amendment One's legislative supporters are trying to create.<sup>16</sup>

Family law professors from every law school in North Carolina issued a collective statement declaring that “[b]ased on our professional expertise, the language of the proposed North Carolina amendment is vague and untested, and threatens harms to a broad range of North Carolina families.”<sup>17</sup> Their statement explained:

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14. See, e.g., Stackpole, *supra* note 4; College Park Baptist Church, *Dr. Maxine Eichner, UNC School of Law, Legal Harms of Amendment One*, YOUTUBE (Apr. 17, 2012), <http://www.youtube.com/watch?v=aqDsQhijv00&>; Progressive Pulse, *UNC Law Professor Maxine Eichner on the Proposed Constitutional Marriage Amendment*, YOUTUBE (Oct. 28, 2011), <http://www.youtube.com/watch?v=SXHc-JDQzXM>.

15. Shannon Gilreath, Op-Ed., *It Goes Way Beyond Marriage*, NEWS & OBSERVER (May 3, 2012), <http://www.newsobserver.com/2012/05/03/2039424/it-goes-way-beyond-marriage.html>.

16. *Id.*

17. *Statement from Family Law Professors*, COAL. TO PROTECT N.C. FAMILIES

The amendment is phrased more broadly than most similar amendments in other states, and would therefore likely be construed by courts more broadly than in other states. The amendment would certainly ban same-sex marriages, civil unions, and domestic partnerships, and would very likely ban the domestic partnership health insurance benefits that a number of municipalities and counties currently offer to same- and opposite-sex unmarried couples. It also threatens a range of other protections for unmarried partners and their children, including domestic violence protections and child custody law.<sup>18</sup>

Opponents predicted that passage of the Amendment would produce much litigation and massive legal uncertainty. North Carolina Attorney General Roy Cooper released a statement opposing the Amendment in which he declared that “Amendment One’s lack of clarity will also result in a significant amount of litigation on many issues that will be decided by courts for years to come.”<sup>19</sup> Russell M. Robinson II, a prominent Charlotte attorney, claimed that the proposed Amendment’s language was “so absurdly broad and unclear” that “[i]t will undoubtedly provoke multiple lawsuits to determine what it means.”<sup>20</sup> Chris Fitzsimon, director of the progressive North Carolina Policy Watch, predicted that “[a]t the very least, it will mean that our courts will be tied up for years trying to figure out what this law means for domestic violence cases.”<sup>21</sup>

The North Carolina Constitutional Amendments Publication Commission, made up of the Secretary of State, Attorney General, and Legislative Services Officer, issued an “official explanation” of the proposed Amendment, as required by law.<sup>22</sup> The explanation echoed concerns raised by Amendment opponents:

The term “domestic legal union” used in the amendment is not defined in

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(Apr. 20, 2012), <http://www.protectncfamilies.org/news/nc-family-law-professors-speak-out-against-amendment-one>.

18. *Id.*

19. Craig Jarvis, *Cooper Says He’ll Vote Against Marriage Amendment*, NEWS & OBSERVER (Apr. 25, 2012), [http://projects.newsobserver.com/under\\_the\\_dome/cooper\\_says\\_hell\\_vote\\_against\\_marriage\\_amendment](http://projects.newsobserver.com/under_the_dome/cooper_says_hell_vote_against_marriage_amendment) (quoting Roy Cooper).

20. Russell M. Robinson II, Op-Ed., *A Deeply Flawed Marriage Amendment: Same-Sex Ban Would Be Vulnerable in Federal Court*, CHARLOTTE OBSERVER (Mar. 29, 2012), <http://www.charlotteobserver.com/2012/03/29/3134106/marriage-amendment-invites-legal.html>.

21. Tom Kludt, *Beyond Gay Marriage: North Carolina Amendment Carries Massive Implications*, TALKING POINTS MEMO (Apr. 10, 2012, 6:22 AM), <http://2012.talkingpointsmemo.com/2012/04/north-carolina-gay-marriage-amendment.php> (quoting Chris Fitzsimon).

22. *See* N.C. GEN. STAT. § 147-54.10 (2012).

North Carolina law. There is debate among legal experts about how this proposed constitutional amendment may impact North Carolina law as it relates to unmarried couples of same or opposite sex and same sex couples legally married in another state, particularly in regard to employment-related benefits for domestic partners; domestic violence laws; child custody and visitation rights; and end-of-life arrangements. The courts will ultimately make those decisions.<sup>23</sup>

Amendment supporters countered that the proposed Amendment should not affect legal protections for unmarried heterosexual couples, but only would forbid same-sex marriages, civil unions, and domestic partnerships. According to the North Carolina Values Coalition, the legal effect of the Amendment would be to “recognize the pre-existing institution of marriage by making it part of the NC Constitution, placing it beyond the power of a court to redefine or overturn. It would also prevent the creation of marriage substitutes, such as domestic partnerships or civil unions.”<sup>24</sup> Representative Paul Stam, the House Majority Leader in the North Carolina General Assembly and a principal sponsor of the legislation that put the proposed Amendment on the ballot, declared in a press release that he was “amazed” at the “baseless” claims made by opponents that the Amendment would affect the enforcement of state domestic violence laws, nullify medical powers of attorney, and determine child custody and visitation rights for unmarried parents.<sup>25</sup> Vote FOR Marriage N.C. released a video

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23. N.C. Dep't of Sec'y of State, *Official Explanation Adopted by the NC Constitutional Amendments Publication Commission for the Proposed Marriage Amendment to the NC Constitution* (Mar. 1, 2012), available at <http://www.secretary.state.nc.us/NCConstitution/thencconstitution2012.aspx>. For a report on the reactions of amendment supporters and opponents to the explanation, see Craig Jarvis, *Both Sides Criticize Official Explanation of Proposed Marriage Amendment*, NEWS & OBSERVER (Mar. 2, 2012), <http://www.newsobserver.com/2012/03/02/1897704/both-sides-criticize-official.html>. Secretary of State Elaine Marshall declared her opposition to the proposed amendment on April 17, 2012. See Elaine Marshall, *Amendment One Is an Ill-Conceived & Dangerous Idea*, TWITTER (Apr. 17, 2012, 7:46 AM), <https://twitter.com/Elaine4NC/status/192262777417633792>. Attorney General Roy Cooper announced his opposition on April 25, 2012. See Jarvis, *supra* note 19.

24. *Protect Marriage*, N.C. VALUES COAL., <http://ncvalues.org/wp-content/uploads/2011/08/Issue-Brief-2.pdf> (last visited Apr. 18, 2013).

25. Press Release, Paul Stam, What Will the Marriage Amendment Do? (Feb. 7, 2012), <http://www.nchouserepublicanleader.com/2012/02/07/what-will-the-marriage-amendment-do>. During House committee debate on the proposed amendment, Representative Stam distributed a memorandum prepared by Austin Nimocks of the Alliance Defense Fund (now Alliance Defending Freedom) explaining the meaning of the amendment and its impact on private business and contracts. *House Committee Considers Marriage Amendment* (WRAL-TV news broadcast Sept. 12, 2011), available at <http://www.wral.com/news/state/nccapitol/video/10115310/#/vid10115310>



advertisement just prior to the election claiming that Amendment opponents were trying to “scare voters with false claims” and emphasized that the proposed Amendment “does one thing: it protects marriage as the union of one man and one woman just as God designed it.”<sup>26</sup>

Several weeks before the vote, two of my law school colleagues and I published a white paper explaining why a dispassionate analysis of applicable law and other states’ experiences with marriage amendments did not support concerns about the Amendment’s “unintended consequences” raised by its opponents.<sup>27</sup> Our paper did not endorse or oppose the proposed Amendment, but rather encouraged a “robust public debate” about the issues, emphasized that “it is not up to us to tell anyone how to vote on the proposed Amendment,” and explained that we wanted voters to have accurate legal information “so that they can properly consider the Amendment’s pros and cons and then vote their conscience.”<sup>28</sup> We suggested that while there are “thoughtful arguments on both sides” of the marriage equality controversy, the Marriage Amendment debate in North Carolina had been distorted by fears about certain legal consequences that were unlikely to occur.<sup>29</sup> We urged voters to compare our legal analysis to the Eichner Paper and family law professors’ statements, and then decide for themselves which arguments were more sensible.<sup>30</sup> Amendment opponents responded mostly with charges of bias and challenges to our

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(0:40-1:12). For a copy of the memorandum, see Memorandum from Alliance Defense Fund to N.C. House Majority Leader Paul Stam (Sept. 12, 2011), *available at* <http://www.adfmedia.org/files/NC-MarriageAmendmentExplained.pdf>. The *Fayetteville Observer* later explained in a news story that “Stam, the Raleigh lawmaker, said that he wanted a more narrowly worded amendment but was ‘overruled’ by ‘national experts’ he identified as the Alliance Defense Fund . . .” See Gregory Phillips, *Passionate Amendment One Debate Goes Beyond Gay Marriage*, FAYETTEVILLE OBSERVER (May 6, 2012), <http://www.fayobserver.com/articles/2012/05/06/1166215>.

26. Vote FOR Marriage N.C., *Vote FOR Marriage N.C. Launches New TV Ad Refuting False Claims About Amendment*, YOUTUBE (Apr. 26, 2012), <http://www.youtube.com/watch?v=JnbFIN8j5fk>.

27. See generally Lynn R. Buzzard, William A. Woodruff & E. Gregory Wallace, *The Meaning and Potential Legal Effects of North Carolina’s Proposed Marriage Amendment*, (Apr. 18, 2012) (not formally published), *available at* <http://www.wral.com/asset/news/state/nccapitol/2012/04/24/11019583/ma-statement1.pdf>.

28. *Id.* at 1.

29. *Id.* For one example of the various issues that could have been debated publicly, see Holning Lau, *Would a Constitutional Amendment Protect and Promote Marriage in North Carolina? An Analysis of Data from 2000 to 2009*, 2012 CARDOZO L. REV. DE NOVO 173 (2012).

30. Buzzard et al., *supra* note 27, at 16.

expertise, but rarely with counterarguments.<sup>31</sup>

There is nothing wrong with legal academics taking public positions on controversial issues. That is their First Amendment right, of course, and public discourse generally is well-served when they do. But law professors also hold a position of trust with the public because of their legal expertise. Rightly or wrongly, when they speak as “experts” on the law—clarifying difficult legal concepts, explaining legal texts, or predicting how courts might rule—they often are perceived as providing legal analysis that is largely untainted by partisan views.<sup>32</sup> There is a difference, then, between a law professor saying “Because I believe in equality, I am opposed to the Amendment,” and saying “Because courts will rule this way if the Amendment passes, I am opposed to the Amendment.” While both are legitimate, the public understands the former conclusion to be determined by the professor’s own moral, political, or social views, while it expects the latter to be guided by the tools of the legal profession.

