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Toward an Abolitionist Interpretation of the Fourteenth Amendment

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TOWARD AN ABOLITIONIST INTERPRETATION
OF THE FOURTEENTH AMENDMENT

ROBIN WEST*

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I. INTRODUCTION

It is by now an open secret that current interpretations of the meaning of the equal protection clause of the Fourteenth Amendment, and of its relevance and mandate for contemporary problems of racial, gender, and economic justice, are deeply and, in a sense, hopelessly conflicted. The conflict, simply stated, is this: to the current Supreme Court,1 and to a sizeable and influential number of constitutional theorists,2 the “equal protection of the laws” guaranteed by the Constitution is essentially a guarantee that the categories delineated by legal rules will be “rational” and will be rationally related to legitimate state ends. To this group of jurists, the relevance of the equal protection clause to issues of racial justice rests on the important complementary minor premise to this guarantee of rationality: the claim, both descriptive and normative, that legislative distinctions based upon race can simply never be rational because there are no differences between the races that can in any way be relevant to state purposes, and, consequently, racial differentiation in any context cannot be a legitimate state goal.

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On this view, the equal protection clause is historically rooted in a constitutional and federal response to the pernicious slave laws, black codes, Jim Crow laws, and segregation mandates of southern states, all of which rested upon a specious and false theory of racial difference and hence upon presumably "natural" distinctions between the slave and the freeman, the black man, and the white man to justify the different legal treatment and protections accorded them. From the historic repudiation of this false theory of racial difference and white superiority culminating in passage of the Fourteenth Amendment — and from the further constitutional premise that categories must be rational — follows the important ethical and constitutional mandate that the central meaning of the equal protection clause, and indeed of the Fourteenth Amendment in its entirety, is that the law must be colorblind.

For a second group of jurists, including the liberal dissenters on the Court\(^3\) and a sizeable number of constitutional theorists in law schools,\(^4\) the "equal protection" clause of the Fourteenth Amendment requires not "rationality" in legislation but, rather, substantive justice. For this group the guarantee of equal protection is a constitutional imperative for the states and Congress to take substantive steps toward the eradication of the unjust subordination of one group of citizens by another, including African-Americans and other peoples of color by whites, women by men, and gays and lesbians by heterosexuals. On this view, the equal protection mandate and the Fourteenth Amendment is historically grounded not in the pernicious idea of racial difference but, rather, in the pernicious practice of racial subordination: the willful and continuing attempt of white people, with the willing acquiescence of state governments, to subordinate, deny, oppress, and use black people for their own ends. That subordination began with the enslavement of blacks by whites and their oppression through black codes and Jim Crow laws. The

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subordination continues in our time through the use of purportedly "neutral" but in fact unjustified and exclusionary criteria that precludes entry of not only blacks, but also women and other people of color into the higher echelons of political, professional, educational, and economic life. The equal protection mandate for these theorists is a guarantee that either the states or, in the breach, Congress will act to reverse these patterns of subordination.

On this view, it most assuredly does not follow that the law must be "colorblind." Rather, the law must be sensitive and responsive to the very real and relevant differences that exist between both blacks and whites, women and men: differences in power, differences in status, and differing positions on the economic, social, and political hierarchies that comprise our public and private lives. The mandate of equal protection is minimally not to exacerbate those inequalities but, understood generously, the Fourteenth Amendment in general, and equal protection in particular, is a mandate to eradicate them.

One purpose of this paper is to argue against both of these understandings of equal protection and to introduce a quite different interpretation — a view grounded in human nature and governmental obligation held by the abolitionists of the early and mid-nineteenth century. These abolitionists, at least according to a number of historians, propagated and popularized the phrase "equal protection of the law" in the decades immediately preceding the Civil War and the Reconstruction amendments. I will ultimately argue that this abolitionist understanding of equal protection, and of the Fourteenth Amendment, is truer to both the plain language and the history of the Amendment than either the formal colorblind view or the substantive anti-subordination view briefly outlined above. Before doing so, however, I want to discuss in a little more detail the nature of the conflict between the two conceptions that dominate current case law and scholarship, why I think that conflict is quite distinctive in our constitutional jurisprudence, and suggest why it seems to me to be imperative that we somehow find a way to break

the deadlock. In the first section that follows, I will therefore discuss the schism in our current understanding of equal protection, and I will then introduce, by way of metaphor, the rather different abolitionist understanding of the phrase "equal protection." In the next two sections, I will discuss modern applications of the abolitionist understanding and structural and intellectual barriers to its modern implementation.

