# Should the Vermont Constitution be Amended to Include an Equal Protection Clause and, If So, What Form Should the Amendment Take? Constitutional Aspects of 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, including articles on Vermont constitutional law. As a constitutional law scholar, I am occasionally invited to testify before committees of the state legislature on constitutional aspects of bills under consideration. I always hope my testimony will be helpful although I never can be sure that what I have to say is what the committee is looking for. In any event I am happy to share what I know. I welcome questions and I don't mind being pressed. I appreciate the opportunity to testify this morning before the Senate Judiciary Committee on constitutional aspects of PR 4 which proposes amending the Vermont constitution to add an equal protection clause.

In my testimony this morning I would like to focus on two things: First, I would like to explain why I support amending the Vermont constitution by adding an equal protection clause and why I think it is important to do so. Second, I want to take a close look at the amendment proposed by PR 4: at how it is framed, where it is located in the text of the constitution, and what it does and does not do. While I share the large aim of the amendment, I have questions about the approach it adopts. As a way of pulling those questions into focus, I propose an alternative approach and an alternative version of the amendment itself - a "Vermont version of the 14th Amendment" - which I think is in some respects better suited to serve the interests of the state in the long run.

## II. Why is it important to amend the Vermont constitution by adding an equal protection clause?

I support amending the Vermont constitution by adding an equal protection clause for two primary reasons: First, and most importantly, because there currently is no equal protection clause in the Vermont constitution. There never has been. As a consequence, the Vermont courts have been forced to rely on the Common Benefits Clause in Article 7 to do the work that an equal protection clause would otherwise do. But, as I explain below, Article 7 was never intended to serve as an equal protection provision. It was never intended to prohibit discrimination against racial and other minorities. Moreover, the mode of analysis employed by the courts in Article 7 challenges is not well suited for dealing with equal protection challenges. If we want to address problems of unfair and unjust discrimination in an effective and

meaningful way, we need a provision in the state constitution that will provide our citizens and courts with the right tools to do so.

Second, I support adding an amendment because it would provide the legislature with state constitutional support for adopting laws aimed at ensuring that all persons in the state are treated with equal dignity and respect. We live in a world where we can no longer count on the U.S. Supreme Court or the federal government to provide adequate protection against discrimination. Adding an article to the state constitution specifically designed to protect the rights of all Vermonters to equal protection of the law would provide lawmakers with constitutional support for (1) adopting policies and programs aimed at countering the effects of systemic racism; (2) dealing with recent Supreme Court decisions which, some have argued, have 'weaponized" the 14th Amendment to disadvantage the very groups it was intended to protect; and (3) shoring up and expanding the protection of other vulnerable groups in the state.[1] It would provide both support and motivation for doing the work in this area that still needs to be done.

Article 7 is not an adequate substitute for an equal protection clause

One might legitimately ask why an equal protection amendment is needed since the Vermont constitution already has Article 1 which proclaims that "all persons are born equally free and independent" and Article 7 which declares that government is created to serve "the common benefit" of the community and not for the benefit of any particular part of the community. The problem is that the Vermont court has declared that Article 1 is not "self-executing," which is a fancy term for saying that it cannot be invoked as the basis for assertion of legal rights in court.[2] And Article 7 simply is not designed to do equal protection work.

Let me explain briefly why the so-called "Common Benefits Clause" in Article 7 cannot be counted upon to do the kind of work that an equal protection clause would do. In the first place, Article 7 was never intended to serve as an equal protection clause. It was never intended to prohibit discrimination against racial or other minorities. This is how the Vermont supreme court puts it in *Baker v. State*:[3]

> "The historical origins of the Vermont Constitution . . . reveal that the framers, although enlightened for their day, were not principally concerned with civil rights for African–Americans and other minorities, but with equal access to public benefits and protections for the community as a whole. The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages."[4]

