It's Time to Amend the Fourteenth Amendment Equal Protection Clause

The need to address changes to the United States Constitutional Amendments lies not in the original writing of the Constitution and the Amendments, but in the urges of men to change the context of the original documents over time as man seeks to bend the original meaning and context to suit his own purposes. This paper will specifically address Section I of the Fourteenth Amendment to the Constitution which has historically been interpreted as something less than the ordinary meaning of the words "equal protection of the laws" (US Const. Amend. XIV 1868) In the early stages of the development of our country, the founders of our republic worried that the federal government would infringe on the rights of the people. The context during this time was one that included recently secured freedom from an oppressive governing power. When writing the Constitution, many measures were taken to keep the power of the federal government in check. This included the Bill of Rights which ensured inclusion of basic rights of human individuals that could not be encroached upon by the federal government (US Const. 1789). However, the Bill of Rights only applied to the federal government, not to the states. After the Constitution was ratified, states used the concept of "states' rights" to resist efforts to prohibit slavery, even though slavery violated the natural rights of U.S. citizens of African descent (Faragher 2011).

Tensions between the slave owning south and the abolitionist north eventually boiled over into a civil war. Lawmakers were required to address the problem of states ignoring the simple truth that all men were created equal. In response, they ratified the Fourteenth amendment to the United States Constitution (US Const. Amend XIV. 1868). Section one of the Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (US Const., Amend. XIV 1868).

The Fourteenth Amendment was one of three Constitutional Amendments born out of the aftermath of the American Civil War. Our country had been divided between the Union who fought to free the slaves and reunify the nation and the Confederates who based their entire economy around slave labor. The Confederates lost, and Union troops occupied the south in a period known as the reconstruction. During this time, the south was rebuilding and there was great opposition to giving former slaves citizenship. The Radical Republicans in power attempted to quickly integrate former slaves into American society by giving them citizenship and the right to vote (Faragher 2011). However, southern states passed laws in order to restrict the rights of individuals of African descent. The Radical Republicans were forced to intervene with a Constitutional Amendment. They Ratified the Fourteenth Amendment to guarantee that all former slaves would become citizens of the United States (Faragher 2011). Additionally, the Fourteenth Amendment was intended to assure that all United States citizens were not denied rights by the states. The states could no longer restrict equal protection rights and were limited just like the Federal government. This became known as the equal protection clause of the Fourteenth amendment (Faragher 2011).

Unfortunately, the Fourteenth Amendment's guarantee of "equal protection of the laws" is and continues to be an unfulfilled promise (US Const. Amend. XIV 1868). Even after the Civil War and the ratification of the Fourteenth Amendment gave citizens equal protection rights, Jim

Crow laws were put into place, particularly in the South (Faragher 2011). These laws segregated all parts of society so that there was little interaction between blacks and whites. Segregationists argued that they were not violating people's rights because everyone had "separate but equal" access to the same things ("United States Supreme Court" 1896). In reality, African Americans had far poorer access to goods and services and were often barred from going to certain restaurants, parks, pools, and other locations in their community. In the area of education, those challenging discrimination also claimed that segregation was unconstitutional (United States Supreme Court" 1896). Again, supporters claimed the education provided was "separate but equal." Unfortunately, the Supreme Court in *Plessy v. Ferguson* agreed with the idea that they could be discriminated against under the idea of "separate but equal" (1896). Therefore, the quest for equal protection was stalled. Unfortunately, this court decision was disingenuous and a wrong ruling that showed a lack of respect and understanding for the words and context of the term "equal protection" in the Fourteenth Amendment to the Constitution (US Const. Amend XIV 1868). It appeared that the term "equal protection" were just words written on a piece of paper for the most part from the time that the Fourteenth Amendment was ratified (US Const. Amend. XIV).

At long last in 1955, there was some positive movement in the quest for equal rights. In the landmark decision of *Brown v. Board of Education*, the Supreme Court decided that an education that was separate was inherently unequal (1955). This ruling, along with the later enactment of the Civil Rights Act of 1964, helped to begin to tear down some of the barriers that were put in place impacting many descendants of slaves. Over time, many of these barriers have been dismantled. However, there is still much work to do and the pace of change has been frustratingly slow. On a recent visit to the The Legacy Museum: From Enslavement to Mass

Incarceration in Montgomery, Alabama, I learned that the separation of the races for educational purposes was still enshrined in the Alabama Constitution and two referendums to remove this text from their state constitution were defeated in recent times ("Ballotpedia" 2012).

As might be expected, some who are frustrated with the slow pace of change have sought to use the idea and language of "diversity" as a means to achieving an equal outcome for certain groups rather than an equal opportunity. After the Civil Rights Act of 1964 in which segregation was banned, many colleges and employers instituted diversity quotas that were based on race alone. This practice was challenged in the Supreme Court case *Regents of the University of California v. Bakke* in 1978. The Supreme Court ruled against racial quotas,,but allowed some consideration of a person's race as one factor in the admissions process ("United States Supreme Court" 1978). Unfortunately, this was a results-oriented ruling instead of recognizing the words equal protection for what they are intended to mean. The move to a results-oriented approach to racial equality only moved the pendulum to the opposite extreme. It was as if the court was saying "equal protection of the laws" can mean an equal outcome, but this is not in keeping with the plain meaning behind the "equal protection of the laws" clause written in the Constitution (US Const. Amend XIV 1868). For forty years, this new viewpoint has been the interpretation of the law and many have been discriminated against as a result.

