Quoted in "Marriage Proposal’s Broader Effects Debated in NC"

E. Gregory Wallace, Campbell University School of Law
Marriage proposal's broader effects debated in NC

BY TOM BREEN - ASSOCIATED PRESS

RALEIGH, N.C. — The debate over a proposed constitutional amendment in North Carolina has increasingly turned to subjects that seem far afield from the question of whether gays and lesbians should be allowed to legally marry.

The referendum vote is set for May 8 on a proposed amendment to ban same-sex marriage in the constitution, though the state already has a prohibition on gay marriage.

Opponents of the ban say it could have dire unintended consequences. For instance, they warn judges may not issue restraining orders in domestic violence cases involving gay couples. Local governments may have to change the benefits offered to employees, they say.

"It's difficult to predict with any certainty how courts are going to predict constitutional provisions or statutes," said E. Gregory Wallace, a constitutional law professor at Campbell University's Wiggins School of Law.

Part of the uncertainty lies in the language of the amendment itself, according to an analysis by three professors and a law student at the University of North Carolina School of Law. The text of the amendment reads in part, "Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this state."

The problem, according to the analysis, is that the phrase "domestic legal union" doesn't currently appear anywhere in North Carolina law, leaving it an open question as to how it can be interpreted.

The only other state that uses similar language in an amendment is Idaho, said Holning Lau, a UNC law professor and one of the authors of the analysis.

A court could rule that unmarried gay and heterosexual couples alike do not constitute a "domestic legal union," which raises a question of whether one partner could get a restraining order against the other, Lau said. Domestic partners may not qualify for benefits offered by local governments like Chapel Hill and Durham County.

"It's possible that a court would say, hey, the state can't recognize these types of partnerships for domestic violence protection purposes anymore," he said.

That's what happened initially in Ohio, which passed an amendment banning gay marriage or civil unions in 2004. In at least seven trial courts, judges ruled that the amendment prevented them from issuing domestic violence protection orders or even charging unmarried people with the crime of domestic violence.

"The idea behind Ohio's domestic violence laws is that it's to treat unmarried partners the same as married partners for purposes of protection," said Marc Spindelman, a professor at Ohio State University's Moritz College of Law. "The purpose of the marriage amendment was to prevent unmarried couples from being treated as if they're married. Pretty shortly after the marriage amendment passed, defense lawyers in some domestic violence cases started using the marriage amendment in exactly the way we thought they would."

In a decision called Ohio vs. Carswell, the state supreme court ruled that the marriage amendment didn't invalidate domestic violence laws. The analysis by UNC researchers argues that an Ohio-like situation is possible here, but Wallace said the fact that the matter has been settled in that state makes such an outcome less likely in North Carolina.

Jeanette Doran, executive director of the North Carolina Institute for Constitutional Law, also said the concerns don't seem to have merit.

"Because court orders in domestic violence situations aren't limited to legally recognized unions, I don't see how a court could be inhibited from issuing a domestic violence protection order if the amendment passes," Doran said.

Ohio illustrates how the debate is being framed in North Carolina. Opponents of the amendment focus on the trial courts that ruled they couldn't prosecute people for domestic violence, while amendment supporters stress the supreme court's decision overturning those lower court rulings. Both sides tend to de-emphasize or ignore altogether the other side's take on Ohio in official statements and on websites.

The legal uncertainty is a consequence of how the amendment was worded by the General Assembly, according to Wake Forest University School of Law Professor Shannon Gilreath.

"These unforeseen consequences merely expose the rush to disadvantage the targeted group at the expense of careful legislation," he said. "All that's really on the minds of North Carolina's legislators when they write an amendment like this is that gay people should be marked for some special disadvantage."

It's up to the voters, of course, to determine whether all of the legal back-and-forth amounts to more than speculation, which Wallace argues is probably for the best on such charged topics.

"I think it's a healthy thing that it's going directly to the people of North Carolina," he said. "When you talk about making fundamental change in an institution as old as marriage, that's probably something that's best left up to the people themselves."

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