1-1-1991

Book Review: The Constitutional World of Harold Norris: Review of Norris, Education for Popular Sovereignty Through Implementing the Constitution and the Bill of Rights

Robert A. Sedler
Wayne State University, rsedler@wayne.edu

BOOK REVIEW:

THE CONSTITUTIONAL WORLD OF HAROLD NORRIS

EDUCATION FOR POPULAR SOVEREIGNTY THROUGH IMPLEMENTING THE CONSTITUTION AND THE BILL OF RIGHTS

by Harold Norris; Detroit College of Law, 130 E. Elizabeth Street, Detroit, Michigan 48201; 1991, Pp. 700, $20.00.

Reviewed by Robert A. Sedler†

I am very honored to have been asked by the Detroit College of Law Review to do this review essay of Professor Norris' book. I was well acquainted with Professor Norris' work and career before I came to Wayne State University in 1977. In the period from 1966 to 1977, when I was teaching at the University of Kentucky, I was not only writing about constitutional matters, but I was an active litigator in civil rights and civil liberties cases, mostly as a volunteer lawyer for the ACLU. To those of us who considered ourselves a part of the struggle for the protection of civil rights and civil liberties in this Nation, Harold Norris was known as a "front-line" defender of those rights and liberties in Michigan, and I looked forward to meeting him.

In the last fourteen years, I have come to know Harold Norris very well both personally and professionally. He is a wonderful human being, and he epitomizes all that is meant by "living under a constitution." As United States Senator Carl Levin states in his preface to the book, "Harold Norris is one of those patriots who have devoted their lives in diverse ways to [the Constitution's] safekeeping, and this book provides

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† Professor of Law, Wayne State University. A.B., 1956; J.D., 1959, University of Pittsburgh.

a sample of his life's effort to protect the U.S. Constitution and to extend its guarantees to each of us."[1]

The book may best be described as a compendium of constitutional insights and experience. Professor Norris presents his views and the views of many others on a large number of constitutional questions. At the same time, he creates a historical record of the protection of civil rights and civil liberties in Michigan, especially during the 1950's and the 1960's, when on the one hand, civil liberties were being threatened from a number of quarters, and on the other hand, this state and nation were moving in the direction of enacting laws that would protect the civil rights of racial minorities, women, and other victims of discrimination.

Perhaps the most distinctive contribution of the book in terms of generating "new knowledge" is that part titled, *Book II: Some Views, Approaches, and Interpretations to Implement the Michigan Constitution and Its Declaration of Rights.* As a delegate from Detroit to the Michigan Constitutional Convention of 1961-62 and vice chairman of the Committee on the Declaration of Rights, Suffrage and Elections, Professor Norris was, as Michigan Congressman John Conyers, Jr. has stated, "[a] principal architect of Michigan's Bill of Rights."[2] In this part of the book Professor Norris has collected the major documents that were a part of the process leading to the adoption of the Michigan Bill of Rights at the Constitutional Convention, and has provided extensive commentary about how the Michigan Bill of Rights came into being. This commentary and the source documents will be very helpful to lawyers and courts in cases involving the application of the provisions of the Michigan Bill of Rights.[3]

There are many themes that Professor Norris develops throughout the book, and it would be impossible to discuss all of them in a review essay. I am going to discuss three

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1. Carl Levin, *Preface* to HAROLD NORRIS, EDUCATION FOR POPULAR SOVEREIGNTY THROUGH IMPLEMENTING THE CONSTITUTION AND THE BILL OF RIGHTS at xv (1991) [hereinafter NORRIS].

2. *Id.* at 579 (citing 124 CONG. REC. 579 (daily ed. July 19, 1978) (statement of Rep. Conyers)).

3. The book also contains a large number of photographs, newspaper articles, editorials, letters, and other materials covering some 30-plus years, which are a treasure in themselves.

themes that are of particular interest to me: (1) the meaning of "education for popular sovereignty;" (2) the function of constitutional limitations on governmental power in a democratic society; and (3) the role of the state constitution in the supplemental protection of individual rights.

