Amending the Vermont Constitution to Add an Equal Protection Clause: Two-and-a-Half Cheers for PR 4

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I. Introduction

My name is Peter Teachout. I am a Professor of Law at Vermont Law School with a field of specialization in state and federal constitutional law. I have published articles on federal and state constitutional issues in law journals and as book chapters. In my role as a constitutional scholar, I am occasionally asked to testify before committees of the Vermont legislature on constitutional issues. I welcome this opportunity to testify before the House Judiciary Committee this morning on PR 4 proposing that the Vermont constitution be amended to add an article guaranteeing equal protection under law.

To anticipate the basic thrust of my testimony this morning:

I strongly support adding an equal protection clause to the Vermont constitution. I also think that the current version of the amendment proposed by PR 4 represents a substantial improvement over the version originally introduced. I do have questions about the proposed amendment in its current form however (see Section V below). The current version of the amendment does an effective job of providing protection for members of the groups listed there but it leaves unclear whether and to what extent it is intended to provide protection to others – to members of groups not listed but who also currently suffer from discriminatory treatment because of matters beyond their control and to members of groups who in the future may also need protection – to all other Vermonters. The problem arises in large part because of the employment of a closed list of protected classes in the current version of the amendment. This problem, I suggest, can be remedied with a simple fix. I realize that the House Judiciary Committee cannot change the language of PR 4 at this point in the process, at least not without the collaboration of the Senate, and that in any event it may decide it is not worthwhile trying to do so, but I feel a responsibility to raise the questions and to suggest a way to address them, and then leave it to the Committee to decide what it wants to do.

II. Why the Vermont Constitution Should be Amended to Add an Equal Protection Clause

I support amending the Vermont constitution by adding an equal protection clause for three primary reasons: First, I support doing so because there is no equal protection clause in the current state constitution. In a few cases, the state supreme court has relied on the so-called "common benefit[s] clause" in Article 7 of Chapter I of the Vermont constitution to strike down

state laws excluding particular segments of Vermont society from participating equally in the fundamental benefits enjoyed by others,[1] but as the state supreme court itself has recognized, that clause is not designed to protect vulnerable groups from discrimination and thus cannot and should not be relied upon as a substitute for a real equal protection clause.[2]

Second, I support adding an equal protection clause to the state constitution because, under well-established principles of American constitutional law, states may provide greater protections of rights under state constitutions than are provided by the federal constitution as interpreted by the U.S. Supreme Court. Thus, although the U.S. Supreme Court has ruled that the Due Process Clause in the 14th Amendment does not provide women with a constitutional right to terminate a pregnancy, Vermont is able to protect a woman's right to make that choice as a matter of state constitutional law.[3] To give another example, although the U.S. Supreme Court has ruled that laws that discriminate against persons with disabilities are subject only to "rational basis" review, the most deferential standard, state courts in Vermont could rule that a provision in the state constitution prohibiting discrimination against persons with disabilities should be interpreted to require that the state provide a more compelling justification for such discrimination.

This underscores a crucially important point: In interpreting a state constitutional equal protection clause, state courts are not bound by the standards adopted by the U.S. Supreme Court in interpreting the federal Equal Protection Clause; nor, for that matter, are they required to employ the same modes of analysis. In interpreting state constitutional provisions, state courts are free to develop their own standards and methodological approach. Adding an equal protection clause to the Vermont constitution would free the state courts from dependency upon U.S. Supreme Court equal protection jurisprudence. It would allow Vermont to develop its own homegrown more protective equal protection body of law.

Third, I support adding an equal protection clause to the Vermont constitution because it would represent an important symbolic commitment to the principle of equal protection under the law. Constitutional provisions provide courts with grounds for making decisions and legislatures with guidance and inspiration for adopting laws and policies, but they also, as importantly, play an important symbolic role by giving expression to the fundamental values and commitments of the people of a state. It would be wrong to underestimate the symbolic significance of adding a provision to the state constitution declaring the state's commitment to the fundamental principle of equal protection under the law.