The distinction between partisan advocate and legal expert, while never exact, was blurred by legal academics who opposed the Amendment. As explained below, conventional legal analysis does not support their predictions that the Amendment “would” or “could” (a distinction mostly lost on the public) lead to a parade of horrors for all unmarried couples in the state. There is very little chance that North Carolina courts will interpret the Amendment to apply to any relationship between unmarried persons and invalidate their domestic violence protections, child custody, adoption, and visitation rights, health benefits, hospital visitation privileges, emergency medical decision making, and end-of-life decisions. Instead of conducting a neutral assessment of actual probabilities, however, the law professors who opposed the Amendment chose the worst-case

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31. See, e.g., *Buzzardgate, Campbellgate or Tamigate—Uncovering the Amendment One Truth Behind the Campbell Law Professors’ Paper*, NC AMENDMENT ONE TRUTH (Apr. 30, 2012), <http://ncamendmentonetruth.wordpress.com/2012/04/30/buzzardgate-campbellgate-or-tamigate-uncovering-the-amendment-one-truth-behind-the-campbell-law-professors-paper>; Carlos Maza, *Meet the “Legal Experts” Supporting North Carolina’s Anti-Gay Marriage Amendment*, EQUAL MATTERS (Apr. 25, 2012), <http://equalitymatters.org/blog/201204250001>; *Wake Forest Law Professor Explains the Proposed Amendment One*, BLUENC (Apr. 23, 2012), <http://www.blunc.com/wake-forest-law-professor-explains-proposed-amendment-one> (quoting Suzanne Reynolds).

32. Indeed, most law schools promote their faculty as “experts” available for media interviews when news stories have legal implications. See, e.g., *News & Media*, U. OF N.C. SCH. OF L., <http://www.law.unc.edu/news/default.aspx> (last visited Apr. 13, 2013); *Faculty Experts*, DUKE L., <http://law.duke.edu/news/press/facexperts> (last visited Apr. 12, 2013); *Need a Media Expert?*, U. OF MINN. LAW, <http://www.law.umn.edu/faculty/expertise.html> (last visited Apr. 12, 2013).

scenario to present to the public.

To be sure, law professors often ask their students to consider various hypothetical outcomes, including worst-case scenarios, to sharpen their thinking about legal issues and make them more careful in drafting legal text. But that approach is not well suited for public discourse, where lay voters are apt to hear only that law professor *X* said that *Y* will happen if we vote for the proposal—especially if *Y* is the worst-case scenario. Presenting the worst-case scenario to the public is a form of disguised advocacy designed to help your side win.

This is not the first time—nor will it be the last—that law professors have failed to make accurate public predictions about how courts will rule because of their political motivations.<sup>33</sup> Public discourse is best served, however, when law professors respect the distinction between partisan advocate and legal expert. In this case, proper analysis of the Amendment’s meaning and effects means asking not “What will win the election?” but “What will courts likely decide?” While the Chicken Littles still may be watching the sky, I examine that question next.

## II. THE MEANING OF NORTH CAROLINA’S MARRIAGE AMENDMENT

The Marriage Amendment to North Carolina’s constitution expands the state’s legal protection of opposite-sex marriage. North Carolina statutes restrict “marriage” to opposite-sex couples.<sup>34</sup> The Amendment goes beyond these statutes to make opposite-sex marriage the only valid or recognized “domestic legal union” in the state.

There is little disagreement that the Amendment bars 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 more controversial question is whether the Amendment applies to other domestic relationships. The answer requires defining the key terms

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33. See, e.g., David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, U. ILL. L. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2224364](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224364). Hyman notes that “law professors, who devote their careers to second-guessing other people’s decisions, should not be allowed to skate away from their own failures.” *Id.* at 4. He explains that such high-profile professional misjudgments can be attributed in part to “motivated reasoning in an echo chamber”—having a strong emotional or ideological stake in the outcome which is reinforced by others with the same pre-existing partisan commitments. *Id.* at 16-20.

34. N.C. GEN. STAT. § 51-1 (2012) (“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.”).

in the Amendment's first sentence: "domestic legal union" and "valid or recognized." It also requires understanding the reach of the Amendment's second sentence, which says that the Amendment does not have any effect on the making and enforcement of private contracts.

The Amendment's supposed "unintended consequences" likely will not be given effect by North Carolina courts, which apply traditional canons of interpretation when considering the meaning of state constitutional provisions.<sup>35</sup> If the meaning is clear from the words used, courts will not look for a meaning elsewhere.<sup>36</sup> Context matters: "The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected."<sup>37</sup> When the meaning is not clear from the words used, construing those terms requires that "effect must be given to the intent of the framers," and so courts "should keep in mind the object sought to be accomplished by its adoption, and proper recourse should be given to the evils, if any, sought to be prevented or remedied."<sup>38</sup> To reach a correct construction, "[r]eference may be had to unofficial contemporaneous discussions and expositions,"<sup>39</sup> and courts may "look to the history [and] general spirit of the times."<sup>40</sup> Constitutional provisions must be interpreted *in pari materia*—that is, when a provision is ambiguous, its meaning may be determined in light of other constitutional provisions on the same subject matter.<sup>41</sup>

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35. *Perry v. Stancil*, 75 S.E.2d 512, 514 (N.C. 1953) (noting that construction of the North Carolina constitution is "in the main governed by the same general principles which control in ascertaining the meaning of all written instruments").

36. *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 479 (N.C. 1989).

37. *State v. Emery*, 31 S.E.2d 858, 860 (1944) (citations omitted).

38. *State Bar v. DuMont*, 286 S.E.2d 89, 93 (N.C. 1982); see *Stephenson v. Bartlett*, 562 S.E.2d 377, 389 (N.C. 2002) ("More importance is to be placed upon the intent and purpose of a provision than upon the actual language used. '[I]n arriving at the intent, we are not required to accord the language used an unnecessarily literal meaning. Greater regard is to be given to the dominant purpose than to the use of any particular words . . .'" (quoting *Perry*, 75 S.E.2d at 514) (internal citations omitted)).

39. *DuMont*, 286 S.E.2d at 93-94. The court in *Perry* explained that "[c]onstitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished . . . . The court should place itself as nearby as possible in the position of the men who framed the instrument." 75 S.E.2d at 514.

40. *DuMont*, 286 S.E.2d at 94 (quoting *Perry*, 75 S.E.2d at 514).

41. *Baxter v. Danny Nicholson, Inc.*, 690 S.E.2d 265, 267 (N.C. 2010).

*A. The First Sentence: "Domestic Legal Union" and "Valid or Recognized"*

The first sentence of the Amendment states that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State."<sup>42</sup> While the term "domestic legal union" never has been used in North Carolina law, it seems reasonable to conclude that in the Amendment's immediate and broader legal context, a "domestic legal union" is a marriage or equivalent legal status. The term is shorthand for marriage and civil unions or domestic partnerships that are legal substitutes for marriage. It does not include relationships that do not constitute or closely resemble marriage.

The term "domestic legal union" contains two modifiers, "domestic" and "legal," that limit the type of union affected by the Amendment. "Domestic" refers to that which relates "to the family or household."<sup>43</sup> Its usage ensures the Amendment cannot be construed to refer to some other kind of union, such as labor unions or credit unions. "Legal" means "that which is according to law . . . . It does not mean permitted by law, but means created by law."<sup>44</sup> It refers to a "formal status derived from law,"<sup>45</sup> something "[e]stablished or recognized by law."<sup>46</sup> Its usage confines the reach of the Amendment to unions that derive their existence, recognition, or status from the law. This includes a legal status created or recognized by legislation, executive action, court decision, or other operation of law.

The key limiting term is the noun "union." North Carolina courts frequently have used the term "union" to describe the marital relationship.<sup>47</sup>

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42. N.C. CONST. art. XIV, § 6.

43. *Domestic Definition*, AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE (5th ed. 2011), <http://www.ahdictionary.com/word/search.html?q=domestic&submit.x=53&submit.y=10> (last visited Mar. 30, 2013).

44. *West v. Slick*, 326 S.E.2d 601, 610 (N.C. 1985) (quoting *Nat'l Council Junior Order Am. Mechs. v. Tate*, 193 S.E. 397, 399 (N.C. 1937)) (internal quotations omitted).

45. *Legal Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/legal> (last visited Mar. 30, 2013).

46. *Legal Definition*, AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE, <http://www.ahdictionary.com/word/search.html?q=legal&submit.x=0&submit.y=0> (last visited Mar. 30, 2013).

47. While the phrases "legal union" or "domestic union" have not been used in North Carolina law, North Carolina court decisions contain numerous references to "marriage union" or "marital union." See, e.g., *State v. Rollins*, 675 S.E.2d 334, 336-37 (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

This is a common usage. *Black's Law Dictionary* defines "marriage" as "[t]he legal union of a couple as spouses."<sup>48</sup> It also defines "same-sex marriage" as "[t]he ceremonial union of two people of the same sex; a marriage or marriage-like relationship between two women or two men."<sup>49</sup>

More important than generic dictionary definitions is the context in which the term "union" is used. Because North Carolina has limited marriage to opposite-sex couples by statute,<sup>50</sup> "union" has not been used in state law to describe same-sex marriage or its alternatives. The term "union" has been used, however, to refer to civil unions and domestic partnerships in states like California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Rhode Island, and Vermont, where state legislatures have created such marriage alternatives.<sup>51</sup> Civil unions generally are understood

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belief that the *marital union* is sacred and that its intimacy and confidences deserves legal protection") (emphasis added); *Woodard v. Blue*, 9 S.E. 492, 494 (N.C. 1889) (referring to the "offspring of a *lawful union*") (emphasis added); *Kornegay v. Robinson*, 625 S.E.2d 805, 806 (N.C. Ct. App. 2006) (referring to "prior *marriages* and offspring from those *unions*") (emphasis added), *rev'd*, 637 S.E.2d 516 (N.C. 2006); *Anderson v. Lackey*, 593 S.E.2d 87, 88 (N.C. Ct. 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*, 559 S.E.2d 217, 218 (N.C. Ct. App. 2002) (addressing "the presumption of legitimacy which attaches when a child is born during a *marriage union*") (emphasis added); *Harris v. Harris*, 373 S.E.2d 312, 313 (N.C. Ct. App. 1988) (noting that "the plaintiff and defendant entered a *union of marriage*") (emphasis added); *Cannon v. Miller*, 322 S.E.2d 780, 798 (N.C. Ct. App. 1984) (declaring that "a *marriage* is a *union of individuals*") (emphasis added); *Jackson v. Jackson*, 315 S.E.2d 90, 90 (N.C. Ct. App. 1984) ("marriage union"); *Heist v. Heist*, 265 N.E.2d 434, 437 (N.C. Ct. App. 1980) ("marital union").

