

# Marriage amendment debate focuses on domestic violence

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Opponents of the marriage amendment on the May ballot have tried to move the debate away from same-sex unions to a more common ground.

They contend the amendment would endanger a wide range of legal benefits for all unmarried couples, including domestic violence protection, wills, employment benefits and custody agreements.

Supporters of the amendment - those who believe marriage between men and women should be the only legally recognized domestic partnership - dispute those claims as hypothetical and baseless.

North Carolina can perhaps learn from Ohio, which amended its constitution to include a same-sex marriage ban in 2004. Almost immediately, defense attorneys across the state tried to have criminal domestic-violence charges against their clients thrown out on the grounds that the new law meant opposite-sex unmarried couples were no longer protected.

The ensuing confusion left conflicting decisions by judges throughout Ohio for two and a half years, until the state Supreme Court settled it by ruling the domestic violence laws and the constitutional amendment were not in conflict.

Like everything else about Amendment One in North Carolina, whether the Ohio scenario could play out here is in dispute. What happened in Ohio wasn't supposed to happen there, either. But it hasn't happened in most of the 30 states with marriage amendments, at least not yet. That makes the Ohio experience a wild card, but for some a worrisome one.

## By the numbers

223,000: estimated number of unmarried couples in North Carolina in 2010

12: the percentage of those 223,000 unmarried couples who were same-sex

34,000: number of domestic violence protection orders sought in North Carolina from mid-2010 to mid-2011

Sources: N.C. Administrative Office of the Courts, U.S. Census

## Amendment wording

North Carolina's proposed amendment:

"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."

Ohio's amendment:

"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."

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In 2003, a Massachusetts court found its constitution guaranteed marriage rights for same-sex couples. States across the country rushed to rewrite their constitutions to prevent it. Ohio's amendment sailed through the Legislature and quickly won voters' approval, as it has in every state where there has been a vote on the issue.

The amendments fall into three categories:

Those that do no more than define marriage as between opposite sexes.

Those that also prohibit a marriage-like legal status for unmarried couples.

Those that are so broad they would seem not to give any special rights to unmarried couples.

North Carolina falls into that third, broadest category. Three other states have similar broadly worded amendments: Idaho, South Carolina and Michigan. Courts in Idaho and South Carolina have not yet interpreted their language, while Michigan courts have interpreted it broadly.

Ohio's amendment included a sentence prohibiting recognition of "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Even before the bill made it out of the Legislature, Ohio State University law professor Marc Spindelman saw a problem.

"If the concern of the marriage amendment was unmarried couples not be treated under the law the same as married couples, then domestic violence laws - which started out protecting married women, then domestic partners more generally - those laws were susceptible to being attacked," he said in a recent interview.

Pro-amendment forces ridiculed that prediction.

"Proponents, when faced with those concerns, initially responded with a kind of sneering dismissal that anything like this would be likely to happen," Spindelman said.

But it did. Within about three months of the amendment passing, a public defender in Cuyahoga County representing a man accused of shoving his live-in girlfriend asked a judge to throw out the case. The attorney argued that since the new provision in the constitution prohibited recognition of a special legal status for unmarried people in a marriage-like relationship, that meant domestic violence laws couldn't apply to live-in boyfriends and girlfriends.

## **Conflicting opinions**

Word spread quickly among Ohio defense attorneys, and soon similar arguments were being made all over the state. Some judges agreed and others disagreed, but the upshot quickly became a patchwork of conflicting opinions.

Between 40 and 50 defendants challenged the constitutionality of the domestic violence statute, said Alexandria Ruden, a domestic violence attorney in Cleveland who tracked the issue, and about two dozen of those cases were appealed.

"What the split of authority meant was whether or not you were covered by domestic violence laws depended on what county you lived in," said Michael Smalz, a domestic violence attorney for the Ohio Poverty Law Center in Columbus. "In some counties you were covered, in others you were out of luck."

The picture didn't become any clearer once some of those cases were appealed. The state has 12 appellate courts, which almost inevitably led to an array of conflicting opinions.