[1] I am indebted to Rev. Mark Hughes for suggestions as to the types of problems that need addressing.
[2] Shields v. Gerhart, 163 Vt. 219 (1995); Sabia v. State, 164 Vt. 293 (1995)
[3] 170 Vt. 194 (1999)
[4] Id. at 211 (underline supplied)

Moreover, in analyzing a constitutional challenge under Article 7, the courts employ a distinct mode of analysis, an analytical approach very different from that employed by courts in analyzing and deciding equal protection challenges. Here again from the court's decision in *Baker v. State:*:

> "The language and history of the Common Benefits Clause thus reinforce the conclusion that a relatively uniform standard, reflective of the inclusionary principle at its core, must govern our analysis of laws challenged under the Clause. Accordingly, we conclude that this approach, rather than the [mode of] analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7 . . . [5]

The court then goes on to describe the mode of analysis to be employed in Article 7 challenges:

> "When a statute is challenged under Article 7, we first define that "part of the community" disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the state's protection. Our concern here is with delineating, not with labelling the excluded class as "suspect," "quasi-suspect," or "non-suspect" for purposes of determining different levels of judicial scrutiny.
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> "We look next to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others. Consistent with Article 7's guiding principle of affording the protection and benefit of the law to all members of the Vermont community, we examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives.
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> "We must ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose. Consistent with the core presumption of inclusion, factors to be considered in this determination may include: (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive."[6]

Although this analytical approach served its intended purposes in *Brigham v. State* (1997)[7] and *Baker v. Vermont* (1999),[8] two important state supreme court decisions, in other contexts it has not proved so helpful, producing constitutional decisions that some have found to be unclear and

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[5] Id. (underline supplied)
[6] Id. At 213-15
[7] 170 Vt. 246
[8] 166 Vt. 246

confusing.[9] Employing Article 7 modes of analysis to deal with equal protection problems, in short, is like employing a Phillips-head screwdriver to turn a flat-head screw.

To summarize, Article 7 cannot be relied upon as a substitute for an equal protection clause because it is not framed as an equal protection clause and was never intended to serve that function. It was never intended to prohibit discrimination against racial or other vulnerable minorities. Moreover, the mode of analysis employed by the courts in deciding Article 7 challenges is different in significant ways from that employed by the courts in deciding equal protection challenges and consequently not well suited for dealing with the sorts of problems that equal protection cases present. If we want to address problems of unjust and unfair discrimination in an effective and meaningful way, we need to give those responsible for making crucial decisions the right tools for doing so.

Providing state constitutional support for adoption of needed legislation

A second reason for amending the state constitution to add an equal protection clause is to provide the state legislature – the lawmakers as distinct from the law deciders - with state constitutional support for adopting a wide range of measures aimed at eliminating both blatant and subtle forms of discrimination and protecting the rights of the most vulnerable members of our society. True, the state legislature does not absolutely need a state equal protection clause to adopt such measures. States generally have the power to adopt laws prohibiting discrimination without needing special constitutional support for doing so. But although not absolutely necessary, adding an equal protection clause or article to the Vermont constitution could perform an important service. It is not accidental that one often finds in the preamble to bills under consideration reference to the constitutional provisions that motivate and support adoption. This is not an insignificant role for a constitutional provision to play. An equal protection provision in the Vermont constitution would provide not only legal support but also motivation for adopting anti-discrimination laws. It would serve as an important symbolic expression of the state's commitment to ensuring that all people in the state are treated with equal respect and dignity.