48. BLACK'S LAW DICTIONARY 1059 (9th ed. 2009).

49. *Id.* at 1061.

50. N.C. GEN. STAT. §§ 6, 51-1, 51-1.2 (2012).

51. See CAL. FAM. CODE § 299.2 (West 2012) ("A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership."); DEL. CODE ANN. tit. 13, § 201 (2012) ("Civil union" means a legal union between 2 individuals of the same sex established pursuant to this chapter."); HAW. REV. STAT. § 572-B-9 (2012) ("Partners to a civil union lawfully entered into . . . shall have all the same rights, benefits, protections, and responsibilities under law . . . as are granted to those who [marry]."); 750 ILL. COMP. STAT. 75/10 (2012) ("Civil union" means a legal relationship between two persons, of either the same or opposite sex, established pursuant to this Act."); NEV. REV. STAT. § 122A.500 (2012) ("A legal union of two persons, other than a marriage as recognized by the Nevada Constitution, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this chapter, must be recognized as a valid domestic partnership in this State regardless of whether the union bears the name of a domestic partnership."); N.J. STAT. ANN. § 37:1-29(a) (West 2012)

to be a legal status nearly identical to marriage, but between same-sex couples.<sup>52</sup> Domestic partnerships also may constitute a legal status similar to marriage, such as in California.<sup>53</sup>

The Amendment does not forbid the legal recognition or validity of all domestic relationships, but only of domestic “unions.” The term “union” limits the Amendment’s reach only to marriage and other legal statuses, such as civil unions or domestic partnerships, that substitute for the marital union. The Amendment could have prohibited only same-sex marriage by stating that “[m]arriage between one man and one woman is the only *marriage* that shall be valid or recognized in this State.” Instead, Amendment drafters used the broader term—“domestic legal union”—to ensure that neither the legislature nor the judiciary in North Carolina will

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(“‘Civil union’ means the legally recognized union of two eligible individuals of the same sex established pursuant to this act. Parties to a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage.”); R.I. GEN. LAWS § 15-3.1-1(2) (2012) (“‘Civil union’ means a legal union between two individuals of the same sex . . . .”); VT. STAT. ANN. tit. 15, § 1204(b) (2012) (“A party to a civil union shall be included in any definition or use of the terms ‘spouse,’ ‘family,’ ‘immediate family,’ ‘dependent,’ ‘next of kin,’ and other terms that denote the spousal relationship, as those terms are used throughout the law.”); *Knight v. Super. Ct.*, 26 Cal. Rptr. 3d 687 (Ct. App. 2005) (referring to officially-recognized domestic partnerships as “unions” or “legal unions” eleven times); *see also* *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006) (“The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process.”); *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (“We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel ‘domestic partnership’ system or some equivalent statutory alternative, rests with the Legislature.”). Vermont approved same-sex marriage in 2009, so civil unions are no longer available as of September 1, 2009; however, civil unions entered prior to that date remain valid. Same-sex marriage became legal in Delaware in July 2013. While civil unions are no longer available in Delaware, all existing civil unions will be converted into marriages by July 2014.

52. *See, e.g.*, N.J. STAT. ANN. § 37:1-31(a) (West 2012) (“Civil union couples shall have all of the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage.”); VT. STAT. ANN. tit. 15, § 1204(b) (2012) (“Parties to a civil union shall have all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage.”); 750 ILL. COMP. STAT. § 75/20 (2012) (“A party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses . . . .”).

53. *See* CAL. FAM. CODE § 297.5 (West 2007) (“Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses.”).

follow other states in creating same-sex marriage or legal statuses that serve as marriage alternatives for same-sex couples. Because the Amendment forbids only domestic *unions*, it does not apply to domestic *relationships* between unmarried couples who are merely living together, dating, or roommates, nor does it apply to other domestic relationships such as parent-child, grandparent-grandchild, or sibling. This is true not only as a matter of constitutional interpretation, but also by the term's common sense meaning—nobody refers to a couple who is dating as being in a “legal union.”<sup>54</sup>

The main flaw in the Eichner Paper is that the authors do not give the term “union” its proper effect in limiting the Amendment's reach. Rather, they contend that “the Amendment would restrict protections for *all unmarried couples*.”<sup>55</sup> In their view, the language of the Amendment is “significantly broader” than other state marriage amendments and thus “could be interpreted broadly, to bar all relationship rights for unmarried couples.”<sup>56</sup> They claim that while other state marriage amendments limit marriage to opposite-sex couples and prohibit creation of legal statuses for same-sex couples substantially equivalent to marriage, “North Carolina's language goes beyond this, barring the ‘validity’ or ‘recognition’ of relationships of unmarried couples, even for purposes of giving these relationships much less significant protections than those accorded married couples.”<sup>57</sup> To apply the Amendment this broadly, however, courts would have to read the term “union” to encompass *all* domestic relationships, which is inconsistent with both its legal and common usage.<sup>58</sup>

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54. See, e.g., *Ferreira v. Liberty Mut. Ins. Co.*, 37 A.3d 104 (R.I. 2011) (rejecting extension of insurance benefits to persons engaged to be married or simply living together because such relationships do not constitute civil unions, domestic partnerships, and other similar unions and partnerships validly recognized and entered into under state law).

55. Eichner Paper, *supra* note 13, at 1 (emphasis added).

56. *Id.* at 2. We examine below the language of several state marriage amendments and show that this assertion is false.

57. *Id.* at 3.

58. Diane Juffras makes a similar error when she says that under the Amendment “marriage is the only legal status that the state can grant an opposite-sex couple” and “the state cannot grant any legal status whatsoever to relationships between same-sex couples.” See Diane M. Juffras, *Amendment One, North Carolina Public Employers, and Domestic Partner Benefits*, 39 PUB. EMP. BULL. 1, 2-3 (June 2012), available at <http://sogpubs.unc.edu/electronicversions/pdfs/pelb39.pdf>. She goes on to define “domestic legal union” as “a relationship between two people who are living together that is authorized by the state, has been entered into in accordance with procedures set forth by law, and gives the parties certain rights and responsibilities.” *Id.* at 6. While this definition is much narrower than the Eichner Paper's “all unmarried couples,” it does not necessarily mean a marital or marital-like relationship, as indicated by the



A legal “union” is a status created by law, as distinguished from mere conduct. That is why the Amendment will not affect North Carolina’s statute that terminates post-separation support or alimony when a dependent spouse engages in cohabitation, which is defined as “the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship.”<sup>59</sup> Cohabitation here describes an “act” (i.e., conduct) and not a legal status created for the purpose of conferring certain rights, privileges, or benefits.

The Amendment also uses the term “valid or recognized” in the first sentence: “Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.”<sup>60</sup> *Black’s Law Dictionary* defines “valid” as “legally sufficient; binding;”<sup>61</sup> the *American Heritage Dictionary* defines “valid” as meaning “having legal force, effective or binding;”<sup>62</sup> and the *Merriam-Webster Dictionary* defines the term as “having legal efficacy or force.”<sup>63</sup> *Black’s Law Dictionary* defines the term “recognize” in its noun form, “recognition,” as “[t]he formal admission that a person, entity, or thing has a particular status,”<sup>64</sup> while the *Merriam-Webster Dictionary* defines the term in its verb form, “recognize,” as “to acknowledge formally: as to admit of being a particular status.”<sup>65</sup> The Amendment thus prohibits legislative, executive, or judicial action that legalizes or gives official sanction, approval, or significance to a domestic legal union, as well as action that merely acknowledges the legal existence of such union.

The meaning of the first sentence in the North Carolina Marriage Amendment becomes even clearer when it is compared to language in marriage amendments in other states. Ten state amendments define marriage as between only a man and woman, while one state amendment

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legal and common usage of the term “union.”

59. N.C. GEN. STAT. § 50-16.9(b) (2012).

60. N.C. CONST. art. XIV, § 6.

61. BLACK’S LAW DICTIONARY, *supra* note 48, at 1690.

62. *Valid Definition*, AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE, <http://www.ahdictionary.com/word/search.html?q=valid&submit.x=68&submit.y=21> (last visited Mar. 30, 2013).

63. *Valid Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/valid?show=0&t=1364738808> (last visited Mar. 30, 2013).

64. BLACK’S LAW DICTIONARY, *supra* note 48, at 1385.

65. *Recognize Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/recognize?show=0&t=1364771510> (last visited Mar. 30, 2013).

gives the state legislature the power to reserve marriage to opposite-sex couples.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

The first sentence of the North Carolina Marriage Amendment is virtually identical to the Idaho amendment, which was adopted in 2006.<sup>69</sup> The Idaho legislature's joint resolution on the amendment contains a section describing the "Effect of Adoption" of the amendment, which

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66. ALASKA CONST. art. I, § 25 (Alaska); ARIZ. CONST. art. XXX, § 1 (Arizona); CAL. CONST. art. I, ¶ 7.5 (2012) (California); COLO. CONST. art. II, § 31 (Colorado); MISS. CONST. art. XIV, § 263A (Mississippi); MO. CONST. art. I, § 33 (Missouri); MONT. CONST. art. XIII, § 7 (Montana); NEV. CONST. art. I, § 21 (Nevada); OR. CONST. art. XV, § 5A (Oregon); TENN. CONST. art. XI, § 18 (Tennessee). California's provision was declared unconstitutional in federal district court. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (subsequent history omitted). The Supreme Court in *Hollingsworth v. Perry*, 133 S.Ct. 2562 (2013), held that the provision's proponents did not have standing to appeal the district court's order and vacated the Ninth Circuit's decision affirming the district court. The district court's decision still stands, but its scope currently is disputed. Hawaii's constitutional amendment grants the state legislature the power to reserve marriage to opposite-sex couples. *See HAW. CONST. art. I, § 23.*

67. ALA. CONST. art. I, § 36.03(g) (Alabama); ARK. CONST. amend. LXXXIII, § 1 (Arkansas); FLA. CONST. art. I, § 27 (Florida); GA. CONST. art. I, § 4 (Georgia); IDAHO CONST. art. III, § 28 (Idaho); KAN. CONST. art. XV, § 16 (Kansas); KY. CONST. § 233A (Kentucky); LA. CONST. art. XII, § 15 (Louisiana); NEB. CONST. art. I, § 29 (Nebraska); N.D. CONST. art. XI, § 28 (North Dakota); OHIO CONST. art. XV, § 11 (Ohio); OKLA. CONST. art. II, § 35 (Oklahoma); S.C. CONST. art. XVII, § 15 (South Carolina); S.D. CONST. art. XXI, § 9 (South Dakota); TEX. CONST. art. I, § 32 (Texas); UTAH CONST. art. I, § 29 (Utah); WIS. CONST. art. XIII, § 13 (Wisconsin).