Probably the dominant theme of the book, as indicated by the title, is Professor Norris' fervent belief in *Education for Popular Sovereignty*. Professor Norris maintains that in the final analysis, the American system of constitutional governance—with its emphasis on limitations on governmental power and the constitutional protection of individual rights—depends on the public's understanding of how a constitution operates and the public's acceptance of the principle that the power of the government *should* be limited in order to protect individual rights. As Professor Norris states at the outset, "[t]here is no substitute for individual responsibility in a self-governing nation of self-governing individuals,"[4] and, "[t]he Constitution and the Bill of Rights place a heavy and continuing responsibility on citizens in the American Experiment in popular sovereignty."[5] And it is the individual citizen—not merely the lawyer, or public official, or constitutional scholar—toward whom this book is primarily directed. Professor Norris concludes his introduction to the book by noting simply that: "[i]t is the purpose of this collection to modestly stimulate more inquiry about, and understanding of, some of the main principles or ideas of our Constitution. We should try to make our founding document even more rooted in our hearts, minds, and conduct as citizens."[6]

Throughout his long and distinguished career, Professor Norris has tried to "popularize the Constitution," to convey its meaning to ordinary citizens, and above all, to "[m]ove younger people to assume greater responsibility to defend and extend the Bill of Rights."[7] The book contains two excerpts from one of his efforts directed toward younger people for which I may modestly claim "originating credit."

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4. NORRIS, *supra* note 1, at iii.
5. *Id.* at v.
6. *Id.* at xxvii.
7. *Id.* at 649.

Sometime during 1985, when I was chairperson of the Constitutional Law Committee of the Michigan State Bar, I proposed to the Committee that we should designate 1987-88 as the "Year of the Constitution." This period would see the coincidence of both the bicentennial of the United States Constitution and the twenty-fifth anniversary of the Michigan Constitution of 1963, and I proposed that the Committee undertake a number of projects to commemorate these events. One of the projects that I proposed we sponsor was the preparation of a sourcebook on the United States and Michigan constitutions for use by high school teachers and students in Michigan. The proposal was enthusiastically approved by the Committee. In my mind, however, the success of the proposal was linked to obtaining a particular author for the sourcebook, which, of course, was Harold Norris. I knew that Professor Norris was very much concerned about the failure of the American educational system to put enough emphasis on the Constitution and Bill of Rights in the school curriculum,[8] and I hoped that he would be able to put some other things aside and make the enormous commitment in time and effort that it would take to complete the project during the "Year of the Constitution." Without a moment's hesitation, he agreed to do so.

This work is titled *Ideas in the Constitution: The Constitution as a Living Document*, and subtitled, *A Discussion Guide for High School Students to Encourage Understanding of Our Nation's Founding Document.*[9] The two excerpts contained in the book are *Some Principles of the Constitution: A Talk About the Main Ideas,*[10] and *Looking Forward: Some Constitutional Problems and Challenges.*[11] In the first excerpt, Professor Norris challenges the students to relate the guarantees

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8. *Id.* at 31-62 (citing Harold Norris, *Education for Popular Sovereignty: A Bicentennial View of the Purpose of Education*, 1988 DET. C.L. REV. 897).

9. The book is summarized in *Constitution Comes Alive in New Lesson Guide*, MICH. B.J., July 1989, at 594. "The book contains well-targeted reading and discussion units, each featuring specific and stimulating questions, analyses and other materials. The book can be used in separate, self contained sections or as a comprehensive lesson plan, depending upon time available." *See also*, Norris, *supra* note 1, at 677.

