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P.R.2

Senator Jeanette White, Chair
Senate Government Operations Committee
Vermont General Assembly

February 14, 2019

Dear Senator White:

I want to thank you for the opportunity to testify before the Senate Government Operations Committee yesterday on the question of whether Article 1 of Chapter I of the Vermont Constitution should be amended as proposed by Proposition 2 to eliminate the reference to slavery. I think I made clear in my written and oral testimony that I am opposed to the amendment as proposed in Proposition 2 because it is based on an anachronistic and inaccurate understanding of the framers' intent and effect of Article 1. The framers did not intend in adopting Article 1 to prohibit only adult slavery. They intended to prohibit slavery generally. That is the way Article 1 has been generally understood from the moment of its adoption in 1777 down to the present. I do not think the Vermont constitution should be amended based on a falsehood. If there is sentiment in favor of amending Article 1, it should not be justified by attributing to the framers of the first Vermont constitution a view that they never held.

Having said that, I should go on to say that there is nothing wrong with amending a state constitution to eliminate provisions that have been rendered obsolete by intervening developments or that are in conflict with U.S. constitutional law. Article 1 in its current form arguably suffers from both defects: The prohibition of slavery expressed there, although of profound historical importance, has been superseded by adoption of the 13th Amendment to the U.S. Constitution in December of 1865 which bans slavery and involuntary servitude nationwide, so that provision no longer has any operative significance. The establishment of maximum ages at which servants, slaves, or apprentices can continue to be "holden by law" to continue to act as servants without their own consent is a little more problematical. Indentured servant contracts have long since fallen out of favor and are no longer used, but, if resurrected, would almost certainly be found to constitute a form of "involuntary servitude" in violation of the 13th Amendment, so to the extent Article 1 seems to give a stamp of approval to such contracts provided they cease to operate when the indentured servant, slave, or apprentice reaches the age of majority, it would almost certainly be found to be a violation of the 13th Amendment.

Upon reflection, I have come to think the Committee has essentially three basic options:

(1) No Amendment

The first is to treat Article 1 as a great landmark in American and Vermont constitutional law and leave it as is. The argument for doing so was very ably presented at the Committee hearing on Wednesday by Senator Richard McCormack. Unlike the “confederate monuments” which are symbols of racism and slavery, he argued, Article 1, even if it represents only a partial step toward elimination of slavery, at least was a step in the right direction, and in that sense represents a constitutional achievement of which we can be legitimately proud. Moreover, if we leave Article 1 undisturbed, it can provide a useful and instructive learning opportunity for future generations of students because it invites us to think about and try to understand our shared historical experience. If amended as proposed, the historical experience itself would not be changed, but it would be, as it were, removed from public view. There is no harm, Senator McCormack argued, in leaving Article 1 as it stands, and doing so will serve as an important and constant reminder of the one of the great achievements of the framers of the first Vermont constitution: making the Vermont constitution the first state constitution to prohibit slavery.

(2) By-Pass Surgery

If taking this approach might prove in the Committee’s judgment politically impalatable given the public outcry to eliminate the reference to slavery in Article 1, a version of this approach would be to strike the phrase “as servant, slave, or apprentice” in the second part of the article and replace it with “in any capacity.” That would get rid of the word “slave,” but at the same time be faithful to the framer’s intent. It would allow any servants brought into the state as slaves to assert their rights under this part of the Article upon reaching the age of majority. It would do the work the framers wanted the second part of Article 1 to do.

I have considered other suggestions for tinkering with the language of the second part of Article 1 but none of them, in my judgment, would be faithful to the framers’ original intent.

(3) Heart Transplant

The third option would probably find the most public support. It would be to strike the entire second part of Article 1 as proposed by Proposition 2 but for different reasons. It would not do so on grounds that the framers of Article 1 intended to prohibit only adult slavery (which is not true) but on grounds that the second part of Article 1 has been rendered obsolete by adoption of the 13th Amendment and, to the extent the second part of Article 1 authorizes indentured servant contracts, it is in conflict with the prohibition against involuntary servitude in the 13th Amendment. Now if you do just that, the great achievement of the framers disappears, because Article 1 so amended would no longer support the label “Slavery Prohibited.” The great original significance of Article 1 – making Vermont the first state to prohibit slavery as a matter of constitutional law - would be lost sight of.

Accordingly, if the Committee is inclined to take out the scalpel and cut out the entire second part of Article 1, I recommend that what has been removed be replaced with a simple phrase (taken from a recent referendum-approved amendment to the Colorado constitution): “There shall never exist in this state either slavery or involuntary servitude.” This would not only save, or restore, the original intent of the framers by prohibiting slavery in Vermont but carry their achievement a step forward by also prohibiting involuntary servitude (in the form of indentured servant contracts). It would allow the editor’s note in brackets at the top of the article to continue to use the descriptive phrases always used, including, critically from an historical perspective, the phrase “Slavery Prohibited.”

I am sure there may be other ways to deal with the question, but these three options seem to me at the moment to be the most viable.

I appreciate your sharing these thoughts with the members of the Committee.

Respectfully,

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