68. 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." VA. CONST. art. I, § 15-A. 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." *Id.* (emphasis added).

69. 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.").

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.<sup>70</sup>

This legislative explanation plainly supports interpreting North Carolina's Marriage Amendment to apply only to marriages and marriage imitations or substitutes, such as civil unions and domestic partnerships, and not to reach beyond to other types of domestic relationships between unmarried persons that do not attempt to approximate marriage.

The Idaho amendment is significant because the North Carolina Supreme Court in *Redmond v. Town of Tarboro*<sup>71</sup> construed a North Carolina constitutional provision that was taken verbatim from another state's constitution. The court relied on a leading case from that state to construe the North Carolina provision, noting that "[t]he construction put upon it therefore, by the supreme court of that state, is entitled to great weight."<sup>72</sup> The court explained:

Where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or country or by that of another, that construction is to be given to the latter statute. It is presumed that the legislature which passed the latter statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law. The foregoing rule, while not absolutely binding, is used as a valuable aid in the construction of laws.<sup>73</sup>

The same logic applies to the Idaho legislature's explanation of its marriage amendment, about which the North Carolina legislature presumably would have known. While the construction was given by Idaho's legislature rather than by its highest court, North Carolina courts likely will give that construction great weight in expounding the meaning of the North Carolina Marriage Amendment.

Amendment opponents repeatedly stress that the phrase "domestic legal union" has not been used in North Carolina law or elsewhere (except, of

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70. See Ben Ysursa, *2006 General Election Proposed Constitutional Amendments*, IDAHO SEC'Y OF ST., [http://www.sos.idaho.gov/elect/initials/06\\_hjr2\\_stmnt\\_effect.htm](http://www.sos.idaho.gov/elect/initials/06_hjr2_stmnt_effect.htm) (last visited June 30, 2013).

71. 10 S.E. 845 (N.C. 1890).

72. *Id.* at 849.

73. *Id.* (internal quotations and citations omitted).

course in Idaho's amendment). They ignore the fact, however, that the term "union," along with the terms "domestic" and "legal," frequently are used in other state marriage amendments in ways that clearly limit those amendments to marriage and legal substitutes for marriage, such as civil unions or domestic partnerships. Here are some examples:

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."<sup>74</sup>

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."<sup>75</sup>

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."<sup>76</sup>

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."<sup>77</sup>

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 . . . ."<sup>78</sup>

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 relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."<sup>79</sup>

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."<sup>80</sup>

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74. N.D. CONST. art. XI, § 28 (emphasis added).

75. S.C. CONST. art. XVII, § 15 (emphasis added).

76. FLA. CONST. art. I, § 27 (emphasis added).

77. UTAH CONST. art. I, § 29 (emphasis added).

78. ARK. CONST. amend. LXXXIII, § 2 (emphasis added).

79. OHIO CONST. art. XV, § 11 (emphasis added).

80. TEX. CONST. art. I, § 32 (emphasis added).

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.”<sup>81</sup>

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.”<sup>82</sup>

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.”<sup>83</sup>

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.”<sup>84</sup>

Although each amendment is stated somewhat differently, the effect of all is two-fold: (1) to limit the status, rights, benefits, and protections associated with marriage to marriages between one man and one woman, and (2) to prohibit legal recognition or validation of other types of marital-like unions or legal statuses. None of these amendments bar creation or recognition of legal rights, benefits, or protections for unmarried couples who do not have such marital-like relationships.<sup>85</sup> While the aim of the North Carolina Marriage Amendment could have been stated with greater clarity, it accomplishes these same two effects by specifying that “[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.”<sup>86</sup> There is no reason to think that North Carolina courts will give the Amendment a uniquely broader meaning than marriage amendments in other states by applying it to all relationships between unmarried couples.

The more difficult question is whether the North Carolina Marriage

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81. LA. CONST. art. XII, § 15 (emphasis added).

82. NEB. CONST. art. I, § 29 (emphasis added).

83. S.D. CONST. art. XXI, § 9 (emphasis added).

84. KY. CONST. § 233A (emphasis added).

85. For a more nuanced view of the various state marriage amendments, see generally Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U.L. REV. 221 (2005).

86. N.C. CONST. art. XIV, § 6.

Amendment operates as a blanket prohibition on legal benefits for same-sex couples. As explained above, the term “domestic legal union” describes a marital-like legal status. The Amendment is silent, however, about the degree of similarity to marriage required to constitute such a union. Many state marriage amendments specify the degree to which prohibited marital-like statuses must resemble marriage by using terms such as “similar,” “substantially similar,” “substantially equivalent,” and “intends to approximate.”<sup>87</sup> Contrary to what Amendment opponents predicted, this ambiguity in the North Carolina Marriage Amendment is more likely to be exploited to restrict the Amendment’s scope than to expand it.

There are at least three points of comparison between marriages and marriage substitutes: (1) eligibility and formation requirements; (2) rights, benefits, and obligations conferred (which typically are described as the “incidents” of marriage); and (3) termination requirements. In determining whether a legal status for same-sex partners is substantially similar to or approximates marriage, several questions arise: must substantial similarity exist across-the-board at all three points of comparison, or is it enough to have substantial similarity on any one point? Is determining substantial similarity simply a matter of totaling similarities and differences, or are some similarities or differences more relevant or important than others? May the state grant a single right or benefit to a partner in a same-sex relationship when that requires treating the partner as if he or she is a spouse?

The controversy over Wisconsin’s creation of domestic partnerships

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87. See, e.g., ARK CONST. amend. LXXXIII, § 2 (“Marriage 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 . . .”) (emphasis added); FLA. CONST. art. I, § 27 (2008) (“Inasmuch 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.”) (emphasis added); NEB. CONST. art. I, § 29 (“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.”) (emphasis added); N.D. CONST. art. XI, § 28 (2004) (“Marriage 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.”) (emphasis added); OHIO CONST. art. XV, § 11 (2004) (“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.”) (emphasis added); UTAH CONST. art. I, § 29 (2005) (“Marriage 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.”) (emphasis added).

provides a good starting point in answering these questions. Wisconsin's marriage amendment, adopted in 2006, 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."<sup>88</sup> In 2009, the Wisconsin legislature passed a domestic partnership law creating the "legal status" of "domestic partnership" and granting such partners *some* of the same rights and obligations accorded marriage.<sup>89</sup> The law was challenged on the ground that it creates a "legal status" that is "substantially similar to marriage."

The Wisconsin Court of Appeals took an essentially "all or nothing" approach in *Appling v. Doyle*<sup>90</sup> and held that the legal status of a domestic partnership in Wisconsin is not substantially similar to the legal status of marriage because the state did not confer all or almost all of the legal benefits and obligations of marriage that it could confer.<sup>91</sup> The court rejected the argument that the relevant point of comparison is the eligibility and formation requirements for a marriage, rather than the rights and obligations incident to a marriage.<sup>92</sup> While it found many similarities in the eligibility and formation criteria (e.g., number of persons, gender, competency, age, consanguinity, etc.), it noted two significant differences: domestic partners must reside together as a prerequisite to recognition of their legal status, and no formal or ceremonial commitment is required.<sup>93</sup> When comparing the rights and obligations of the two statuses, the Court observed that "it would 'take pages' to list the rights and obligations that go with marriage but not domestic partnerships," and noted that the trial court had identified thirty-three specific differences.<sup>94</sup> The court of appeals also found substantial differences in the termination requirements, with a domestic partnership being terminated upon either party filing a notice of termination with the county clerk, giving notice to the other party, and paying a fee.<sup>95</sup> The court finally explained that even if it ignored the two differences in the eligibility and formation criteria identified above, it still would conclude that marriages and domestic partnerships in Wisconsin are

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88. WIS. CONST. art. XIII, § 13.

89. WIS. STAT. § 770.05 (West 2012).

90. 826 N.W.2d 666 (Wis. 2012).

91. *Id.* at 685.

92. *Id.* at 671-74.

93. *Id.* at 682-84.

94. *Id.* at 684.

95. *Id.*

not substantially similar.<sup>96</sup>

The *Appling* court determined that a legal status prohibited under the state's marriage amendment must be substantially similar to marriage in all three points of comparison—eligibility and formation, benefits and obligations, and termination. Marriage-like requirements found solely in the criteria used to identify eligible couples and formalize their relationships, the court reasoned, are not sufficient to make domestic partnership a legal status substantially similar to marriage in Wisconsin because there is no substantial similarity in the benefits and obligations granted. The court nevertheless hypothesized that a legal status substantially similar to marriage could be created by similarity solely in benefits and obligations:

[I]t is unreasonable to think that “legal status” excludes reference to the rights and obligations of marriage because that would mean that voters thought the marriage amendment would permit legally recognized same-sex-couple relationships that are formed with criteria different than marriage criteria but carry with them all the rights and obligations that attend marriage—in other words, marriage by any other name.<sup>97</sup>

This inconsistency potentially undermines the court's essentially “all or nothing” approach. If a Wisconsin voter would think the state's marriage amendment bars substantial similarity in benefits and obligations even though there is no such similarity in eligibility and formation criteria, then why would a Wisconsin voter not also think the amendment applies when a domestic partner must meet marriage-like eligibility criteria to qualify for a single right or benefit that traditionally is reserved for married couples? For example, if Wisconsin extends spousal health insurance benefits to domestic partners conditioned upon being in a spousal-like relationship with the employee, as defined by eligibility criteria substantially similar to marriage, it would seem that the state has created a legal status substantially similar to marriage for the purpose of conferring that benefit.

Two considerations may help resolve this inconsistency, while at the same time limiting the relevance of *Appling*. First, *Appling* addressed the constitutionality of a state statute creating a comprehensive, stand-alone legal status of “domestic partnership,” not a legal status conveying a

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96. *Id.* at 685.