It is important to recognize there are limits as to what can be realistically expected from adoption of an equal protection clause. It is well established that states are free to adopt laws more protective of rights than are provided by the federal constitution. The federal standard establishes the floor below which states cannot go, but it does not prevent states from providing greater protections. The limit is when the state law conflicts with federal constitutional law. That is the limitation that Vermont would face if it were to attempt to invoke a newly added equal protection clause as support for adopting affirmative action programs giving preferences to members of historically disadvantaged groups. In a recent case involving challenges to affirmative action admission programs at Harvard and the University of North Carolina, the U.S. Supreme Court ruled that making race a factor in deciding who gets beneficial treatment – whatever the motivation and whether it serves to advantage or disadvantage a racial minority -

[9] *See, e.g., Vitale v. Bellows Falls Union High School*, 293 A.3d 309 (2022)

constitutes a form of racial discrimination prohibited by the Equal Protection Clause in the 14th Amendment.[10] So if the state constitution were to be amended to include an equal protection clause, that clause could not be invoked by the state as support for adoption of affirmative action programs that take this form. Since federal law is supreme, all such programs would be vulnerable to challenge under the federal Equal Protection Clause on grounds they constitute impermissible discrimination on the basis of race.

## III. What PR 4 Does and Does Not Do: A Proposed Alternative Approach

PR 4 proposes amending the language of Section 2 of Article 7 of Chapter I of the Vermont constitution to read as follows:

> "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."
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> Article 7 of Chapter I of the Vermont Constitution
> (proposed amended language underscored)

There are several things to note about this approach. First, PR 4 proposes inserting the new language into an existing article rather than adding the amendment as a free-standing article at the end of Chapter I as was done with PR 5; second, as framed, the amendment applies only to government action; it does not prohibit discrimination by non-government or private actors;[11] third, the list of classes to be protected is a finite list, leaving potentially unprotected members of groups or classes not listed who at some point in the future may also need protection;[12] and fourth, PR 4 is limited to prohibiting discrimination against individuals because of membership in some suspect class. It differs in this respect from the Equal Protection Clause in the 14th Amendment of the federal constitution which, because it is more general in thrust, has provided support for invalidating a wide variety of discriminatory legislation[13]

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[10] *Students for Fair Admission, Inc. v. President and Fellows of Harvard College v. University of North Carolina,* 600 U.S. 181, 143 S.Ct. 2141 (2023). Technically, the Harvard decision was based on violation of a federal statute since Harvard, as a private institution, is not covered by the 14th Amendment, but the ruling in both cases is the same.

[11] Some state constitutions also protect citizens from discrimination by private actors in certain contexts, for example in housing or employment. For a survey of equal protection clauses in state constitutions as of 2009, see J Parness, "American State Constitutional Equalities," 45 Gonzaga Law Review 773 (2009).

[12] For example, persons involved in polyamorous relationships and multi-adult families. See "Somerville Recognizes Polyamorous and Other Multiple-Adult Families," GBH News, updated July 6, 2020.

[13] Examples of U.S. Supreme Court decisions striking down on equal protection grounds state or federal laws that do not involve discrimination against one of the categories listed in PR4 include: *Griffin v. Illinois* (1956) (access to

PR 4 does a fair job, I think, of addressing the problems of discrimination currently facing the state, although even in this respect it presents a number of problems that need addressing.[14] But the prevailing view among students of American constitutional history is that constitutional amendments should be drafted in general terms, adaptable to changed circumstances and applicable in a whole range of contexts that we may not be able even to imagine.[15] That is one of the virtues of the way the framers of the 14th Amendment framed the equal protection and due process clauses. Consequently I have questions about the approach adopted by PR4, questions that I can perhaps best illustrate by suggesting an alternative approach.

If I had a free hand in drafting an equal protection amendment to the Vermont constitution, I would propose adding a provision along the following lines as a free-standing article at the end of Chapter I, a new Article 23:

> "Every person is entitled to be treated with equal respect and dignity under the law, therefore government, acting either alone or in conjunction with private actors, shall not deprive any person of life, liberty, or property without due process of law or deny any person the equal protection of the laws. The legislature shall have the power to enforce the provisions of this article with appropriate legislation."