10. NORRIS, *supra* note 1, at 63-79.

11. *Id.* at 391-96.

of the Bill of Rights to *moral values* inherent in the concept of political freedom. As he states:

> Political freedom is a moral concept. We believe political freedom is congenial to human spirituality, human survival, human reason, and human growth. It urges all to recognize the morality of our constitutional arrangement of power and rights. We best promote the interest of all majorities and all minorities by a democratic state and constitution. . . . Our constitutional arrangement has given us the best chance of continuing the personal and national effort to achieve our national purpose—to constitute ourselves as a self-governing nation of self-governing individuals.[12]

In the second excerpt, Professor Norris asks the younger generation to think about "matters for constitutional concern." These include, *The Military-Industrial Complex and the Impact of Continuous Tension and War, The Declaration of War in an Age of Nuclear Weapons, The Significance of the Authority of Non-Governmental Organizations over the Civil Liberties and Rights of the American People, The Need for Recognizing Economic Rights as Well as Political Rights in the Constitution, Shall a Federal Constitutional Convention Be Convened?* and *Is There Not the Need for the Equal Rights Amendment (ERA) in the Constitution?* He reminds the students that while the Bicentennial is a time of celebration and commemoration, "[i]t is also a time to take inventory, to take a long look backward and forwards."[13]

Because of the wonderful sourcebook that Professor Norris has prepared, high school students in Michigan will be in a much better position to think about these questions and to understand the meaning of our system of constitutional governance. As the Detroit News stated, in an editorial built around the publication of the sourcebook, "[o]ther anniversaries can be noted, but for the Constitution to work, its ideas need to be constantly renewed."[14] The sourcebook is another example of Professor Norris' strong commitment to "popularizing the Constitution," and reflects most clearly the dominant theme of the present book, *Education for Popular Sovereignty.*

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12. *Id.* at 78.
13. *Id.* at 391.
14. *Id.* at 679 (citing *Teaching the Constitution*, DETROIT NEWS, Sept. 26, 1989, at 10A).

A second important theme in the book is the function of constitutional limitations on governmental power in a democratic society. There is no "tension" between democratic government and constitutional limitations on the exercise of governmental power. Quite to the contrary, Professor Norris emphasizes that the Constitution limits the power of government in order to protect the sovereign power of the American people to be a self-governing community of self-governing individuals. As he states:

> All these rights, particularly the first eight amendments say to government, look we have reserved power to ourselves as part of our ruling power and we have the right of speech, we have the right to be free from unreasonable search and seizures, we have the right not to be compelled to give testimony against ourselves, we have the right to a fair trial, the right to counsel. *In short we have reserved to ourselves the right to have rights.* We have reserved these rights to ourselves to protect our political freedom, our paramount principle, our power to be a self-governing community of self-governing individuals.[15]

Professor Norris goes on to say that the same sovereign power of the people that established governmental institutions and gave them the power to govern also imposed limitations on the exercise of that power. The design of the Constitution, says Professor Norris, is that at the base of all our governmental institutions is the sovereign power of the people. And, "[f]rom this sovereign power flows delegation, separation, limitation, and reservation."[16] He further states that: "This conception, this design of the Constitution, imposes a comprehensive and pervasive duty of vigilance on the part of the citizenry to see that all government, is, indeed, limited, is indeed watched, is indeed toeing the constitutional mark. Eternal vigilance is the price of the Bill of Rights."[17]

Like Professor Norris, I believe that the relationship between electorally accountable democracy and limitations on the exercise of governmental power in order to protect individual rights is fundamental to an understanding of the system of

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15. NORRIS, *supra* note 1, at 71 (emphasis added).
16. *Id.* at 336.
17. *Id.*

constitutional governance established by the Constitution. It is my submission, developed more fully elsewhere,[18] that the overriding principle in the structure of constitutional governance established by the Constitution is the principle of limitation on governmental power to protect individual rights. Electorally accountable democracy is a very important principle in our structure of constitutional governance in that the Constitution directed that those who hold the reins of federal legislative and executive power be electorally accountable. But the same structure also makes it abundantly clear that the framers were not willing to put their faith in electorally accountable democracy alone to prevent abuses of governmental power. So, in the same Constitution, and most particularly in the Bill of Rights,[19] they imposed substantial and sweeping limitations on the power of the federal government, designed to protect individual rights.