97. *Id.* at 672. The parties challenging the domestic partnership law in *Appling* apparently took the position that Wisconsin could “accord[] all of marriage's legal incidents to every Wisconsin citizen” without violating the state's marriage amendment, so long as the criteria for obtaining such benefits are not substantially similar to the eligibility and formation requirements for marriage. *Id.* at 672-73 (internal quotations omitted).



specific legal right or benefit of marriage in a particular context, such as spousal health insurance benefits. While the court in *dicta* suggests that Wisconsin can create a legal status extending such benefits without violating its marriage amendment, that was not the issue in the case.<sup>98</sup> Second, and more importantly, in public statements prior to the vote, proponents of Wisconsin's marriage amendment repeatedly asserted that the purpose of the amendment was to prohibit only "Vermont-style" civil unions which simply are marriages by another name because they confer on same-sex couples essentially all the rights, benefits, and obligations of marriage. They acknowledged that civil unions or domestic partnerships that conferred a more limited subset of the rights and obligations of marriage would be permissible under the amendment.<sup>99</sup> Given such statements, it is not surprising that the *Appling* court limited the reach of Wisconsin's marriage amendment.

The Michigan Supreme Court took a different approach in *National Pride at Work, Inc. v. Governor of Michigan*,<sup>100</sup> which held unconstitutional certain public employee health insurance plans that offered benefits to the employees' domestic partners. The Michigan amendment declares 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."<sup>101</sup> Benefit plan supporters argued that because the public employers did not bestow on domestic partnerships all the legal rights and responsibilities of marriage, the partnerships recognized under the plans were not "similar" to marriage. The court explained, however, that "[a] union does not have to possess *all* the same legal rights and responsibilities that result from a marriage in order to constitute a union "similar" to that of

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98. *Id.* at 677.

99. *Id.* at 676-80. For example, Representative Gundrum, one of the sponsors of the marriage amendment legislation, was quoted as saying that the amendment "would allow the Legislature at some point to create a civil union that includes a limited number of benefits, as long as it wasn't 'substantially similar' to what's granted to a married couple." *Id.* at 677-78 (quoting Rep. Gundrum) (internal quotations omitted). Senator Fitzgerald, another co-sponsor, explained in a press release that "the proposed amendment does not ban civil unions, only a Vermont-style system that is simply a marriage by another name . . . . [T]he legislature will still be free to pass legislation creating civil unions if it so desires." *Id.* at 678 (quoting Sen. Fitzgerald) (internal quotations omitted). Proponent Richard Esenberg stated in a debate on the amendment voters should "[t]hink of marriage as a bundle of sticks. Each stick is a different right or incident of marriage. The second sentence [of the amendment] only prohibits creation of a legal status which would convey virtually all of those sticks." *Id.* at 789, 826 N.W.2d at 679 (quoting Richard Esenberg) (internal quotations omitted).

100. 748 N.W.2d 524 (Mich. 2008).

101. MICH. CONST. art. I, § 25 (2004).

marriage” because that would render the term “or similar union” meaningless.<sup>102</sup> The court then seized upon two unique eligibility requirements for marriage, rather than the sum total of the legal effects of marriage, to find sufficient similarity—“[a]lthough there are . . . many different types of relationships in Michigan that are accorded legal significance . . . 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.”<sup>103</sup>

While a marital-like relationship is implicit in the North Carolina Marriage Amendment’s use of the term “domestic legal union,” North Carolina courts will likely not follow *Appling’s* “all or nothing approach” by similarly limiting the Amendment’s scope. The Amendment’s language and history do not contain any limits that restrict its scope only to those domestic legal unions that possess all or essentially all of the incidents of marriage. The Amendment expressly bans creation or recognition of “all” unions other than heterosexual marriage, which has similar effect to the “for any purpose” language of the Michigan amendment. This wider effect is clearly seen in the Idaho legislature’s explanation of the effect of nearly identical language in Idaho’s marriage amendment.<sup>104</sup> Such language is intended to prohibit not only the recognition of “civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage, no matter how denominated” but also the granting of “*any or all* of the legal benefits of marriage to civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage.”<sup>105</sup> Thus, a

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102. *National Pride at Work, Inc.*, 748 N.W.2d at 534.

103. *Id.* at 535-36 (original emphasis). The *National Pride at Work* decision is discussed more fully below in Part III.B, which addresses the effect of North Carolina’s Marriage Amendment on employee benefits. In a similar opinion on employee health insurance coverage for domestic partners, the Kentucky Attorney General explained:

“Recognition” of a “substantially similar legal status” to marriage . . . need not imply recognizing any substantial proportion of rights and obligations conferred upon married persons under existing law. If the standard were of that nature, it would have to be subject to continual reappraisal whenever statutes affecting the rights of married persons were amended, enacted, or repealed. Moreover, and more importantly, allowing a limited recognition of a similarly-defined relationship to marriage for some purposes, provided only that it were not extended to all subject matters at the same time, would enable various state agencies within their separate spheres of competence to accomplish piecemeal by the sum of their efforts what the legislature could not.

Ky. Op. Att’y Gen., No. OAG 07-004, 2007 WL 1652597, at \*3-4 (June 1, 2007).

104. 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.”).

105. See *Ysursa*, *supra* note 70 (emphasis added).

legal status similar to marriage can be created by the granting of a single benefit, if the eligibility requirements for that benefit are similar to marriage. So long as the same-sex couple (or unmarried heterosexual couple) is required to satisfy marriage-like criteria to receive the legal right or benefit, and so long as the right or benefit is one that typically is reserved for married persons, the state has created a legal status that recognizes or validates a “domestic legal union” other than heterosexual marriage.

This interpretation is consistent with the scope of the North Carolina Marriage Amendment as described by its supporters. While the Amendment prohibits marriages by another name, such as Vermont-style civil unions or California-style domestic partnerships, no similar history in North Carolina limits the Amendment’s scope to *only* such broadly-defined, all-encompassing unions. Amendment supporters acknowledged that it applies to extending a specific spousal right or benefit to a same-sex couple if the right or benefit is conditioned upon marriage-like eligibility requirements. For example, Representative Paul Stam, one of the Amendment’s leading legislative supporters, explained in a press release that:

[a]ny benefits extended by government to a person based on a domestic legal union other than marriage would be prohibited. But Government could still extend employment benefits that impact or benefit non-married domestic households. The extension of such benefits, however, could not be predicated only upon the status of a domestic relationship other than marriage. For example, a city could still allow an employee to pick one other person of his or her choice to be the beneficiary for health insurance.<sup>106</sup>

Prior to the vote, Representative Stam also introduced into the legislative record a memorandum from the Alliance Defense Fund (now Alliance Defending Freedom), which discussed the Amendment’s application to specific benefits:

The proposed amendment does not proscribe the dissemination of any form of benefit or privilege, even if such benefits support the same-sex partner of a governmental employee. The proposed amendment is, by its own language, unconcerned with benefits. What the proposed amendment does is limit to only marriage the types of domestic legal unions that may form the basis for the dissemination of benefits.

For example, under the proposed amendment, the State of North Carolina could allow its employees to designate any one additional person as a beneficiary of any retirement benefits they might receive, or as a beneficiary of their health care coverage. The fact that the same-sex

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106. Press Release, Paul Stam, *supra* note 25.

partner of a state employee might be designated as that beneficiary would be completely permissible under such a scheme since the dissemination of benefits is not premised on any domestic legal union, but only the employee's designation of the beneficiary.<sup>107</sup>

Amendment supporters thus recognized that the Amendment bars the extension of specific marriage-like rights or benefits to same-sex partners if they are treated as spouses in order to obtain the rights or benefits, but it does not bar such rights or benefits if granted pursuant to non-marriage-like criteria.

To illustrate the meaning of the Amendment's first sentence, 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 define 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, and siblings.

Would this law be valid under the 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.<sup>108</sup> 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 status 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 will not be barred by the Amendment. That is 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.

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."<sup>109</sup> That person is placed in order of priority behind the deceased's surviving spouse, children, parents, siblings, and certain other relatives. Empowering a domestic partner in this category based simply on recognition of the partner's relationship to the deceased will not violate the

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107. Memorandum from Alliance Defense Fund to N.C. House Majority Leader Paul Stam, *supra* note 25, at 8.

108. See N.C. GEN. STAT. § 130A-420 (2010).

109. § 130A-420(b)(6).

Amendment. 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 does not depend upon the partner 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 will not keep a domestic partner from qualifying under this category because the Amendment bars legal recognition or validation of domestic *unions*, not *relationships* of special care and concern.<sup>110</sup>

The first sentence of the North Carolina Marriage Amendment bars the state from validating or recognizing same-sex marriage or its legal substitutes, including civil unions and domestic partnerships meant to embody marriage-like relationships. The state cannot create or acknowledge a legal status that closely approximates or resembles a marriage by treating an unmarried couple like they are spouses. The term “domestic legal union” does not include any other domestic relationship that receives legal recognition, rights, privileges, benefits, or protection from the state. The Amendment therefore does not alter or affect the legal status of unmarried persons who are cohabiting, roommates, dating, or just friends, nor can it be applied to parent-child, grandparent-grandchild, and sibling relationships. It also will permit the state to extend a variety of legal benefits and protections to unmarried couples so long as, in doing so, it does not treat them like they are spouses.

*B. The Second Sentence: Contracts Between Private Parties*

The second sentence clarifies that the North Carolina Marriage Amendment does *not* have any effect on contracts between private parties: “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.”<sup>111</sup> This means that the Amendment does not bar continuing judicial enforcement of agreements between cohabiting, unmarried couples. It also is a straightforward affirmation that private employers may contract or otherwise extend benefits to same-sex couples based on their own internal policies.

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110. 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, § 29, Neb. Op. Att’y Gen., No. 03004, 2003 WL 21207498, at \*1 (Mar. 10, 2003).

111. N.C. CONST. art. XIV, § 6.

North Carolina courts have enforced contracts between cohabiting, unmarried couples regarding finances and property, so long as sexual services or promises thereof did not provide consideration for them.<sup>112</sup> The Amendment does not change the law regarding such contracts:

As a result of the second sentence, Amendment One does not prohibit two same-sex individuals or two opposite-sex unmarried individuals from entering into legally binding agreements with one another with respect to joint financial obligations, joint ownership of property, and disposition of such property under specified circumstances. The amendment further allows courts to continue to decide cases based on such agreements.<sup>113</sup>

The Amendment does not affect private individuals and their private contractual matters. Marriage contracts, however, are not purely private contracts, as they involve both the individuals who marry and the state.<sup>114</sup>

While the second sentence does not mention private employment contracts, its application to such contracts is obvious. As explained in Part II, the Amendment may bar state and local government employers from providing domestic partner benefits, but public employers still may offer such benefits under a different name. The second sentence makes it clear that any such prohibitions apply to government employers only. Contracts between private employers and their employees are exempted by the Amendment's second sentence. If a North Carolina company wants to grant benefits to same-sex partners, the Amendment does not prohibit that company's ability to do so.