III. Amended Version of PR 4 Represents a Substantial Improvement

As originally introduced, PR 4 would have inserted a new equal protection clause in existing Article 7 in Chapter I of the Vermont Constitution so that Article 7 would read as follows [proposed language underlined]:

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[1] *State v. Brigham* and *Baker v. State*

[2] I elaborate on this point in my original testimony on PR 4 before the Senate Judiciary Committee on [date]

[3] As in fact it has done with the addition of Art 22.

> "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; that the government shall not deny equal treatment and respect under the law on account of a person's race, ethnicity, sex, disability, sexual orientation, gender identity, gender expression, or national origin; and that the community hath an indubitable, unalienable and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal."

The approach adopted by the original proposal, in short, was to insert a new equal protection clause in the middle of an existing provision of the constitution and to list particular classes of persons entitled to protection from government denial of "equal treatment and respect." Moreover, the list of protected classes was a closed one. The original proposal, in short, adopted what might be called "the finite list of protected classes" approach.

After holding hearings on this proposal, the Senate Judiciary Committee ultimately concluded that it would better serve the people of the state to have a free-standing equal protection article in the state constitution added as a new Article 23. As amended by the Senate Judiciary Committee, PR 4 now reads as follows:

> "Article 23. [Equality of rights]
>
> "That the people are guaranteed equal protection under the law. The State shall not deny equal treatment under the law on account of a person's race, ethnicity, sex, religion, disability, sexual orientation, gender identity, gender expression, or national origin. Nothing in this Article shall be interpreted or applied to prevent the adoption or implementation of measures intended to provide equality of treatment and opportunity for members of groups that have historically been subject to discrimination.

In moving the proposed amendment from a clause sandwiched in the middle of existing Article 7 to a free-standing article, the Senate Judiciary Committee also made several important substantive changes in the provision itself:

First, the amended proposal adds a first sentence expressing the general principle that "the people are guaranteed equal protection under the law."[4]

Second, the amended proposal adds "religion" as a prohibited basis for discrimination. This is an important addition since discrimination against members of religious groups has been a problem in Vermont in the past.[5]

[4] See discussion below at

[5] Island Pond raid. This too however introduces a complication: See discussion below at

Third, the amended version of PR 4 adds a new third sentence making clear that adoption of the amendment should not be interpreted to prevent government from adopting "measures intended to provide equality of treatment and opportunity" for members of historically disadvantaged groups.[6]

In my view, all these changes represent substantial improvements over the original version,[7] and I think the Senate Judiciary Committee should be commended for the work it has done in this respect.

IV. General Observations

Before turning to consider questions raised by PR 4, I think it might be helpful to make a few general observations about what the proposed amendment in its current form does and does not do.

First, the amended version carries over the basic approach employed in the original version in that: it employs a closed list of protected classes. Although this is not unusual for modern day equal protection clauses,[8] it does raise questions I discuss below.

Second, unlike the reproductive rights amendment approved last year as new Article 22, the amendment proposed by PR 4 does not attempt to identify a standard of review to be employed by the courts in reviewing allegations of prohibited discrimination.[9] That is probably wise, and perhaps inescapable, since the standard of review employed by the courts is likely to differ depending on the particular type of discrimination involved and possible countervailing considerations.

Third, this calls attention to another feature of PR 4 that also needs highlighting: the protections against discrimination in the proposed amendment are not absolute. In some instances, it may be possible for the state to justify discriminatory treatment of members of the groups listed (for example, in the identification or assignment of bathroom or showering facilities; or –

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[6] As originally proposed without this sentence the amendment would have called into question the constitutional legitimacy of a number of state institutions and policies aimed at remedying the effects of past legal, economic, and societal discrimination against members of the protected classes, for example, the Commission on Racial Equity, the Women's Commission, the Human Rights Commission, and, to give another example, even the policies of the Cannabis Control Board.

[7] The amended version of PR 4 also makes one other minor change in the language in the opening phrase of the second sentence in the proposed amendment. The original version provided that the government "shall not deny *equal treatment and respect* under the law." The amended version drops the phrase "and respect" and provides simply that the state "shall not deny equal treatment." As I understand it, the reference to "respect" was dropped out of a concern that the provision be judicially enforceable and reflected the view that it might be difficult for courts to entertain and provide judicial relief for complaints that a particular individual was treated "disrespectfully" by some government bureaucrat. The elimination the phrase "and respect" should not be interpreted consequently as reflecting the view that being treated with equal respect and dignity is not constitutionally important. Dropping the phrase was felt important rather to cut off any argument that the provisions of Article 23 were, like those in Article 1, simply hortatory and not judicially enforceable.