The message that the framers were trying to convey to the institutions of government established by the Constitution is very clear:

> We believe in representative democracy, and since we must have a government, that government should be electorally accountable. But we are fearful of government. We are concerned about abuse of governmental power. There are certain things that we don't want *any* government, no matter how electorally accountable, to be able to do. Above all we want to protect certain individual rights—fundamental rights, if you will—from any governmental interference. So, in this Constitution, reflecting the structure of constitutional governance that we have established, we have placed numerous and often sweeping limitations on governmental power.[20]

In any event, as Professor Norris emphasizes, limitations on governmental power in our constitutional system are necessary to protect the sovereign power of the American people to be

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18. Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93 (1983) [hereinafter Sedler, *The Legitimacy Debate*].

19. The Bill of Rights is properly considered a part of the structure of constitutional governance established by the original Constitution, because it was promulgated "[p]ractically contemporaneous with the adoption of the original." The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 67 (1873).

20. *See* Sedler, *The Legitimacy Debate*, *supra* note 18, at 125.

a self-governing community of self-governing individuals. Not surprisingly, Professor Norris sees the First Amendment as the most important limitation on governmental power designed to protect the right of the American people to self-governance. As he cogently states:

> The First Amendment is your right to self-government. The First Amendment is, as Professor Alexander Meiklejohn used to say, what democracy thinks with. The First Amendment provides the means with which democracy corrects error; it is a self-correcting mechanism. It promotes national security and peaceful change because error can be found and corrected.[21]

Professor Norris' discussion of the relationship between the First Amendment and democratic government demonstrates what I have referred to as the *dissent and social change* function of the First Amendment. As I have explained this function:

> First, and from the political perspective the most important, is what I call the freedom to dissent and work for social change. Utilizing the guarantees of expression, assembly and petition in their fullest sense, individuals and groups have the right to dissent from the policies pursued by the government. They have the right to try to change those policies and through the democratic process to try to obtain the reins of governmental power for themselves. In short, the First Amendment guarantees the right of peaceful revolution, and the exercise of this right may not be subject to inhibition and repression by those presently possessing governmental power.[22]

In elaborating on what I have called the dissent and social change function of the First Amendment, Professor Norris discusses the "role of dissenting minorities throughout our history."[23] It was the "dissenting minorities," as Professor Norris puts it, who:

> (1) [d]issented from the law of the land, started the movement for the abolition of slavery, and produced the Thirteenth, Fourteenth, and Fifteenth Amendments; (2) . . . dissented from legal discrim-

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21. NORRIS, *supra* note 1, at 75.

22. Robert A. Sedler, Review, *The First Amendment in Theory and Practice*, 80 YALE L.J. 1070 (1971) (reviewing T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970)).

23. NORRIS, *supra* note 1, at 107.

> ination on account of sex, started the Women's Suffrage Movement, and produced the Nineteenth Amendment granting women the right to vote; (3) . . . protested segregation of Black people and the violation of the right of Black people to vote in the South, [which] brought about the Civil Rights Acts of 1964 and 1965 and an amendment outlawing the poll tax; and (4) . . . urged recognition of a fundamental right to form, join and assist a labor union.[24]

On the other hand, when dissent is discouraged or repressed, there is greater danger that the government will pursue policies that turn out to be unsound and harmful to the Nation. Professor Norris, myself, and many other Americans believe that the Vietnam War was a disaster and caused grave harm to this Nation both at home and abroad. Professor Norris emphasizes that the Constitution, which reposes in the Congress the power to declare war, contemplates full public debate on the question: "It is the theory of the Constitution that Kings and Presidents can do wrong and even if Presidents may be right, they cannot wage war successfully unless there is public support and broad consensus. Principle and pragmatism do not favor Presidential preemption of Congress's power to declare war."[25]