II. MODERN EQUAL PROTECTION JURISPRUDENCE

The two interpretations of equal protection that dominate current law, which we might call "formal" and "anti-subordinationist," have in one form or another been present in judicial interpretations of the phrase from its genesis. However, it has only recently become clear how deeply incompatible these interpretations are and how thoroughly contradictory their implications. We can identify three modern phases in the evolution of the appearance of this contradiction.

The first phase dates from Brown v. Board of Education[6] up through the mid-seventies or so — roughly the period that saw the dismantling of Jim Crow laws and the integration of those southern public schools which had been intentionally segregated by state law. During this period, the contradiction between these two interpretations was almost entirely invisible for the straightforward reason that both views were compatible with the integrationist ideal expressed and, to some degree, mandated in Brown. Under the formal, colorblind approach, Brown is correct and integration is required because the race-consciousness that is the central evil at which equal protection is aimed had manifested itself in segregation laws, of which segregated schooling was a part. To these jurists and thinkers, "separate but equal" was and is a cruel anomaly because the "separate" part of the "separate and equal" formula rested on, and was intended to communicate, a false claim of racial inferiority[7] and, hence, inequality, and thus almost by definition could never yield

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7. Id. at 494.
equality. Thus, *Plessy v. Ferguson*\(^8\) is wrong, *Brown* right, and integration required. Under the anti-subordination approach as well, *Brown* is correct and integration required, not because segregation rested on a false view of racial difference, but because the subordination of blacks by whites with state acquiescence and support, which was the central evil at which equal protection was aimed, had manifested itself in profoundly unequal schooling of black and white children, which had in turn furthered the subordination of black adults by whites, thus completing the circle.\(^9\) Integrating the schools is one way, certainly not the only way, and perhaps, in retrospect, not the best way to redress the inequality of an unequal and segregated school system. Again, *Plessy* is wrong, *Brown* right, and integration required, not as a way to obliterate the root of a false racial theory of black inferiority but, rather, as a remedy of substantive inequality which happened to be manifested in segregated facilities.

By the end of the *Brown* era, it was clear that these two interpretations of both equal protection and of *Brown* itself were in fact different; they would yield divergent results in post-*Brown* cases regarding the extent of actual integration required by *Brown* of the states, rather than the mere cessation of state-ordered segregation.\(^10\) Nevertheless, these differences could be relegated to the margins. At the time of *Brown*, and for the most part during the post-*Brown* dismantling of Jim Crow laws, the two interpretations appeared to be in harmony. They both were consistent, although for different reasons, with the distinctive and specific mandate of *Brown* to integrate the schools, and, more loosely, with the integrationist vision of Martin Luther King, Ralph Abernathy, and the other civil rights leaders of the fifties and sixties for whom *Brown* was (and is) the institutional secular triumph of an often religious vision of racial harmony, integration, and brotherhood.

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\(^8\) 163 U.S. 537 (1896).


The second phase of the evolution of this contradiction begins with Washington v. Davis in 1976.\(^{11}\) In Washington, the Court held that neutral criteria employed by states (or the District of Columbia) for the distribution of governmental benefits, and which disproportionately and unjustifiably exclude blacks, are not unconstitutional unless it can be shown that those employing the neutral criteria intended to discriminate against the injured group.\(^{12}\) In Davis, it became clear that the two interpretations of equal protection, in uneasy alliance through the dismantling of intentional discrimination accomplished during the post-Brown era, were in fact incompatible. For it is easy to see that under the formal understanding of equal protection, Davis is surely right: the evil at which equal protection is addressed — differential treatment by the state of blacks and whites, premised upon a false claim of racial difference and black inferiority — is not present.\(^{13}\) The state is not treating the two groups differently; they are being treated the same, in a perfectly colorblind fashion. It is also easy to see, however, that under a substantive understanding of equal protection, Davis is profoundly, even tragically, wrong.\(^{14}\) The evil at which the equal protection clause is aimed — the unjustified subordination of blacks by whites by whatever means — was present in Davis, as well as in the wide range of state actions within its holding. Whites subordinate blacks (and men subordinate women) by the use of “neutral” criteria that, whether intentionally or not, reflect white (or male) interests, histories, preferences, and aspirations, no less than by laws that explicitly treat the two groups differently on a theory of racial difference. If subordination, rather than a false claim of racial superiority, is the evil targeted by equal protection of the law, then Davis is simply wrong. A statute, regulation, or criterion that unjustifiably injures African-Americans is no less subordinating than a statute which intentionally and differentially classifies.