As you can see, this is not entirely original. Essentially it is a simplified Vermont version of the 14th Amendment Clause. But importantly it does a number of things that PR 4 does not do. First, by setting it off as a free-standing amendment, it underscores the significance of the constitutional commitment.[16] Secondly, it combines under one roof, as does the 14th Amendment, both a due process and equal protection clause. This is important because in a number of important Supreme Court cases, the Court has based its decision on the combined operation of the two clauses.[17] And it provides protection not just against government

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transcript in criminal appeal); *Baker v. Carr* (1962) (fair apportionment); *Skinner v. Oklahoma* (1942) (involuntary sterilization); *Chicago v. Mosely* (1972) (free speech); *Douglas v. California* (1963) (assistance of counsel in criminal appeal); *Boddie v. Connecticut* (1971) (waiver of filing fee in divorce case); *Harper v. Virginia* (1966) (access to vote); *Shapiro v. Thompson(*1969) (access to welfare benefits); *MLB v. SLJ* (1996)(waiver of record preparation costs in parental termination case); *Plyler v. Doe* (1982) (access to basic levels of education);

[14] For example: it is unclear why PR 4 does not also prohibit discrimination on the basis of age or religion; it is unclear whether the proposed amendment prohibits only facial discrimination or would also apply to laws that have a discriminatory effect (for example, a law banning flavored cigarettes); it does not make clear whether discrimination against the various categories listed in PR 4 will be subject to the same or different standards of review; by inserting the proposed amendment into Article 7, it leaves unclear whether the analytical approach to be employed by the courts in deciding cases under the amendment clause is the same as that employed for challenges under the common benefits clause in the first section of Article 7 or that traditionally employed by the courts in equal protection challenges or an entirely different approach.

[15] As Chief Justice Marshall says in *McCulloch v. Maryland* (1818): "We must never forget it is *a constitution* we are expounding," a fundamental document of governance intended "to endure for ages to come."

[16] And also, putting the equal protection clause in an independent "free standing" article, it avoids the problem created by inserting it in existing Article 7: the problem of not knowing which mode of analysis to apply.

[17] For example, *Skinner v. Oklahoma* (1942) (sterilization based on types of crimes involved); *Loving v. Virginia* (1969) (interracial marriage); *Lawrence v. Texas* (2003) (criminal conviction for sodomy)

discrimination acting alone, but also government discrimination when acting in combination with private actors.[18] Fourth, it frames the protection in general terms. It is not limited in operation to just those situations where individuals are discriminated against because of membership in a particular group. And finally it provides express authorization to the legislature to adopt legislation enforcing the substantive provisions.[19]

I realize that the legislature may not be inclined to consider alternatives to PR 4 at this point in the process, and that is understandable. But if that is the case, hopefully putting this alternative out there will at least provide a comparative perspective from which to view PR 4 and to better understand what it does and what it does not do.

[18] The proposed alternative amendment could be invoked to challenge discriminatory policies adopted by state regulated utility (for example, if a utility were to impose higher rates on black customers), or private schools receiving part or all of their revenue from government sources. In contrast, as written PR 4 would only prohibit discrimination by "government."

[19] Among other things, this would give the legislature authority to adopt legislation elaborating on the standards to be applied by the courts in deciding cases involving different kinds of discrimination, for example, perhaps applying a different test for laws that discriminate against a racial minority (strict scrutiny) and laws aimed at compensating racial minorities for disadvantages suffered as a consequence of three hundred years of legal subjugation under slavery, Jim Crow and segregation laws, or perhaps a different test for laws that discriminate on the basis of race and those that discriminate against persons with disabilities, recognizing the need in the latter context to provide some latitude for "reasonable accommodation." The important thing to note is that, in developing its own "Vermont-grown" body of equal protection jurisprudence under the "Vermont version of the 14th Amendment," the legislature and the courts would not be locked into either the mode of analysis employed by courts in interpreting the 14th Amendment in the United States Constitution or the standards adopted by the U.S. Supreme Court in equal protection cases. The state would be free to develop its own approach.