

Testimony of Rev Mark Hughes

Apr 5, 2024

Senate Judiciary

PR.4 Constitutional Amendment

Equal Protection

## **Background**

In June 2020, Burlington, the largest city in Vermont resolved racism and citywide health crises. The following month a group of 30, including VRJA, the City of Burlington, the Howard Center, United Way Northwest, The University of Vermont Medical Center, Chittenden County State's Attorney, Chittenden County Regional Planning Commission and more declared racism a public health emergency. In April 2021 CDC Director Rochelle P. Walensky, MD, MPH declared racism a **“serious public health threat that directly affects the well-being of millions of Americans and, as a result, affects the health of our entire nation.”** In May of 2021 the Vermont General Assembly resolved the racism to be a public health emergency.

## **The Challenge**

There are ongoing unprecedented reversals and/or significant alterations of civil rights protections previously safeguarded by the Equal Protection Clause of the 14th Amendment. Attempts to create the policies and programs to redress systemic racism and other forms of systemic oppression are largely unable to withstand what has evolved as the equal protection jurisprudence.

The equal protection doctrine continues to be exploited by the use of highly complex discriminatory algorithms that further perpetuate systemic racism.

**Systemic racism and other forms of systemic oppression create wealth disparities and indirectly affect health and wellness; threaten economic growth and development, and ultimately place democracy at risk.**

### **The 14th Amendment**

While the 14th Amendment's Equal Protection Clause has provided a legal framework for challenging disparate outcomes created by systemic racism, its effectiveness is limited by various factors, including **judicial interpretation**, enforcement challenges, intersectional issues, and the need for broader societal change. Addressing systemic racism requires a comprehensive approach that includes legal, legislative, social, and cultural efforts to promote equity, justice, and equality for all.

The "basic analysis" doctrine, also known as "rational basis review," is a standard of judicial review applied by courts when assessing laws challenged under the Equal Protection Clause. Under this doctrine, **courts typically defer to legislative discretion and uphold laws as long as they are rationally related to a legitimate government interest.** This standard tends to make it more difficult to successfully challenge laws or policies that result in disparate outcomes due to systemic racism.

SCOTUS defied Stare Decisis when it overturned Roe v Wade and as a result of recent ethical challenges exhibited by Justices SCOTUS' credibility has been undermined over the past several years. Because the court has been conservative for nearly all of its existence (with the exception of about 15 years) the equal protection clause has rarely been interpreted in a manner that has given it the power it has required. Further, the existing jurisprudence of the equal protection clause fails to acknowledge or enable the redress of systemic racism (and other forms of systemic oppression). The recent overturning of Affirmative actions at Harvard and UNC Chapel Hill illustrate the reversal of established civil rights protections protected by the equal protection clause. Plessey v Furguson, United States v. Cruikshank and other precedent reinforce the SCOTUS proven propensity to reverse established civil rights protections protected by the Equal Protection Clause. Now with a conservative supermajority supreme court and given the current political climate (inflamed by racial backlash) further reversals of established civil rights protected by the Equal Protection Clause are imminent?

**The 14th amendment equal protection clause, with the use of the basic analysis doctrine, enables the ability to construct new discriminatory algorithms that further perpetuate systemic racism producing indefensible disparate outcomes.** This further renders the 14th amendment equal protection clause less effective and provides the ability to weaponize the equal protection clause to perpetuate a mesh of policies and programs that insidiously and consistently produce racially disparate outcomes.

The equal protection clause is at a minimum one of the sources of systemic racism, given the nature of basic analysis doctrine, the Stare Decisis conundrum, perceptions and precedent, the political climate and racial backlash?

**The legal doctrine of equal protection, basic analysis presents an obstacle in creating policies that promote racial equity and justice or create the required social, economic and political interventions required to eradicate systemic racism.**

Vermont can adopt alternative legal doctrines or approaches that may be more conducive to creating policies aimed at promoting racial equity and justice and addressing systemic racism.

A State constitutional amendment including an equal protection clause could lay the groundwork in creating an alternative parallel approach to the 14th amendment equal protection (basic analysis doctrine). This could assist Vermont in the creation of survivable corrective policy; sustaining the protection of existing civil rights; expanding the civil rights of protected classifications (and new classifications), and repelling new discriminatory algorithms that further perpetuate systemic racism by producing indefensible disparate outcomes. This amendment could enable Vermont to move to an alternate legal doctrine.

To be clear, this equal protection constitutional amendment article will complement the protections provided by the 14th Amendment but would

primarily govern state actions. It could offer stronger guarantees of equality and non-discrimination in areas not covered by federal law or where federal protections may be limited.