Professor Norris maintains that the "legacy of McCarthyism" stifled debate over the United States' involvement in the Vietnam War. "McCarthyism"[26] was "[p]rincipally a pervasive repression of the civil liberties of persons in trade unions, teacher and lawyer groups, writers, actors, activists of all sorts by linking such individuals with 'subversion and communism.'"[27] The effect of "McCarthyism," according to Professor Norris, was that "[a] whole generation was intimidated."[28] Professor Norris goes on to say that: "I believe it can be argued that without McCarthyism there could not have been a Viet Nam. Many of those who disagreed with the Tonkin Resolution and the Viet Nam War did not openly do so because

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24. *Id.* at 107-08.
25. *Id.* at 95.
26. Named after the Wisconsin senator who, during the period roughly from 1946-1953, attacked political liberals as "communists" or "communist sympathizers," and accused them of being disloyal to the United States.
27. NORRIS, *supra* note 1, at 655.
28. *Id.* at 98.

they feared McCarthyite attacks upon themselves and concomitant loss of income and reputation."[29]

However, once the Nation became enmeshed in the Vietnam War, the dissent and social change function of the First Amendment underwent a revival. Never before had there been so much opposition to a war in which the nation was engaged. There were massive protests and demonstrations, and a demand for an end to the war and the draft that fueled it.[30] The government's efforts to repress anti-war protest by criminal prosecutions of protestors and the like foundered on the rock of the First Amendment, as the courts, with few exceptions, upheld their First Amendment claims.[31] The protests persisted, and succeeded in their objectives. In 1972, Congress abolished the draft, and in January, 1973, the United States began pulling out of Vietnam. The success of public opposition to the Vietnam War demonstrates the operation of the dissent and social function of the First Amendment and can furnish another example of how "dissenting minorities" produced a fundamental change in governmental policy.

It is highly significant, in my view, that when President Bush sought to employ military force against Iraq in the Gulf War, he felt it necessary to assure the American people that it would not be "another Vietnam." Even more significantly, he recognized Professor Norris' point that the President "cannot wage war successfully unless there is public support and broad consensus."[32] There was a full debate in the Congress over the use of military force against Iraq, and Congress gave its approval. Regardless of whether or not one agrees with the

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29. *Id.*

30. *See* Robert A. Sedler, Review, *The Draft: A Handbook of Facts and Alternatives*, 57 KY. L.J. 302, 311-12 (1969) (discussing the relationship between the military draft and the ability of the President to involve the nation in the Vietnam war).

31. *See e.g.*, United States v. Spock, 416 F.2d 165 (1st Cir. 1969), where the court reversed the convictions of a number of prominent anti-war activists who were charged with conspiracy to assist draftees to avoid military service. All of the activity of the defendants relied on by the government to establish the "conspiracy" consisted of acts of expression. As the court noted, "Inseparable from the question of the sufficiency of the evidence to convict are the rights of the defendants, and others, under the First Amendment." *Id.* at 169.

32. NORRIS, *supra* note 1, at 95.

decision to use military force against Iraq, it was a decision arrived at only after full public debate, and a decision that had strong public support.

It is in this respect that the circumstances leading to American military involvement in Iraq supports Professor Norris' thesis of the First Amendment as protecting the right of the American people to self-governance. This is true of all the constitutional limitations on governmental power designed to protect individual rights, and it is this theme that Professor Norris develops so effectively in his book.