The Amendment also protects private businesses from being forced by the government to grant benefits to same-sex couples that opposite-sex married couples enjoy under company policies, since that would constitute creation or recognition of a "domestic legal union" other than opposite-sex marriage. Thus, the Amendment protects businesses in two ways: (1) by protecting their freedom to offer benefits to domestic partners if they so decide, and (2) by protecting their freedom *not* to provide benefits to non-

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112. See, e.g., *Rhue v. Rhue*, 658 S.E.2d 52 (N.C. Ct. App. 2008); *Suggs v. Norris*, 364 S.E.2d 159 (N.C. Ct. App. 1988); *Collins v. Davis*, 315 S.E.2d 759 (N.C. Ct. App. 1984), *aff'd*, 321 S.E.2d 892 (N.C. 1984).

113. *Juffras*, *supra* note 58. Given the second sentence of the Amendment, it is astonishing that Professor Gilreath would claim in his op-ed piece that "Amendment One . . . limits [unmarried couples'] ability to contract around marriage" by making it unlikely that they could execute and enforce agreements "about how their assets will be divided should their relationship end." See Gilreath, *supra* note 15.

114. See, e.g., *Ritchie v. White*, 35 S.E.2d 414, 415 (1945) ("There are three parties to a marriage contract—the husband, the wife and the State. For this reason marriage is denominated as a status, and certain incidents are attached thereto by law which may not be abrogated without the consent of the third party, the State.").

married couples on the same basis as married couples.

### III. THE LEGAL EFFECTS OF NORTH CAROLINA'S MARRIAGE AMENDMENT

Predicting with any certainty how a court might decide a case involving the North Carolina Marriage Amendment is impossible. While a remote possibility always exists that a rogue judge will issue a ruling that does not follow traditional rules of legal interpretation, it is highly unlikely that the Amendment will result in widespread invalidation of existing or future North Carolina laws. 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."<sup>115</sup> 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."<sup>116</sup> When a judge has available a reasonable construction of the Amendment's language which allows the law in question to be upheld, there is little chance that he or she would choose an "unintended" interpretation to strike the law down.

Opponents of the Amendment—including prominent legal professionals—claimed that its passage would lead to a flood of litigation over its meaning and application.<sup>117</sup> That typically has not occurred in other states with marriage amendments. For example, Idaho's marriage amendment, which contains the same wording as the North Carolina Marriage Amendment, was adopted in 2006.<sup>118</sup> To date, some seven years later, there has not been one reported appellate court decision clarifying the amendment's meaning. The Eichner Paper's authors acknowledged as much when they observed in late 2011 that "Idaho courts have yet to interpret that statute."<sup>119</sup> South Carolina also passed a marriage amendment in 2006, which the Eichner Paper's authors say "approach[es] the breadth of North Carolina's proposed language."<sup>120</sup> The authors again concede that "[i]ts scope also has not yet been interpreted by South Carolina courts."<sup>121</sup> Thus, there has been no court decision interpreting marriage amendments in Idaho and South Carolina since their adoption in 2006, the former with

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

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

117. *See supra* text accompanying notes 19-21.

118. IDAHO CONST. art. III, § 28 (2006) ("Marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this State.").

119. Eichner Paper, *supra* note 13, at 3.

120. *Id.*; *see supra* text accompanying note 75.

121. Eichner Paper, *supra* note 13, at 3.

language exactly like the North Carolina Marriage Amendment and the latter with language nearly as broad. In fact, no reported appellate decisions involving marriage amendments are available in the majority of the thirty other states that have these amendments. Despite unsubstantiated claims that North Carolina's Marriage Amendment goes "far beyond" other state marriage amendments,<sup>122</sup> nothing suggests that North Carolina's experience will be different than that of other states.

The only exception is Ohio, where extensive litigation occurred in lower courts over whether that state's marriage amendment rendered existing domestic violence laws unconstitutional. The Ohio Supreme Court resolved the question by *not* applying the state's marriage amendment to its domestic violence laws. While the same arguments made in Ohio's lower courts might be made in some domestic violence cases in North Carolina, the state's appellate courts, for reasons explained below, likely will resolve the matter by following the reasoning of the Ohio Supreme Court.

North Carolina courts should construe the Amendment to apply only to marriage and marriage imitations or substitutes, and not assign unreasonably broad or bizarre interpretations to it. Nevertheless, I examine below the likelihood of those "unintended consequences" urged by Amendment opponents.

#### *A. Domestic Violence Laws*

Prior to the vote, critics frequently claimed that adoption of the North Carolina Marriage Amendment could invalidate existing state domestic violence laws protecting all unmarried women. They predicted that North Carolina courts might apply the Amendment to strike down such laws, as some lower courts did in Ohio after the passage of Ohio's marriage amendment. Suzanne Reynolds, a family law professor at Wake Forest University School of Law, said, "I'd be astounded if batterers failed to raise that argument. And I'd be astounded if every District Court judge in the state—how many are there, 200?—rejected that argument."<sup>123</sup> She feared that the Amendment would nullify such protections simply because the victim has a "relationship other than marriage" with the attacker.<sup>124</sup> "It is not an illogical argument," she said, "I'm afraid it's very logical."<sup>125</sup> Shannon Gilreath, another Wake Forest law professor, made the same prediction:

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122. College Park Baptist Church, *supra* note 14, at 4:47.

123. Phillips, *supra* note 25 (quoting Suzanne Reynolds) (internal quotations omitted).

124. *Id.*

125. *Id.* (quoting Suzanne Reynolds) (internal quotations omitted).



Would you want to live in a North Carolina in which your daughter could be beaten up or otherwise abused by her boyfriend but could not obtain a domestic violence protective order restraining him? In Ohio, where an anti-gay marriage amendment significantly more precise than the proposed N.C. amendment passed in 2004, prosecutors and judges interpreted the “pro-marriage” amendment to mean just that. Are you willing to bet your daughter’s life that the outcome would be different here?<sup>126</sup>

The Coalition to Protect N.C. Families, an organization opposing the Amendment, ran a television advertisement featuring Amily McCool, an assistant district attorney in North Carolina’s Wake County, in which she claimed that “Amendment One could take away protections for domestic violence victims . . . who are unmarried to the person that’s [sic] abusing them.”<sup>127</sup> Showing a stack of photos of domestic violence victims, she further declared that “[t]his is just a handful of the many, many, many victims that [sic] could be affected.”<sup>128</sup>

There is little chance that the Amendment will invalidate existing North Carolina domestic violence protections for unmarried couples. Such protections do not require victims to have, or recognize them as having, a marital or marital-like “union” with the offender. Additionally, the North Carolina judiciary has the benefit of the Ohio experience and likely will not repeat it.

While worded differently, Ohio’s marriage amendment—like the North Carolina Marriage Amendment—bars the state from creating or recognizing same-sex marriage or any other marriage-like statuses, such as civil unions or domestic partnerships, that approximate marriage. Compare the language of the two provisions:

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.”<sup>129</sup>

North Carolina: “Marriage between one man and one woman is the only

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126. Gilreath, *supra* note 15, at 2. Professor Gilreath neglected to mention that the Ohio Supreme Court ultimately rejected the interpretation of Ohio’s marriage amendment held by the prosecutors and judges who denied the protective orders. *See State v. Carswell*, 871 N.E.2d 547 (Ohio 2007).

127. Coal. to Protect N.C. Families, *Amily*, YOUTUBE (Apr. 29, 2012), <http://www.youtube.com/watch?v=ypJsBXd42-I>.

128. *Id.*

129. OHIO CONST. art. XV, § 11 (emphasis added).

domestic legal union that shall be valid or recognized in this State.”<sup>130</sup>

The meaning and legal effects of the two amendments are essentially the same, given the meaning of the term “domestic legal union,” as explained in Part II above, and especially the Idaho legislature’s statement describing the “Effect of Adoption” of nearly identical language in its own state’s marriage amendment.<sup>131</sup> Both amendments bar same-sex marriage and any legal relationship between unmarried persons that approximates marriage.

Initially in Ohio, several lower courts read Ohio’s marriage amendment to bar the state from giving any domestic violence protections to unmarried partners. The confusion was created by language in the state’s domestic violence laws protecting an unmarried person “living as a spouse” with the offender. Ohio’s domestic violence law recognizes 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.<sup>132</sup> Some lower courts held that giving protection to a “person living as a spouse” (i.e., cohabiting) with the offender was unconstitutional under the amendment because it conferred upon that person an effect of marriage.<sup>133</sup>

The Ohio Supreme Court in *State v. Carswell*<sup>134</sup> properly rejected that interpretation of Ohio’s marriage amendment and overruled those courts, holding that the state’s marriage amendment did not affect domestic violence protections. The court noted that the first sentence in Ohio’s marriage amendment “prohibits the recognition of marriage between persons other than one man and one woman.”<sup>135</sup> The second sentence prohibits the state “from creating or recognizing a legal status deemed to be the equivalent of a marriage of a man and a woman.”<sup>136</sup> The Ohio domestic violence statute, the court said, 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:

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130. N.C. CONST. art. XIV, § 6.

131. See *supra* text accompanying note 70.

132. OHIO REV. CODE § 2919.25(F) (2012).

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

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

135. *Id.* at 551.

136. *Id.*

[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 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].<sup>137</sup>

The court also noted that while the state has a role in creating marriage, it does not create cohabitation—the cohabiting partner creates cohabitation by the “determination to share some measure of life’s responsibilities with another.”<sup>138</sup>

The Kansas Court of Appeals rejected a challenge to the state’s domestic violence laws, similarly reasoning that the protection a person receives under such laws is not predicated on the state recognizing that the person’s relationship with the offender is similar to conventional marriage.<sup>139</sup> The Kansas marriage amendment limits marriage to one man and one woman and bars the state from recognizing as valid any other relationships that entitle the parties to the “rights or incidents of marriage,”<sup>140</sup> which the court interpreted to mean the “‘bundle of rights’ that identifies marriage as a distinct and separate institution.”<sup>141</sup> The court held that the defendant’s conviction for domestic violence did not turn upon the state recognizing his relationship with the victim as having the characteristics of conventional marriage, but merely extended to the cohabiting victim the same protection of the law granted to others—married or single—who, like the victim, were particularly vulnerable to violence “due to their close proximity to or relationship with the defendant.”<sup>142</sup>

Opponents of North Carolina’s Marriage Amendment seized upon the temporary confusion in Ohio’s lower courts to argue that the Amendment, if passed, would threaten domestic violence protections for all unmarried heterosexual couples in North Carolina. Professor Eichner, in fact, suggested that it was *more likely* that North Carolina’s domestic violence protections would be overturned. She told *Talking Points Memo* that “[The Ohio amendment] prohibits anything that ‘approximates’ marriage. Our

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137. *Id.* at 554.

