

TAKE CARE

Ensuring the President “shall take Care that the Laws be faithfully executed”

Forced Classification, Biological Determinism, and Sad Chapters from Our Nation’s History

Praveen Fernandes // 10/31/18 // Commentary

October is LGBTQ History Month, a moment to reflect upon the history of the LGBTQ movement, but also how it interacts with our nation’s broader civil rights history. Unfortunately, the Trump Administration seems to have treated this month as simply another opportunity to push our nation backward. Like so many of my peers, I read with dismay the press accounts of the most recent move by the Trump Administration to roll back civil rights protections for transgender people. According to the *New York Times*, the leaked memo demonstrates an intent to define sex “as either male or female, unchangeable, and determined by the genitals that a person is born with” and to require any disputes about sex to be clarified through genetic testing. Apparently, the Trump Administration’s plan is to use this new definition to restrict rights in areas such as equal access to health care, education, and housing.

As a former Obama Administration lawyer who worked on LGBTQ issues, and who witnessed the painstaking effort and detailed factfinding that informed guidance documents and rulemakings at the Office of Personnel Management, the Department of Education, and the Department of Health and Human Services, I am saddened that so much progress can be casually replaced by policy formed contrary to medical opinion, federal court decisions, and human rights principles. As a student of American civil rights history, I am dispirited by how policy can be formed at odds with the lessons of our country’s past.

In the aftermath of the Civil War, our young and fragile nation was forced to grapple with the ways in which the Declaration of Independence's promises of liberty were broken when it came to African Americans. The resulting Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, drafted and adopted in what many historians refer to as our nation's "Second Founding," were an attempt to fulfill these unkept promises by elucidating clear principles of equal protection, due process, and citizenship. These Reconstruction Amendments form a critical part of our collective story of Constitutional progress, which trends toward inclusion. We know, however, that the story has had twists and turns. The Reconstruction Amendments signaled a movement toward equality, but that movement was met by resistance and the emergence of Jim Crow laws and other state and local laws and policies aimed at preserving segregation and racial subordination.

An example from a state bordering our nation's capital city proves instructive. In 1924, Virginia passed SB 219, The Racial Integrity Act. The Act was motivated by fear of racial self-definition and mixing, and aimed to prevent a blurred racial landscape that would have made the subordination of African Americans more difficult. The Act required a racial description of each resident at birth, placing people in one of two categories: white or colored. This latter category included African Americans and most Native Americans. (The absence of Latinos and Asian Americans in the legislation signals not a tolerance for, but rather a relative ignorance of, their existence.) According to the Act, race was defined using the "one-drop rule," defining persons with any African or Native American ancestry (no matter how removed) as "colored." According to the statute's twisted logic, one drop of colored blood made one colored, but one drop of white blood did not make one white. The Act went further by confirming and expanding Virginia's ban on interracial marriage, making criminal any marriage between a white person and a colored person. The United States Supreme Court's 1967 *Loving v. Virginia* decision struck down Virginia's interracial marriage ban (along with interracial marriage bans in several other states), rightly finding it an unconstitutional violation of the Equal Protection Clause of the 14th Amendment. However, it wasn't until 1975 that the remainder of the Racial Integrity Act was repealed.

What propelled the Racial Integrity Act was not the joy of classification; rather the Act was needed because discriminatory systems depend upon clear definitions of "the other." Virginia's racial subordination system was challenged by people who might defy easy classification, by people who might engage in self classification, or by actions (such as interracial marriage) that blurred classes altogether. The Act, by requiring racial classification at birth, and by grasping at purportedly accurate biological ways of making the classification (the one drop rule), sought to prop up the old system, assuring a supply of the necessary inputs. If the old system were to be

considered a factory, with racial subordination its ultimate product, then clearly raced humans (raced at birth and not by their own self-description) were necessary raw materials.

As both a person of color and a member of the LGBTQ community, I'm cautious about easy equations between race, sex, sexual orientation, and gender identity or expression. However, that wariness pales in comparison to my suspicion of forced classifications and strained appeals to biological determinism. Neither has served our nation well in the past. Just as racial subordination systems require a clear sense of who is a racial "other," sexual subordination systems require a clear sense of who is a sexual or gender minority "other." Self-definition and identities that defy simple classification pose challenges to these systems. So perhaps it should not surprise anyone that at a moment when our nation was making progress toward understanding how the Constitution's Equal Protection Clause (embedded in one of the Reconstruction Amendments, the Fourteenth Amendment) applies to the LGBTQ community, such systems would strike back, and that they would aim first at the community's most vulnerable members, our transgender, non-binary, and intersex family.