[8] See discussion below at

[9] Cite to Article 22, adopts strict scrutiny standard.

controversially – in determining eligibility for participation on athletic teams; or because certain occupations require certain capabilities) if the state is able to produce a sufficiently compelling justification for doing so.

Finally, the current version of the amendment leaves open the question of whether the protection provided is limited to protection from laws and policies that expressly discriminate against members of the protected groups or is also intended to provide protection from facially neutral laws that can be shown to have a discriminatory impact. This may turn out to be important since under federal Equal Protection jurisprudence, facially neutral laws that have a discriminatory impact upon members of protected classes are not subject to heightened judicial scrutiny unless it can be shown the law or policy was motivated by a discriminatory purpose.[10]

V. Three Questions

I think I can best raise the concerns I have about the current version of the amendment proposed by PR 4 by asking three questions.

A. Question #1: Why This Particular List of Protected Classes?

It is not unusual for equal protection provisions in state constitutions to include lists of protected classes. It is instructive in this respect to compare the list of protected classes in PR 4 with the classes protected under other state equal protection provisions.[11]

As currently proposed, the second sentence in PR 4 reads as follows:

> "The State shall not deny equal treatment under the law on account of a person's race, ethnicity, sex, religion, disability, sexual orientation, gender identity, gender expression, or national origin."

This list is not radically out of line with the lists of protected classes found in other state constitutions – there is a great deal of overlap - but it raises the question: why are these particular categories singled out for special protection and not others?

Why, for example, does PR 4 not also prohibit age discrimination? Other state constitutions do.[12] Compare in this respect the equal protection amendment recently added to the Nevada Constitution:[13]

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[10] cite

[11] As of February 2023, at least 29 state constitutions had provisions guaranteeing equal rights. https://ballotpedia.org/New_York_Equal_Protection_of_Law_Amendment_(2024)#State-level_Equal_Rights_Amendments.

[12] For example, Nevada, Louisiana.

[13] Cite 2021

> "Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin." [underline supplied]

The omission of age discrimination from the amendment proposed by PR 4 is particularly glaring since it is widely recognized that age discrimination is a serious problem:

> "Age discrimination is real. Two out of three workers between ages 45 and 74 say they have seen or experienced age discrimination at work, and job seekers over age 35 cite it as a top obstacle to getting hired."[14]

The failure of PR 4 as currently drafted to include age discrimination as a protected category is not the only noticeable omission. What about providing protection to those who suffer from discrimination because of weight or body type? Is that not also a serious problem?[15] Or from discrimination based on height?[16] Or past criminal record? Or genetic make-up?[17] Or condition of temporary homelessness? These also are types of discrimination that people in Vermont experience every day. And since constitutional provisions are supposed to provide rules of governance over the long term, what about protection from unfair discriminatory treatment for members of other classes we cannot even imagine?

I think you can see the problem: once you start listing protected classes, you raise the question of why the particular types of discrimination are listed and not others. The law has a technical term for this reflected in the Latin maxim, *expresio unious est exclusio alterius*, which means that if you include certain classes in a closed list you mean to exclude others.[18]

Because of the way PR 4 is currently framed, practitioners and courts will consequently be faced with difficult questions: Are members of the classes specifically listed in the amendment in PR 4 the only ones entitled to judicial protection against discrimination? If not, are they entitled to

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[14] https://www.aarp.org/work/age-discrimination/facts-in-the-workplace/?cmp=KNC-DSO-WORKJOBS-WJ-AgeDiscrimination-General-NonBrand-Exact-41162-Bing-AGEDISCRIM-AgeDiscrimination-Exact-NonBrand&&msclkid=c8c298b748ca1e9a6c4ffe91153f6eb8&utm_source=bing&utm_medium=cpc&utm_campaign=WJ-AgeDiscrimination-General-NonBrand-Exact&utm_term=age%20discrimination&utm_content=Age%20Discrimination&gclid=c8c298b748ca1e9a6c4ffe91153f6eb8&gclsrc=3p.ds; *cf* prohibitions on age discrimination in Article 21 of the European Charter of Fundamental Rights and in Article 19 of the Treaty on the Functioning of the European Union.