138. *Id.* at 553.

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

140. KAN. CONST. art. XV, § 16.

141. *Curreri*, 213 P.3d at 1090.

142. *Id.*

amendment is much broader. It says you can't recognize or validate these relationships at all."<sup>143</sup> In an e-mail to Amendment opponents, Professor Eichner explained:

[T]he Ohio Supreme Court ruled that domestic violence protections for unmarried couples did not violate the Ohio amendment. It did that, however, based on the narrower language of the Ohio amendment, which barred the state only from recognizing a legal status that "approximates" marriage. Our amendment's language, though, bars *any* recognition of "domestic legal unions," not simply those that approximate marriage. If a North Carolina court applied the same rationale as the Ohio Supreme Court to our amendment's language, domestic violence protections for unmarried partners would be struck down.<sup>144</sup>

According to Professor Eichner, a "domestic legal union" encompasses all relationships between unmarried couples, not just those that approximate marriage. But, as explained in Part II above, that is not what the term "domestic legal union" means. The Amendment bars validation or recognition of any legal union other than heterosexual marriage. A "union" is a marriage or marriage-like relationship, but not any relationship between two unmarried persons.

There is every reason to believe that North Carolina courts, if presented with the question, will follow the same reasoning as the Ohio Supreme Court and hold that the state's domestic violence laws do not violate the North Carolina Marriage Amendment. North Carolina law defines "domestic violence" for purposes of both civil protections afforded victims and various criminal offenses as the commission of certain specified acts (e.g., attempted or actual bodily injury, causing fear of imminent serious bodily injury, stalking, sexual assault) by a person with whom the victim has or has had a "personal relationship."<sup>145</sup> The term "personal relationship" is defined as a relationship in which the parties are: (1) current or former spouses, (2) persons of the opposite sex who live together or have lived together, (3) related as parents and children, or grandparents and grandchildren, including persons acting in loco parentis to a minor child, (4) persons who have a child in common, (5) current or former household members, and (6) persons of the opposite sex who are in a dating relationship or have been in a dating relationship.<sup>146</sup> North Carolina courts have applied the "household members" category to unmarried same-

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143. Kludt, *supra* note 21 (quoting Professor Eichner).

144. Carlos Maza, *NC Law Professor Corrects the Record: Amendment One Could 'Invalidate' Domestic Violence Protections*, EQUAL MATTERS (May 2, 2012, 3:31 PM), <http://equalitymatters.org/blog/201205020005> (quoting e-mail from Professor Eichner).

145. N.C. GEN. STAT. § 50B-1(a) (2009).

146. § 50B-1(b).

sex couples and categories (2), (4), and (6) to unmarried opposite-sex couples.<sup>147</sup> Domestic violence victims may sue their abusers with whom they have or have had a “personal relationship” for a domestic protection order.<sup>148</sup> Such orders, which can be issued *ex parte* in an emergency, are enforced by both criminal process and civil contempt against persons accused of physical abuse, serious threats of abuse, stalking, or sexual assault.<sup>149</sup>

The wording of North Carolina’s domestic violence statutes makes it *less likely* that what happened in the lower courts in Ohio will happen in North Carolina. Unlike Ohio law, North Carolina statutes do not use the category of persons “living as a spouse,” and therefore are not susceptible to the same arguments that persuaded some Ohio lower court judges.<sup>150</sup> They protect broader categories of potential victims than protected under Ohio law by focusing on *personal* relationships, rather than marital or marital-like relationships. As detailed above, North Carolina domestic violence statutes apply to a wide range of persons, including those who are living together, household members, and even couples who are dating, whose status under those laws does not depend upon having a marital or marital-like union with the offender.<sup>151</sup> 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.

The North Carolina Marriage Amendment only bars recognition of domestic legal *unions*, not every relationship between unmarried couples. 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 any of the benefits, rights, and obligations of marriage (e.g., spousal support, inheritance rights, or the marital privilege). Put differently, simply acknowledging the fact that two persons are dating or living together for purposes of domestic violence laws does not recognize or validate a legal status that constitutes or closely resembles marriage. Thus, opposite-sex and same-sex couples in North Carolina

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147. See Eichner Paper, *supra* note 13, at 14; see also *Eatmon v. Safferman*, 578 S.E.2d 328 (N.C. Ct. App. 2003).

148. § 50B-1 to 50B-4.

149. § 50B-2(c).

150. 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. See, e.g., *Conner v. N.C. Council of State*, 716 S.E.2d 836, 842 (N.C. 2011). The Ohio Supreme Court’s decision should put the issue to rest. See *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007).

151. § 50B-1.

should not lose any protections under the state's domestic violence laws.

### *B. Domestic Partner Benefits*

Whether the North Carolina Marriage Amendment bars public employers from offering insurance benefits to their employees' heterosexual or homosexual domestic partners depends on how the partnership is defined. The Michigan Supreme Court held that such benefits were prohibited by the state's marriage amendment in *National Pride at Work, Inc. v. Governor of Michigan*,<sup>152</sup> the leading case on the issue, but the insurance benefits there were premised upon recognition of a narrowly-defined status ("domestic partner") that was substantially similar to marriage. If the beneficiary class that includes domestic partners is defined in a way that does not create or recognize a status similar to marriage, the North Carolina Marriage Amendment should 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.<sup>153</sup> The court observed 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, employer-employee—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."<sup>154</sup>

The *National Pride at Work* court noted other similarities between marriage and the criteria for domestic partners under the policies. Domestic partnerships were relationships that only two persons could enter. The partners were prohibited from having another domestic partner relationship within the previous six months. They were required to undertake obligations of mutual support, have a partnership contract, be at least eighteen years old, continue indefinitely in the partnership until one of the partners takes affirmative action to terminate, and share a common residence.<sup>155</sup> 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

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152. 748 N.W.2d 524 (Mich. 2008).

153. *Id.* at 535.

154. *Id.* at 535-36.

155. *Id.* at 536 n.14.

policies also invoked marriage as an analogous or comparable relationship.<sup>156</sup>

Michigan's marriage amendment states "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."<sup>157</sup> In *National Pride at Work*, the court addressed whether Michigan public employers were recognizing domestic partnerships as a union similar to marriage for the purpose of providing employee health insurance benefits. Given the features that domestic partnerships, as defined by the insurance policies, held in common with marriages, the court concluded that "domestic partnerships are unions similar to marriage,"<sup>158</sup> 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." 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.<sup>159</sup>

The Kentucky Attorney General reached the same conclusion as the

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156. *Id.* at 537 n.15.

157. MICH. CONST. art. I, § 25.

158. *Nat'l Pride at Work*, 748 N.W.2d at 537.

159. *Id.* at 543 (footnote omitted). Several earlier challenges to county and municipal policies granting benefits to domestic partners turned upon the question of whether those entities were authorized under state law to grant such benefits. *See, e.g.*, *Tyma v. Montgomery Co.*, 801 A.2d 148 (Md. 2002); *Heinsma v. City of Vancouver*, 29 P.3d 709 (Wash. 2001); *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. Ct. 1999); *Schaefer v. City of Denver*, 973 P.2d 717 (Colo. App. 1998). For a lower court decision contrary to *National Pride at Work*, see *Leskovar v. Nickels*, 166 P.3d 1251 (Wash. Ct. App. 2007), *rev. denied*, 187 P.3d 270 (Wash. 2008) (distinguishing *National Pride at Work* and holding that executive order granting domestic partner benefits does not give legal effect to same-sex marriages in violation of state law prohibiting same-sex marriage, even though order contained language in its "whereas" clauses stating that "marriage equality" should be afforded to all consenting, adult couples regardless of their sexual orientation), and *Lowe v. Broward County*, 766 So.2d 1199, 1205-06 (Fla. Dist. Ct. App. 2000) (holding that a county ordinance granting benefits to domestic partners, defined as both being at least 18 years old, freely consenting to the partnership, and agreeing to be responsible for each other's basic food and shelter, and neither being married, in another domestic partner relationship, or related by blood, is not unconstitutional under state marriage amendment because it does not create a "new marriage-like relationship").

Michigan Supreme Court in *National Pride at Work* when asked whether a state university's offering health insurance coverage for "domestic partners" of its employees violated the Kentucky marriage amendment.<sup>160</sup> 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 eighteen 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."<sup>161</sup> 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."<sup>162</sup> 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 placed unconstitutional conditions on health insurance coverage for domestic partners, since the benefit is premised upon the recognition of a legal status in the two individuals that is substantially similar to marriage.<sup>163</sup>

The reasoning used by the Michigan Supreme Court and Kentucky Attorney General does not bar public employers from covering domestic partners in a way that does not define their relationship in terms of a status

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160. Ky. Op. Att'y Gen., No. OAG 07-004, 2007 WL 1625297, at \*11 (June 1, 2007).

161. *Id.* at \*7.

162. *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.

163. *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 Idaho Op. Att'y Gen., No. 08-21508 (Feb. 4, 2008), available at <http://www.alliancedefensefund.org/UserDocs/IdahoAGOpinion.pdf>.



similar to marriage. The Kentucky Attorney General's opinion explains:

If "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.<sup>164</sup>

The *National Pride at Work* decision did not end health insurance benefits offered to same-sex partners of public employees in Michigan. Public employers simply revised their health insurance plans to extend benefits to beneficiaries not defined by marriage-like criteria such as "domestic partners."<sup>165</sup> The University of Michigan's current health insurance plan provides benefits to "Other Qualified Adults" (OQA), who share a primary residence with the employee and have done so for the previous six months.<sup>166</sup> Michigan State University's current plan grants benefits to an "Other Eligible Individual" (OEI), who is defined as a person who currently resides in the employee's residence and has lived there for the past eighteen months, who is not a "dependent" of the employee as defined by the IRS, and who is ineligible to inherit from the employee under the state's intestate succession laws.<sup>167</sup>

At least one court has approved similar plans that extended employee benefits to same-sex partners of public employees. The court in *In re Utah*

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164. Ky. Op. Att'y Gen., No. OAG 07-004, at \*10.

165. See, e.g., Gilia C. Smith, *Same-Sex Marriage Bans' Effects on Public Universities' Benefits*, CHRON. OF HIGHER EDUC. (July 24, 2011), <http://chronicle.com/article/article-content/128379>.

166. Univ. of Mich. Benefits Office, *Benefits Eligibility—Other Qualified Adults (OQA)*, U. OF MICH., <http://www.benefits.umich.edu/eligibility/oqa.html> (last visited July 6, 2013). The OQA cannot be the employee's child, grandchild, parent, sibling, niece, nephew, grandparent, aunt, uncle, cousin, renter, boarder, tenant, or employee.