In the coming days, weeks, and months, as we learn more about the Administration's plans to implement its proposed changes to civil rights laws and regulations, attention will rightly focus on the ways such plans could harm the lives of our nation's 1.4 million transgender people. Attention will also rightly focus on how the plans categorically erase intersex individuals, whose lives challenge the gender binary and crude appeals to biological determinism. Discussions will also cover the ways in which the plans harm children who do not conform to gender stereotypes. We might also spare some concern for how such plans evoke the sadder portions of our national journey and how they represent a detour from the path to constitutional progress. We ignore history at our own peril.

Praveen Fernandes is Vice President for Public Engagement at the Constitutional Accountability Center. He was a political appointee in the Obama Administration, serving as Senior Counsel and Advisor to the General Counsel at OPM, where he worked on issues including transgender health and relationship-recognition for same-sex couples and their families.

Tags:

[Civil Rights](#) [LGBT Rights](#) [Racial Equality](#)

Congress Has Another Avenue on Mueller's Investigation

[\(/blog/congress-has-another-avenue-on-mueller-s-investigation\)](/blog/congress-has-another-avenue-on-mueller-s-investigation)

Brianne J. Gorod // 3/29/19 // In-Depth Analysis

Versus Trump: Mueller-ing Things Over

[\(/blog/versus-trump-mueller-ing-things-over\)](/blog/versus-trump-mueller-ing-things-over)

Charlie Gerstein, Jason Harrow // 3/28/19 // Commentary

Why the New Push to Kill Obamacare Is So Alarming

[\(/blog/why-the-new-push-to-kill-obamacare-is-so-alarming\)](/blog/why-the-new-push-to-kill-obamacare-is-so-alarming)

Nick Bagley // 3/27/19 // Commentary

Trump's Unyielding Religious Exemptions from the Contraceptive Coverage Requirement Are Unconstitutional

[\(/blog/trump-s-unyielding-religious-exemptions-from-the-contraceptive-coverage-requirement-are-unconstitutional\)](/blog/trump-s-unyielding-religious-exemptions-from-the-contraceptive-coverage-requirement-are-unconstitutional)

Joshua Matz // 3/26/19 // In-Depth Analysis

The Trump Administration Now Thinks the Entire ACA Must Fall

[\(/blog/the-trump-administration-now-thinks-the-entire-aca-must-fall\)](/blog/the-trump-administration-now-thinks-the-entire-aca-must-fall)

Nick Bagley // 3/25/19 // Quick Reactions

The Two Sides of Donald Trump in The @realDonaldTrump Litigation

[\(/blog/the-two-sides-of-donald-trump-in-the-realdonaldtrump-litigation\)](/blog/the-two-sides-of-donald-trump-in-the-realdonaldtrump-litigation)

Kyle Skinner, Leah Litman // 3/25/19 // Commentary

Related Posts

Christian Nationalism and the Bladensburg Cross

[\(/blog/christian-nationalism-and-the-bladensburg-cross\)](/blog/christian-nationalism-and-the-bladensburg-cross)

3/25/19 // Commentary

One of the core goals of the Establishment Clause is to stave off developments like Christian nationalism and its hierarchies of citizens. The Bladensburg cross reflects and strengthens this troubling strain in American society.

Caroline Mala Corbin

UMiami Law

Masterpiece Cakeshop & Proof of Religious Hostility in Civil Rights Enforcement

[\(/blog/masterpiece-cakeshop-and-proof-of-religious-hostility-in-civil-rights-enforcement\)](http://blog/masterpiece-cakeshop-and-proof-of-religious-hostility-in-civil-rights-enforcement)

3/14/19 // In-Depth Analysis

The Supreme Court's decision in Masterpiece Cakeshop offers no warrant for a rampant free exercise exceptionalism, in which the normal rules of constitutional law are suspended or inverted

Joshua Matz

Publisher

Versus Trump: California X Trump

[\(/blog/versus-trump-california-x-trump\)](http://blog/versus-trump-california-x-trump)

3/7/19 // In-Depth Analysis

On this week's episode of Versus Trump, Charlie and Jason discuss a new lawsuit from California challenging new regulations regarding Title X, an important federal family planning program. Listen now!

Charlie Gerstein , Jason Harrow

Civil Rights Corps Equal Citizens



[\(http://creativecommons.org/licenses/by-nc-sa/4.0/\)](http://creativecommons.org/licenses/by-nc-sa/4.0/)

This work is licensed under a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License](http://creativecommons.org/licenses/by-nc-sa/4.0/)

[\(http://creativecommons.org/licenses/by-nc-sa/4.0/\)](http://creativecommons.org/licenses/by-nc-sa/4.0/)