[15] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7511432/#:~:text=Even%20though%20discrimination%20based%20on,an%20anti%2Dweight%20discrimination%20law; https://www.psychologytoday.com/us/blog/beauty-sick/202107/fat-or-obese-which-terms-are-least-stigmatizing#:~:text=The%20language%20used%20to%20describe,fat%22%20or%20%22obese.%22

[16] https://www.bbc.com/worklife/article/20220825-height-discrimination-how-heightism-affects-careers

[17] https://medlineplus.gov/genetics/understanding/testing/discrimination/#:~:text=Genetic%20discrimination%20occurs%20when%20people,risk%20of%20an%20inherited%20disorder.

[18] cite

special protections that members of other classes are not entitled to? If neither of those, then what is gained by listing them?

You may think that, although age discrimination is not specifically listed, courts could find that victims of age discrimination are protected under the first sentence of the proposed amendment which reads: "That the people are guaranteed equal protection under the law."

That is a possibility and I wouldn't want to rule it out, but there are complications:

The first complication is presented by the Preamble to PR 4. If a Court should consult the Preamble for guidance as to the purpose the amendment to see if it was intended to protect members of other classes – classes not listed - from discrimination, this is what the court would find:

> "PROPOSAL 4
>
> "Sec. 1. PURPOSE
>
> "(a) This proposal would amend the Constitution of the State of Vermont to specify that the government must not deny equal treatment and respect under the law on account of a person's race, ethnicity, sex, religion, disability, sexual orientation, gender identity, gender expression, or national origin."

According to the Preamble, the purpose of the amendment is to prevent the government from denying equal treatment to members of the listed classes. That is the purpose. That is all. No mention of age discrimination. No mention of protecting other Vermonters from discriminatory treatment. No mention of whatever additional purpose, if any, is supposedly served by the first sentence in the amendment.

A second source of complication derives from the general rule of interpretation which allows courts to find that constitutional provisions of a general nature do not provide a basis for the assertion of legal rights.[19] Such provisions are declared to be, in legal terms, "non-self-executing." For example, the Vermont supreme court has ruled that Article 1 of Chapter I declaring that all persons "are born equally free and independent" is not "self-executing" and therefore cannot be invoked as a basis for claiming protection of rights. Such provisions only become legally operational, the courts have ruled, when supplemented with implementing legislation. To give another example, the U.S. Supreme Court recently found that the 3rd paragraph in the 14th Amendment declaring that those engaged in insurrection are not eligible for public office also is not "self-executing."[20]

So that raises the question, Is the first sentence in the proposed amendment intended to provide a basis for asserting legal claims? Or is it intended as a statement of general principle that by itself cannot be invoked as basis for asserting legal claims but needs implementing legislation to be made operational?

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[19] cite

[20] cite

This is not a merely academic concern. Given the limited purpose of the amendment as expressed in the Preamble, and given the juxtaposition of the general statement of principle in the first sentence of the proposed amendment with the specific prohibitions of discrimination in the second, it is not clear whether and to what extent PR 4 is intended to provide members of classes not listed there with the same level of protection afforded to members of the listed classes or even with any protection at all without implementing legislation.

B. Question #2: Why Employ a Closed List of Protected Classes?

Although it is possible for state equal protection provisions to employ a closed list of protected – the equal protection clauses in some other state constitutions do – it is not necessary. Drafters of other equal protection provisions, confronted with the problem presented by employing a closed list, have found ways to work around the problem. And the solution hit upon is both a simple and obvious one: make the list of protected classes representative rather than exclusive.

There are two basic ways for doing so. The first is to add at the end of the list of protected classes words to this effect: "and all others similarly situated."[21] A variation on this approach can be found in the Spanish constitution which adds at the end of the list of protected classes in its equal protection provision "or any other personal or social condition or circumstance."[22]

The other approach is to insert before the listed classes a phrase like "on grounds such as" or "on account of factors such as." That is the approach employed in the European Convention on Human Rights.[23]

In the case of PR 4, the "finite list" problem could be cured by amending the language to strike out "on account of" and substituting "on grounds such as" so it reads like this [proposed amended language in brackets]:

> "The State shall not deny equal treatment under the law on [grounds such as] a person's race, ethnicity, sex, religion, disability, sexual orientation, gender identity, gender expression, or national origin."