167. Mich. State Univ. Human Res., *Other Eligible Individual*, MICH. ST. U., <http://www.hr.msu.edu/benefits/oei.htm> (last visited July 6, 2013). The OEI cannot be the employee's spouse, children, grandchildren, parent, sibling, niece, nephew, grandparent, aunt, uncle, cousin, renter, boarder, or tenant. In 2011, Michigan enacted the Public Employees Domestic Partner Benefit Restriction Act (PEDPBRA), which prohibits public employers (excluding public universities) from providing medical or other fringe benefits to an individual currently residing in the same residence of a public employee who is not either married to the employee, a dependent of the employee, or a person eligible to inherit from the employee under the state intestate succession laws. See MICH. COMP. LAWS § 15.581-.585. The ACLU filed suit challenging the constitutionality of the law in 2012. See *Bassett v. Snyder*, No. 12-10038, 2013 WL 3285111 (E.D. Mich. June 28, 2013).

*State Retirement Board's Trustee Duties*<sup>168</sup> held that a public employer's plan that provided benefits to an "Adult Designee" of the public employee does not violate the Utah marriage amendment. The "Adult Designee" beneficiary was defined under the plan as "a person, not the spouse of the employee, who resides in the domicile of the eligible employee for not less than twelve consecutive months and intends to continue to do so, is at least eighteen years old, and is economically dependent on or interdependent with the eligible employee."<sup>169</sup> 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."<sup>170</sup> The court concluded that conferring this benefit did not make the relationship between the employee and the adult designee "substantially equivalent" in its legal effect to marriage.<sup>171</sup>

Whether North Carolina or its local government subdivisions can offer employee benefits to same-sex partners turns upon whether the beneficiary designation creates a legal status that approximates marriage. To the extent that North Carolina courts follow *National Pride at Work*, they will focus on similarities between the eligibility criteria for marriage and for plan beneficiaries. Several local government entities in North Carolina continue to grant domestic partner benefits after adoption of the North Carolina Marriage Amendment. Both Mecklenburg County and the City of Greensboro define a "domestic partner" as one who lives in a "spousal-like" relationship with the public employee.<sup>172</sup> The cities of Charlotte, Chapel Hill, and Durham also grant domestic partner benefits, but omit the "spousal-like" language. Their requirements vary, but include requirements that the domestic partners be at least eighteen years old, share a common residence for a certain period of time, have a long-term relationship, not be married or related by blood, and be jointly responsible for each other's financial obligations.<sup>173</sup> The provision of benefits to domestic partners by these county and municipal insurance policies could be considered an unconstitutional recognition of a "domestic legal union" under the Amendment. The safest course for these local government units is to revise their policies to (1) delete any references to "domestic partner" and "spousal-like" relationships, and (2) define the beneficiary category in

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168. No. 050916879, 2006 WL 5711482 (D. Utah May 11, 2006).

169. *Id.* (internal quotation omitted).

170. UTAH CONST. art. I, § 29.

171. *In re Utah State Ret. Bd.'s Tr. Duties*, 2006 WL 5711482, at \*4.

172. Copies of these current benefits policies are on file with the author.

173. Copies of these current benefits policies are on file with the author.

a way that does not include unique marriage-like attributes or eligibility criteria (i.e., no prohibition on blood relations, no gender requirements, etc.). With such revisions, the policies should be constitutional under the Amendment.

The Amendment does not prevent *private* employers from extending health insurance benefits to domestic partners, no matter how those relationships are defined. It 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.”<sup>174</sup> Private employers remain free to recognize and provide employee benefits to same-sex couples, if they so choose.<sup>175</sup>

### *C. Child Custody, Adoption, and Visitation Laws*

The North Carolina Marriage Amendment likely will not alter the state’s custody, adoption, and visitation laws for unmarried parents. To begin with, the Amendment does not change the “best interests of the child” standard<sup>176</sup> that North Carolina courts use for determining custody and visitation. The Amendment defines permitted and prohibited legal unions between adults and does not attempt to regulate relationships between adults and children.

The Amendment also does not attach any legal consequences to cohabitation. Under North Carolina law, a parent’s cohabitation is not a factor in custody determinations unless it can be shown to have an adverse impact on the child.<sup>177</sup> The Eichner Paper’s authors argue that “judges may interpret [the Amendment] 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

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174. N.C. CONST. art. XIV, § 6.

175. Ironically, a state’s legalization of same-sex marriage actually may narrow the number of gay couples who receive same-sex partner benefits. For example, after Minnesota legalized same-sex marriage, the Mayo Clinic told employees who were receiving same-sex domestic partner benefits that they would have to get married to continue receiving those benefits. See Heather J. Carlson, *Mayo Clinic Employees Must Marry to Keep Getting Same-Sex Partner Benefits*, POST-BULLETIN (Aug. 2, 2013), [http://www.postbulletin.com/news/politics/mayo-clinic-employees-must-marry-to-keep-getting-same-sex/article\\_3e71cbda-ec99-5530-ac0b-fd99501e064f.html](http://www.postbulletin.com/news/politics/mayo-clinic-employees-must-marry-to-keep-getting-same-sex/article_3e71cbda-ec99-5530-ac0b-fd99501e064f.html).

176. See generally SUZANNE REYNOLDS, *LEE’S NORTH CAROLINA FAMILY LAW* § 13.3 (5th ed. 2002).

177. See *Williford v. Williford*, 277 S.E.2d 515 (N.C. 1981); *Browning v. Helff*, 524 S.E.2d 95 (N.C. Ct. App. 2000).

to deny the parent custody or visitation.<sup>178</sup> The Amendment's plain language, however, does not disapprove of cohabitation nor make illegal any non-marital relationship; rather, it preserves traditional opposite-sex marriage and bars the state from creating or recognizing alternate legal statuses for unmarried couples that resemble marriage. Simply acknowledging the fact that two persons are living together does not create or recognize a legal status that resembles marriage.<sup>179</sup>

The Eichner Paper's authors argue that the 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*,<sup>180</sup> where the parent gives up her paramount parental status by creating a family unit with the non-parent in which the non-parent also acts as a parent of the child.<sup>181</sup> These cases, however, turn upon recognition of a "de facto" parent status between the non-parent and the child, and not upon the existence of any marriage-like status between the parent and non-parent.

*Boseman* 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 is prohibited by state statute.<sup>182</sup> The court did not so hold, and there is no reason to believe that it would rule differently now. Thus, under the Amendment, the custody and visitation rights of same-sex partners in circumstances similar to *Boseman* should remain unaffected.

#### D. Other Legal Benefits and Protections

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 that treats them as if they are spouses. As North Carolina has done with its domestic violence laws, the state can provide such rights or privileges to unmarried partners by including them in

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178. Eichner Paper, *supra* note 13, at 19.

179. *See supra* note 58 and accompanying text.

180. 704 S.E.2d 494 (N.C. 2010).

181. Eichner Paper, *supra* note 13, at 20.

182. *See* N.C. GEN. STAT. § 51-1 (2012) ("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 . . .").

classes or categories of persons that are not defined by criteria or a status resembling marriage. Thus, North Carolina can 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.<sup>183</sup>

While conceding that such a result would be “far-reaching,” the Eichner Paper’s authors claim 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.”<sup>184</sup> This view depends on the unfounded claim that the Amendment applies to any non-marital relationship, not just legal unions that constitute or resemble marriage.

There is almost no chance that the Amendment will interfere with unmarried couples’ ability to grant their partners property through a will or trust. For such a “far-reaching” outcome to occur, two things must happen. First, someone would have to object to the transfer of property to the unmarried partner. Most interested parties typically know about and respect the transferor’s wishes and do not attempt to use the courts to substitute their own preferences for those of the transferor. Second, if there is such an objection, a court would have to refuse to enforce the will or trust provision in favor of the cohabitant because such a transfer would violate public policy. North Carolina law provides no basis 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 the Eichner Paper points out, North Carolina courts repeatedly have affirmed a testator’s freedom of testation<sup>185</sup>—the ability to dispose of one’s property as one wishes. There are two public policy exceptions to that principle, both 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.<sup>186</sup> The public policy justification for this is that a wrongdoer should not profit from his or her wrongdoing. The second exception to freedom of testation is the “Elective Share” statute,<sup>187</sup> which effectively prevents a testator from disinheriting a surviving spouse.

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183. See the hypothetical and explanation accompanying notes 102-04.

184. Eichner Paper, *supra* note 13, at 24.

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

186. N.C. GEN. STAT. §§ 31A-3 to -12.1 (2012).

187. §§ 30-3.1 to -3.6.

No North Carolina court has refused to enforce on public policy grounds a transfer provision in favor of a cohabitant. That likely will not change under North Carolina's Marriage Amendment. First, the Amendment arguably does not alter the public policy of North Carolina; instead, it simply makes it explicit. North Carolina has never given legal recognition to same-sex marriage or marriage substitutes or alternatives, and yet no state court has struck down a transfer in favor of a cohabitant as violating public policy. 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."<sup>188</sup> There is no reason to assume that testamentary freedom would not be accorded the same or even greater protection than contractual freedom.

The Eichner Paper's authors concede that such an interpretation of the 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."<sup>189</sup> Fortunately, North Carolina courts do not seek to interpret the meaning of legal texts in ways that lead to nonsensical results.<sup>190</sup>

#### IV. CONCLUSION

Amendment opponents began with a premise that they could not prove, namely, that the Amendment will apply broadly to all unmarried couples in North Carolina, whether opposite-sex or same-sex. The critical flaw in their projections was the failure to recognize the limiting effect of the term "union" in the Amendment. In the Amendment's immediate and broader legal context, the term "domestic legal union" refers to marriage or a legal status resembling marriage. It does not alter or affect the legal status of unmarried persons who are cohabiting, roommates, dating, or just friends. It permits the state to extend a variety of legal benefits and protections to unmarried couples so long as, in doing so, the state does not treat them as if they are spouses. This understanding of the Amendment's meaning and effect suggests that it is highly doubtful that the worst-case scenario predicted by many legal experts will ever appear. The widespread alarm about the Amendment's "unintended consequences" only served to obscure a more substantive and meaningful debate about marriage equality—an opportunity lost that may not occur again for several years.

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188. N.C. CONST. art. XIV, § 6.

189. Eichner Paper, *supra* note 13, at 26.

190. *See, e.g., In re A.C.F.*, 626 S.E.2d 729, 733 (N.C. Ct. App. 2006).

