

William Clardy  
Augusta  
L.D. 260

Senators and Representatives of the Judiciary Committee,

I am testifying in opposition to L.D. 260, misleadingly labelled as “Proposing an Amendment to the Constitution of Maine to Establish That All Maine Residents Have Equal Rights Under the Law.” (*emphasis added*)

I find it worrisome that a majority of Committee members – including veteran legislators, three of them licensed attorneys – have chosen to add their names to the list of co-sponsors for this proposed amendment. I can only presume that your decision was based more on the title than the actual content.

At least, that would be my hope. The alternative would be recognizing you as legislators who are more interested in writing virtuous-sounding new laws than recognizing their obligations under laws already written.

During the public hearing, I heard countless witnesses refer to this as an “inclusive” equal-rights amendment, apparently because it would prohibit denying “[e]quality of rights” based on any of a dozen explicitly listed characteristics (nine of which are immutable, plus three which are potentially mutable).

Before you nod sagely amongst yourselves about the need for such an explicit guarantee, please take a moment to answer this: What rights would your Section 26 protect which Section 6-A doesn’t already guarantee to everybody?

“No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof.”

Perhaps you can understand how your proposed amendment sounds to some of us like a “And this time we really, truly mean it” – with an Orwellian “at least for our most equal favorite friends” tacked on.

That’s another rub: The very language which your favorite friends are lauding as “inclusive” carries with it an implication of exclusion.

*Expressio unius est exclusio alterius*

A wee bit of Latin, for “the expression of one thing is the exclusion of the other.” You can find it in numerous decisions published by the Maine Supreme Judicial Court:

“The maxim – *expressio unius est exclusio alterius* — is well recognized in Maine as in other states. It is a handy tool to be used at times in ascertaining the intention of the lawmaking body.” *Wescott v. Allstate Ins*, 397 A.2d 156, 169 (Me. 1979)

“The time-honored precept of ‘*expressio unius est exclusio alterius*’ should find ready application in the construction of legislation, where the Legislature has manifested a deliberate attempt to be specific to the minute detail.” *Radvanovsky v. Maine Department of Manpower Affairs Employment Security Commission*, 427 A.2d 961, 967 (Me. 1981)

The United States courts are notably more skeptical of that principle than Maine’s own courts, but you are very unlikely to find any U.S. court which won’t remand questions regarding the meaning of Maine’s Constitution to the courts of Maine.

So, by inclusively naming a handful specific grounds for protecting rights, this “Equal Rights Amendment” also brings in an implicit interpretation that any unnamed reasons are honky dory.

Want to limit public transportation to only people with an ID number tattooed on their forearm? Or bar children from public schools based on their parents’ politics?

As a later addition to the Constitution, your Section 26 could be read as limiting Section 6-A’s unqualified guarantee to only your chosen dozen reasons. Think about that.

But if you want a more subtly scary thought, let’s look apply that “time-honored precept” to what appears to be a gratuitous final sentence in your proposed amendment: “The Legislature has the power to enforce this section by appropriate legislation.”

I say gratuitous, because I don’t think you’ll find a judge anywhere who would question a legislature’s inherent authority to enact laws, especially ones implementing constitutional mandates. Article III of our state Constitution lays it out succinctly:

“The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.”

I’m tempted to ask who among this cohort of elected legislators doesn’t seem to realize the breadth of this authority, but I’d really rather not know. I don’t feel as obliged to

defend the Constitution against unidentified threats as I feel about the clearly identified ones.

But do consider this: Would a new amendment which explicitly declares the Legislature's the authority to enforce it not plant a legal seed that there might be rights the Legislature has no authority to protect?

I ask all of you, especially the ones listed as co-sponsors, to ask yourself whether this proposed amendment actually adds any protections which would justify the money, time and political energy which will be consumed by a state-wide referendum.

Please vote to report out that this duplicative, inherently divisive proposal "Ought not pass."