That simple change would make clear that the list of protected classes is not intended to be an exclusive one. It also would provide an answer to the question of what the relationship is between the first sentence and the second sentence in PR 4, since now the first sentence could be read as establishing the general principle and the second sentence as providing representative examples.

I know that the House Judiciary Committee cannot propose or make changes in the language of the proposed amendment at this point in the process but it is important to remember we are considering the adoption of a constitutional amendment, a fundamental statement of governance

[21] Cite to Montana constitution
[22] cite
[23] cite

that is supposed to guide us over the long term, so while we are doing it, it is important to try to get it right.

I am out of my depth here, but I wonder if it might be possible for the House Judiciary Committee to return PR 4 to the Senate to request a "quick fix" along the lines suggested. Amending the current proposal to insert a phrase like "on grounds such as" should not be controversial since no group currently covered by the list would be left without protection and, unless there are procedural barriers to doing so, making a simple change like that should not take much more time than it does to change a flat tire.

Question #3: What are the Implications of Adding a Provision Prohibiting Discrimination on Grounds of Religion for Protecting the Religious Liberty Rights of Vermonters under Article 3 of Chapter I?

I support adding discrimination on the basis of religion to the types of discrimination prohibited by the proposed amendment. Virtually every modern equal protection clause does so. And discrimination based on religion has been a problem in Vermont in the past. My concern rather is with how the prohibition against discrimination based on religion might impact rights of religious liberty protected by Article 3 of Chapter I of the Vermont constitution, in particular the right not to have to contribute to the religious education and indoctrination of others.[24] I am concerned with how inclusion of discrimination against religion as a protected class in the proposed amendment might be exploited by groups, like the Alliance Defending Freedom, to argue that the state must provide taxpayer support to parents who want to use that support to provide their children with religious education.

If the state provides taxpayer support for parents who send their kids to public schools, the argument goes, failure to provide identical support for parents who want to send their kids to private religious schools constitutes discrimination on account of religion. That argument has already been made under the common benefits clause of Article 7 although so far without success.[25] It also has played a role in U.S. Supreme Court decisions requiring states that rely upon private schools to provide public education to support private religious schools on equal terms.[26] Prohibiting discrimination against religion in the proposed amendment in the Vermont constitution would give proponents of that argument additional ammunition.

I am not sure exactly what to suggest about how to anticipate and deal with that problem. It may be that the sentence in Section (a) the Preamble which provides that "This proposed constitutional amendment is not intended to limit the scope of rights and protections afforded by any other provision in the Vermont Constitution" will do the required work. Although Preamble statements do not have operational legal effect, that statement in the Preamble may be enough to make clear that prohibiting discrimination on the basis of religion is not intended, and should not be interpreted, to override the protection of religious liberty embodied in Article 3 of Chapter I of the Vermont constitution. But it is something that should be made clear.

[24] cite
[25] cite
[26] Cite to Carson v. Makin

VI. Conclusion

Constitutional provisions are different from ordinary legislation in an important respect. Constitutional provisions, as Chief Justice Marshall once said, are "intended to endure for ages to come" and thus should be designed to be adaptable to deal with problems that the current generation may find it difficult even to imagine. The most serviceable provisions in the Vermont constitution - one thinks of Article 7 in Chapter I as an example – have that durable quality.

I think that the current version of the amendment being considered in PR 4 does an effective job of providing protection for members of the groups specifically listed there. I am not sure it is as well designed to protect from discrimination members of groups not listed: other Vermonters, both today and in the future, who also will suffer discriminatory treatment because of matters beyond their control. I think that problem can be remedied with a very simple fix aimed at making clear that the list of protected classes in the proposed amendment is intended to be representative rather than exclusive.[27] I suggest above how that can be done.

I apologize to the Committee for getting this in at the last minute, and in such rough shape, but this is the best I can do on fairly short notice. I am happy to make myself available to the Committee for questions.

Thank you for your consideration.

[27] And making the Preamble to PR 4 reflect this as well.