The third theme in the book that I want to discuss is the role of the state constitution in the supplemental protection of individual rights. As I have discussed more fully elsewhere,[33] in practice the function of the state constitution is to provide *additional protection to individual rights*, beyond that which is provided by the federal Constitution. When Professor Norris authored the Michigan Bill of Rights at the Constitutional Convention, it was with the view of expanding constitutional protection of individual rights in Michigan by strengthening the existing provisions of the Michigan Bill of Rights. As he put it at the time: "[T]he Bill of Rights is what America is all about. The United States, including Michigan, to be true to itself, must close the gap between the principles and practices of civil liberty, for a nation today is judged by the status of the civil liberties of its citizens."[34]

In his capacity as vice chairman of the Committee on Declaration of Rights, Suffrage and Elections, Professor Norris was able to exercise an enormous influence over the development of Michigan's Bill of Rights in the 1963 Constitution.[35] Specifically, he drafted the following provisions: (1) the anti-discrimination clause of Article I, Section 2, which prohibits the "denial of civil or political rights on the basis of religion, race, color or national origin," and the companion implementing clause, which directs the legislature to implement the

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33. Robert A. Sedler, *The State Constitution and the Supplemental Protection of Individual Rights*, 16 TOLEDO L. REV. 465 (1985).

34. NORRIS, *supra* note 1, at 412 (citing Harold Norris, *Constitutional Rights Issues at the Michigan Constitutional Convention*, THE DET. LEGAL CHRON., June 9, 1961).

35. The Michigan Bill of Rights is contained in Article I, "Declaration of Rights," and includes 23 sections. MICH. CONST. art. I.

guarantees of this section "by appropriate legislation;"[36] (2) the expansion of the right of petition in Article I, Section 2 from "legislature" in the predecessor provision to "government," so that, as he puts it, "petitions for redress of grievances can be encouraged and directed to any unit of government;"[37] (3) the addition of the word "express" to the words "speak, write, and publish" thus creating a "freedom of expression" to protect all the new media and all the many art forms, and the substitution of the word, "views," for "sentiments," in Article I, Section 5's guarantee of freedom of speech and of the press, which, as the Convention Comment notes, "seems to have a sharper and specific meaning;"[38] (4) a new provision, contained in Article I, Section 17, which creates a "right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings."[39] According to Professor Norris, this provision was intended to prevent against some of the abuses that occurred in such investigations during the "McCarthy era;"[40] and (5) a guaranteed right of appeal in all criminal cases, in Article I, Section 22.[41]

In addition, Professor Norris was a co-author of Article 5, Section 29, which created a Civil Rights Commission with constitutional status and investigative powers to prevent discrimination in the enjoyment of the civil and political rights referred to in Article I, Section 2, and such other rights created "by law," including federal law.[42] This is a very unusual provision in a state constitution. In most states, civil rights commissions do not enjoy constitutional status and are subject to regulation by the legislature. The fact that the Michigan Civil Rights Commission enjoys constitutional status is strong evidence of Michigan's constitutional commitment to racial equality.[43]

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36. NORRIS, *supra* note 1, at 650.
37. *Id.*
38. MICH. CONST. art I, § 5, Convention Comment.
39. NORRIS, *supra* note 1, at 650.
40. *Id.*
41. *Id.*
42. *Id.* at 651.
43. See the discussion of the constitutional status of the Michigan Civil Rights

Professor Norris was also instrumental in removing a provision of the previous constitution that had been adopted by referendum in 1950, during the height of the "McCarthy era." This provision defined "subversion" as "[a]dvocacy of any act intended to overthrow the form of government of the United States or the form of government of this state," made subversion a criminal offense, and declared that the guarantees of freedom of speech, press or assembly could not be a defense to subversion.[44] Professor Norris says that this section was "clearly a police state measure," and that its elimination was "one of the most challenging problems I faced at the convention."[45]

Professor Norris is justifiably proud of his role as architect of a number of important provisions of the Michigan Bill of Rights. As he observes, "[o]n the whole, many believe that the changes I wrote into Michigan's Constitution made Michigan's Bill of Rights more protective than that of any other state in the country."[46]

Perhaps the most important of the provisions of the Michigan Bill of Rights that were drafted by Professor Norris, in terms of its potential impact, is the anti-discrimination clause of Article I, Section 2.[47] Article I, Section 2 contains three separate clauses: the general guarantee of equal protection, the anti-discrimination clause, and the implementing provision. The anti-discrimination clause provides that "[n]o person shall be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin."[48] The Convention Record notes that "[t]he