"It created chaos," Smalz said. "Keep in mind that most of the people affected were not same-sex couples. They were unmarried men and women. The people losing protection in those courts were generally women who were co-habiting with their male abusers."

Police and prosecutors weren't sure what to do either, sometimes calling domestic violence groups for advice. Those advocacy groups were also confused and frustrated.

"It was an incredibly difficult time to provide advocacy because you didn't know what to do," said Nancy Neylon, executive director of the Ohio Domestic Violence Network. "I know there were instances of people who went back into violent relationships and were battered again and injured again because they had no legal protection."

Ruden said it became clear where the dispute was headed.

"By this time people didn't care; they just wanted it to get to the Supreme Court," she said. "They just wanted a definite decision."

Two and a half years after the amendment was enacted, the Ohio Supreme Court, in a 6-1 decision, ruled that the state's domestic violence law was constitutional because it did not create a special class of people in a quasi-marital relationship. It was a decision that narrowly focused on the statute rather than on the bigger question of whether the marriage amendment itself was constitutional.

## **Concerns for N.C.**

Phil Burress downplays how the amendment played out in Ohio courts. Once known as an anti-pornography crusader, Burress has organized the nationwide same-sex marriage campaign since the mid-1990s, when the New York Times referred to him as the Paul Revere of the movement. As head of the Cincinnati-based Citizens for Community Values, he was a key force for the amendment in Ohio.

"It ended up being thrown out," he said of the case that went to the state Supreme Court. "It ended up being nothing. It was one case and the guy lost. It's not an issue with the marriage amendment. We got hit with hundreds of scenarios - that it would tie up courts forever with litigation, which didn't happen."

The Ohio experience won't necessarily replay in North Carolina. The proposed amendment here intentionally does not include Ohio's wording about not establishing rights for what amounts to a substitute marriage. North Carolina has only one appellate court, contrasted with Ohio's dozen.

The domestic violence statute in North Carolina does not require there to be a marriage-like relationship. It recognizes six categories of victims, including current or former household members, who were not even necessarily romantically involved.

There were about 34,000 domestic violence protection orders sought in North Carolina in a year, according to the most recent data available from the state Administrative Office of the Courts. Beth Froehling, executive director of the N.C. Coalition Against Domestic Violence, is concerned about what happened in Ohio. "It raises a red flag that that will be a problem," she said.

Rep. Paul "Skip" Stam, a Republican lawyer from Apex who helped write the proposed amendment, calls it "far-fetched" that domestic violence laws in North Carolina would be threatened. "Domestic violence is a crime, whether there is a recognized marriage-like relationship or not," he said.

Tami Fitzgerald, executive director of the N.C. Values Coalition, agrees. She is running the pro-amendment campaign, and is also a lawyer.

"It is unreasonable and without legal precedent to believe that protecting marriage in our state constitution as the legal union of one man and one woman 'might' suddenly deprive same-sex couples of domestic violence protections that they presently have under our statutes," she said. "That conclusion is based on nothing but supposition and legal fabrication."

Several law professors in North Carolina and Ohio disagree. They say that if judges interpret the amendment broadly, it could render unconstitutional the domestic violence law. That's because the amendment prohibits the state from recognizing any "domestic legal union" other than opposite-sex marriage - for any reason, they contend.

If that happens, "then a bunch of protections will fall, including domestic violence," said UNC-Chapel Hill law professor Maxine Eichner, who has co-authored a study of the proposal.

Spindelman, the Ohio State professor, said judges are reluctant to strike down domestic violence laws, but that's where the law is headed. "The pressure is on in other states to read the amendment more broadly. Meanwhile, does it leave victims of domestic violence without protection? This is not hypothetical. It happened in Ohio."

In fact, amendment proponents in Ohio wanted just such a far-reaching declaration. They filed a brief on the side of the defendant who was trying to get his case thrown out. They would have rather seen the domestic violence statute declared unconstitutional and re-written later by the Legislature, in exchange for a ruling that declared the marriage amendment constitutional in the broadest terms possible.

Although "legal union" has not been defined in North Carolina courts, Amendment One supporters counter that the term is defined in federal law and will not undermine domestic violence law.

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