Even with a state-level equal protection article, state actions could still be subject to challenges under the 14th Amendment's Equal Protection Clause, particularly if they involve fundamental rights or implicate federal constitutional principles. **The basic analysis doctrine could still be applied by federal courts when assessing the constitutionality of state laws or policies.**

While this amendment could bolster civil rights protections within the state, it would not eliminate the risk of existing civil rights being overturned entirely. Vermont could potentially reinterpret or limit the scope of rights protected under the state constitution, although the extent of such revisions would depend on the language of the amendment and judicial interpretation.

**The equal protection article could provide a basis for challenging discriminatory algorithms or policies that perpetuate systemic racism within the state. State courts could use the language of the clause to scrutinize state actions and policies that disproportionately harm marginalized communities and to demand transparency and accountability in algorithmic decision-making processes.**

**The equal protection article** could enable Vermont to expand rights not previously realized, including protections for marginalized communities such

as the disabilities community. Vermont could interpret and enforce the clause in ways that promote greater inclusion, equity, and justice for all residents, potentially filling gaps left by federal law.

### **Compelling State Interest**

Incorporating the intent to eradicate systemic racism as a compelling state interest into a constitutional amendment can have far-reaching implications for addressing racial inequality and promoting racial justice. By explicitly stating this intent and documenting it through contemporaneous notes or records, stakeholders can enhance the defensibility, legitimacy, and impact of the constitutional amendment in combating systemic racism.

Incorporating the intent to eradicate systemic racism as a compelling state interest into the language of the constitutional amendment can provide a clear and explicit mandate for addressing racial inequality.

Explicitly stating the intent to eradicate systemic racism can guide courts and policymakers in interpreting and applying the constitutional amendment. It provides a framework for assessing the constitutionality of laws, policies, and practices, ensuring they align with the goal of combating racial discrimination and promoting equality.

Including contemporaneous notes or documentation highlighting the intent to eradicate systemic racism can strengthen the defensibility and legitimacy of the constitutional amendment. These records provide evidence of the legislative or constitutional framers' intentions, which can be cited in legal proceedings to support the constitutionality of the amendment.

State legislative and executive efforts specifically intended to eradicate systemic racism include but are not limited to Act 54, 2017; Act 9, 2018 (Sp); EO-04-18; Act 165, 2019; Act 33, 2021, and Act 182, Sec 22, 2022. Joint Legislative Resolution R-113, 2021 resolves “That this legislative body commits to the sustained and deep work of eradicating systemic racism throughout the State, actively fighting racist practices, and participating in the creation of more just and equitable systems...”

### **Examples of Constitutional Amendment “Intents and Purposes”**

#### **PR.2, 2019 as Introduced**

**Purpose.** This proposal would amend the Constitution of the State of Vermont to eliminate reference to slavery. *Eliminating reference to slavery in the Vermont Constitution will serve as a foundation for addressing systemic racism in our State’s laws and institutions.*

#### **As Passed by the General Assembly**

**Purpose.** This proposal would amend the Constitution of the State of Vermont to clarify that slavery and indentured servitude in any form are prohibited.

Today neither Vermonters nor the Courts know that it was our intention to amend the constitution in 2019 because Vermont was NOT the first State to abolish slavery but the first state to constitutionalize slavery. Folks will not know that it was our intention that the amendment would serve as the foundation for addressing systemic racism in Vermont state laws and

institutions. This intent will not be considered in any attempt in establishing law, its basis or constitutionality.

**PR.11, 1991 is believed to have been passed to ensure the inclusion** of gender inclusive (or neutral) language in Chapters I and II of the Vermont Constitution. The vast majority of this constitutional amendment addressed removing instances of voter suppression denoted by the use of the term “Freemen.” The absence of this intent would delay the reflective amendment of Title 17 by 26 years (S.107, 2019) and leave a remnant of the language in the title of the 42nd chapter of the Constitution and in the Senate’s rule 84 to this today!

Clearly articulating the intent to eradicate systemic racism in the constitutional amendment raises public awareness about the importance of addressing racial inequality. It also holds policymakers accountable for taking meaningful action to fulfill the objectives outlined in the amendment and provides a basis for evaluating progress and accountability.

## **Closing**

Thank you for doing the work of amending the Vermont State constitution to incorporate an equal protection clause.

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A State constitutional amendment including an equal protection clause could lay the groundwork in creating an alternative parallel approach to the 14th amendment equal protection (basic analysis doctrine). This could assist Vermont in the creation of survivable corrective policy; sustaining the protection of existing civil rights; expanding the civil rights of protected classifications (and new classifications), and repelling new discriminatory algorithms that further perpetuate systemic racism by producing indefensible disparate outcomes.

Explicitly stating the intent to eradicate systemic racism can guide courts and policymakers in interpreting and applying the constitutional amendment. It provides a framework for assessing the constitutionality of laws, policies, and practices, ensuring they align with the goal of combating racial discrimination and promoting equality.

Our proposed language of the constitutional amendment is submitted for your consideration.

Thank you!

Rev Mark Hughes  
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