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Commission in Beech Grove Inv. Co. v. Michigan Civil Rights Comm'n, 380 Mich. 405, 417-19, 157 N.W.2d 213 (1968). In that case, the court held that racial discrimination in the sale of housing by private persons was a "civil right" within the meaning of Article I, § 2, and so was within the investigative and enforcement jurisdiction of the Michigan Civil Rights Commission. *Id.*

44. *See* NORRIS, *supra* note 1, at 672 n.3 (setting forth the text of this provision). It is clear today that that provision was void on its face and in violation of the First Amendment. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

45. NORRIS, *supra* note 1, at 651.

46. *Id.*

47. MICH. CONST. art. I, § 2.

48. *Id.* When the clause first emerged from the Committee, it included "sex," and, if it had been adopted in that form, it would have constituted the Nation's

principal, but not exclusive, areas of concern are equal opportunities in employment, education, housing, and public accommodations."[49]

In the book, Professor Norris sets out in detail all the events leading to the adoption of the anti-discrimination clause and includes the major documents that were part of this process.[50] He also sets out the justification for the provision that he advanced at the Convention:

> The Fourteenth Amendment of the Constitution prohibits Michigan or any other state from denying due process of law and the equal protection of laws to any citizen. However, it is not yet the declared policy of the State of Michigan to prohibit race and religion as criterion for discrimination or segregation. The question is pertinent; May not the articulation of a constitutional policy against racial or religious discrimination or segregation be in keeping with advancing Michigan in the cause of a free society in light of the national and international realities of the twentieth century? May not such a constitutional provision implement our national purpose to evaluate all Americans on the basis of individual merit so that every citizen shall have equal opportunity to make the best contribution to the strength and freedom of Michigan and the nation?[51]

The anti-discrimination clause was unanimously adopted by the Convention, and as the Michigan Supreme Court has observed, referring to the Anti-Discrimination Clause and the other "civil rights" provisions in the Michigan Constitution, "[t]he capstone of Michigan public policy with respect to civil rights is the 1963 Michigan Constitution."[52]

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first equal rights amendment. As stated at that time, "[t]he Committee, in recognition of the modern doctrine of the equality of women, has also incorporated a guarantee against discrimination on account of sex." Norris, *supra* note 1, at 435-36 (citing Report of the Declaration of Rights Committee, No. 61, Jan. 19, 1962)). The prohibition against discrimination on the basis of "sex" was deleted from the final version. Professor Norris has told me that this was because of opposition from the relatively few *women* delegates to the Convention, who feared that such a prohibition would have invalidated the "special protections" purportedly provided for women under Michigan law. What an ironic footnote to Michigan's constitutional history!

49. NORRIS, *supra* note 1, at 436.

50. *Id.* at 423-46.

51. *Id.* at 415 (citing Harold Norris, *Constitutional Rights Issues at the Michigan Constitutional Convention*, THE DET. LEGAL CHRON., June 9, 1961).

52. Beech Grove Inv. Co. v. Michigan Civil Rights Comm'n, 380 Mich. 405, 435, 157 N.W.2d 213, 222 (1968).

The reason why the anti-discrimination clause may be so important in Michigan is that it can be interpreted to provide greater protection against racial discrimination than is provided by the Fourteenth Amendment's Equal Protection Clause. This brings me to my own involvement with the anti-discrimination clause. In November, 1985, the residents of Dearborn, in a referendum vote of 17,000 to 13,000, adopted an ordinance that prohibited non-residents from using Dearborn's parks except as guests of Dearborn residents. This ordinance was widely perceived as being directed toward keeping blacks out of Dearborn's parks. Two parks, Ford Woods in east Dearborn, adjacent to Detroit, and Crowley in west Dearborn, adjacent to Inkster, were extensively used by black residents of those cities respectively. I was asked by the Michigan ACLU and the Detroit Branch, NAACP, to prepare a constitutional challenge to the ordinance, and agreed to do so.[53]