As a student applying to colleges, I have found that there are many science, technology, and math programs that favor minorities or women in the application process based on their race, ethnicity or gender. Other times there are STEM camps that are only open to females or minorities. Sadly, this preference does not necessarily benefit the student because they are not being judged on merit alone. Instead of being judged on hard work and merit, they are being judged upon something they cannot control, which is discrimination. Even if policies and

programs are designed with good intentions, discrimination for good will always be bad because it hurts someone else who may be working just as hard. I believe the use of race, ethnicity and gender as a consideration for admission purposes and other educational benefits is not in keeping with the "equal protection of the laws" in the Fourteenth Amendment to the Constitution (1868). The government and educational institutions should not be in the business of picking winners and losers in the area of whether someone gets an education. Access to or barriers to educational opportunities can be life changing.

Affirmative action is the latest flavor of discrimination promoting "equality" by limiting the opportunities of others with equal or greater merits. Martin Luther King once said, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character" (King 1963). He would be appalled by how much discrimination is still in practice today. Even with good intentions, it has proven impossible to agree on a concrete standard on what is a racial minority and how much it should count as a factor in the college admissions process. Because admission to college and other programs is such an important milestone, it is too important to allow discretion for college acceptance based on the race, ethnicity and gender since that discretion that cannot effectively be monitored.

To make matters worse, a large part of decision making is performed subconsciously ("Project Implicit"). All subjective decisions are biased because all people are biased, whether it is implicit or explicit. For example, a continuing Harvard study called "Project Implicit" shows how much racial preferences are a factor in our subconscious mind. If the people who are making arbitrary "racial considerations" have implicit biases, then the system cannot work.

Because the two hundred year old American experiment tried to integrate racial preferences into the equation and failed to promote equality, history shows that in order to have equality we must take race, ethnicity and gender out of the equation altogether. In my opinion, racial, ethnicity and gender preferences are a refusal to recognize that the plain meaning of the term "equal protection of the laws" means that you should not consider a person's race, ethnicity or gender at all when it comes to admission and scholarship decisions (US Const. Amend. XIV 1868). Otherwise, I feel like I am paying the price for society's history of discrimination. Although some may see this as good public policy, it still violates the Fourteenth Amendment to the Constitution. Any means to an end is inherently unjust. One person's preference is another person's lost opportunity.

Fortunately, these affirmative action policies have come under stricter scrutiny from the Supreme Court. In *Gratz v. Bollinger* (2003), the Supreme Court ruled that blanket favoritism of certain minorities through much higher scoring was unconstitutional. The University of Michigan added twenty points to the overall score of a student if they were a minority and only twelve points for a perfect Standard Aptitude Test score ("Supreme Court" 2003). The Supreme Court ruled universities could only identify race of an individual, on a case by case basis. However, this ruling did not solve the problem (2003).

Recently, Harvard was sued because of discrimination against Asian Americans during the admission process because they had a far lower acceptance rate compared to students of different ethnic groups with similar scores ("United States District Court" 2018). An undisputed statement of facts revealed that in the past, Harvard's admission process at one point discriminated against Jews in particular ("United States District Court" 2018). It also revealed a practice of "submarine" quotas, in which there was not a concrete quota, but the effects can be

seen and traced back to the admissions process ("United States District Court" 2018). The statement of facts also reads that "Put differently, it can be said with 99.8% confidence that Harvard has manipulated its admission process to ensure that the African-American admissions rate tracks the overall admissions rate" ("United States District Court" 2018). Even those who opted to not put their race on their common application were not safe from discrimination. The Harvard Admissions Office "has alternative ways to determine the student's race through other information the Common Application requires, including the student's last name, citizenship status, birthplace, language proficiency, country of birth of the student's parents, and the parent's last names and former last names" ("United States District Court" 2018). If race is not a big factor, they would not be going to such lengths to figure it out. The citizenship status and language proficiency of the applicant should be allowed for an application because they are legitimate concerns for aptitude, but other personally identifying information should not be allowed because it can be used to undermine the equal protection clause. There is still a concern that Harvard can learn about a person's race and gender during an interview or admission essay as an attempt to evade any restriction on the application information.

True equal opportunity means allowing people to have a fair chance to succeed not because they were born with a certain skin pigmentation, but because they have worked hard to get there. If we are to have true "equal protection," then we must be color blind as Dr. Martin Luther King suggested. We need to adhere to the words "equal protection" that are used in the Constitution. A person's name, race, ethnicity and gender should not be on a person's college application. This will be the only way to truly eradicate discrimination based on race, ethnicity and gender as the evil that is prohibited by our Constitution. Because we, as a society, have

allowed for creative interpretation of the clear term “equal protection”, equal protection of the laws seems to be as out of reach as ever.

The only solution to addressing the problem of a vague equal protection clause is to make it more specific. My recommendation for amending the first section of the Fourteenth Amendment is as follows: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. In furtherance of this Amendment, the States or any institution that receives State or Federal government funding shall not consider a person’s name, race, ethnicity, or gender in any application for grants, contracts, employment or benefits.

In conclusion, while the example of the need for clarifying Section I of the Fourteenth Amendment to the Constitution was based on college admissions in this paper, the argument could be applied across any situation in which decisions are being made relating to employment, grants, construction contracts and educational opportunities. Ultimately, individuals should be judged on merit rather than race, ethnicity and gender if true equality is to be achieved. Amending the Fourteenth Amendment Equal Protection Clause will help make that happen.

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