I immediately concluded that a challenge to the ordinance under the Fourteenth Amendment's Equal Protection Clause would be unsuccessful. The United States Supreme Court has interpreted the Equal Protection Clause as reaching only governmental action undertaken with a racially discriminatory *purpose*,[54] and there was no realistic way of showing that an ordinance approved by 17,000 voters in a referendum was adopted with a racially discriminatory purpose. However, it was possible to construct a challenge to the ordinance under the anti-discrimination clause of the Michigan Constitution. We argued that the anti-discrimination clause was an independent limitation on governmental action affecting racial minorities, and that it provided greater protection against racial discrimination than is provided by the more general guarantee of equal protection in Article I, Section 2, and in the Fourteenth Amendment. This meant, we argued, that the standard for a constitutional violation under the anti-discrimination clause was racially discriminatory *effect* rather than racially discriminatory

53. NAACP v. City of Dearborn, 173 Mich. App. 602 (1988), *lv. denied*, 433 Mich. 906, 447 N.W.2d 751 (1989).

54. *See* Washington v. Davis, 426 U.S. 229 (1976). *See generally* Robert A. Sedler, *The Constitution and the Consequences of the Social History of Racism*, 40 ARK. L. REV. 677, 687-96 (1987).

purpose. Under this standard, a governmental action would be unconstitutional if it had an *effect because of race*. Specifically, we contended that since the foreseeable effect of the Dearborn parks ordinance was to exclude Black residents of Detroit and Inkster, who were "natural users" of Dearborn parks, from those parks, and since there was no substantial justification for the ordinance,[55] it had an effect because of race for constitutional purposes, and thus violated the anti-discrimination clause.

Wayne Circuit Judge Marvin Stempien agreed with all our arguments and held that the ordinance violated the anti-discrimination clause with respect to Ford Woods and Crowley.[56] The Michigan Court of Appeals, in an opinion written by Judge Myron Wahls, and joined in by Judges William Murphy and John Gillis, affirmed Judge Stempien's decision in all respects, and leave to appeal was denied by the Michigan Supreme Court.[57] Thus, the Michigan Court of Appeals has held that the standard for a constitutional violation under the anti-discrimination clause is racially discriminatory effect. So long as this holding stands—and I am optimistic that the Michigan Supreme Court would agree with the holding of the court of appeals if the question should come before it—the Michigan Constitution, as a result of the anti-discrimination clause that was drafted by Professor Norris, provides greater protection against racial discrimination than is provided by the United States Constitution.

The potential impact of the anti-discrimination clause on the struggle for racial equality in Michigan illustrates most clearly the function of a state constitution in providing additional protection to individual rights, beyond that which is provided by the federal Constitution. The other provisions of the Mi-

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55. The undisputed evidence showed that the Dearborn parks were not overutilized, so that the only purpose for the ordinance could be a "naked, selfish preference for Dearborn residents." *NAACP*, 173 Mich. App. at 610-15, 434 N.W.2d at 448-50.

56. The judge also held that the ordinance was completely unenforceable as to all the parks in the Dearborn system because the enforcement mechanism—random demands by park rangers for resident identification by park users—constituted an illegal search and seizure, in violation of the Michigan Constitution. *Id.* at 618-19, 434 N.W.2d at 451.

57. *Id.* at 605, 434 N.W.2d at 445.

chigan Bill of Rights, as well, may be used to provide such additional protection. Of all the many contributions of Harold Norris to the "constitutional life" of Michigan, his role as the "architect of the Michigan Bill of Rights" may turn out to be the most significant.

It is on this note that we may end our review of the constitutional world of Harold Norris and our personal and professional tribute to this very outstanding person. It surely can be said that the constitutional world is a better place to be because for a period of time Harold Norris has lived in it.