The irreducible conflict between these two interpretations during the Washington v. Davis era was clouded, however, for a reason

\(^{11}\) 426 U.S. 229 (1976).
\(^{12}\) Id. at 240.
\(^{13}\) Id. at 246. See also Brest, supra note 2 (arguing that antidiscrimination is the general principle underlying equality law, not rectification of substantive inequalities).
\(^{14}\) See Tribe, supra note 4, at 1514-21.
that echoes the invisibility of the conflict during the Brown era. Just as both models proved compatible with the integrationist ideal expressed and mandated in Brown, although for very different reasons, similarly, both models proved compatible with the tort-like conception of constitutional responsibility assumed and furthered by Davis. In Davis, constitutional responsibility for implementing the mandate of equal protection took on the contours of a garden-variety tort: equal protection, under the model that came to the fore in Davis, simply means that the state is liable for harm that it causes to groups injured or burdened through its legislative classifications; liability accrues, however, only if the requisite tortious mental state is present, just as individuals are liable in tort for harms caused to groups injured or burdened through their actions only if the requisite tortious mental state is present. When filtered through this quasi-constitutional-tort approach to equal protection, the difference between the formal and substantive understanding of equal protection is narrowed to an almost technical difference over what requisite mental state is sufficient to trigger tort liability, rather than a fundamental difference in vision. For the formalist majority, something akin to specific intent to harm is clearly required;\textsuperscript{15} for the substantive, anti-subordination minority, something much less is sufficient: general intent, recklessness, or perhaps negligence alone. Again, the difference is real and visible, but when viewed through the filter of the quasi-tort principles adopted or assumed in Davis, it appears to be a difference of degree. Both approaches seem to accept the overall picture of the equal protection clause as laying out duties for states not to harm their citizens in the same way that tort law spells out duties for citizens not to harm each other. The two models appear to differ only over the reach of the constitutional tort or, putting it differently, over the extent to which the conduct of states should be interfered with or regulated by the inhibiting force of constitutional duty.

The third phase in the evolution of the conflict between these two competing interpretations dates from the Supreme Court’s de-

\textsuperscript{15} Washington v. Davis, 426 U.S. at 240.
cision in Croson v. City of Richmond.\textsuperscript{16} The Croson decision struck down, as violative of the equal protection clause, an affirmative-action plan undertaken by the city of Richmond to rectify the subordinating effect of decades of systematic, institutional, and private discrimination against African-Americans.\textsuperscript{17} In Croson and its aftermath (continuing to the present), the full and explosive scope of the conflict between a formalist and an anti-subordinationist account of equal protection became fully apparent, as well as its origin in fundamentally different and incompatible conceptions of equality. To the formalist, including a majority of the current Court, race-conscious affirmative action is clearly unconstitutional; it rests for its justification of the differential treatment of the races on a theory of racial difference (albeit socially, rather than biologically engendered) and, therefore, violates the Fourteenth Amendment for the same reason as the Jim Crow laws of the late-nineteenth to mid-twentieth centuries violate the Fourteenth Amendment.\textsuperscript{18} For the substantive anti-subordinationist, such a plan is not only clearly permitted, but, as at least a number of such theorists have argued, may well be required: the plans reverse the utterly predictable effects of private, racial subordination which is precisely the target of the equal protection clause itself.\textsuperscript{19}

The scope and significance of this contrast should not be understated. Again, the difference is not simply that one group sees a constitutional violation where the other sees none or that one group reads the Constitution as prohibiting (x) where the other sees the Constitution as silent on (x), the standard form of constitutional disagreement. Rather, on this issue, while one group sees the Constitution as prohibiting (x), the other sees the Constitution as not simply silent on (x) but as actually requiring it: the formalists see as prohibited by equal protection what the anti-subordinationists see as required by it.

\begin{enumerate}
\item \textsuperscript{16} 488 U.S. 469 (1989).
\item \textsuperscript{17} \textit{Id.} at 480.
\item \textsuperscript{18} \textit{Id.} at 518 (Kennedy, J., concurring in part and in the judgment).
\item \textsuperscript{19} See, e.g., Croson, 488 U.S. at 520-28 (Scalia, J., concurring in the judgment); Strauss, \textit{The Myth of Colorblindness}, supra note 9. See Fried, \textit{supra} note 2.
\end{enumerate}
Thus, the two groups are reading the constitutional phrase not just as having differing scopes of reach but as mandating absolutely opposite obligations. It is not, to use an analogy, simply that one group reads the Constitution as requiring that we close the door while the second reads it as silent on the question; rather it is that one group reads the phrase as requiring that we close the door, while the second reads the phrase as requiring that we open it. It is for this reason that both groups can, with internal plausibility and coherence, accuse the other of Orwellian double-speak: of claiming that war is peace. Professor Charles Fried, a fervent and eloquent advocate of a formalist view, thus accuses the modern anti-subordinationist approach (which he labels “collectivist”) of using the equal protection clause, which was intended to combat racism, to promote it; he analogizes the modern anti-subordinationist position to that embraced by one of the most racist cases in our constitutional history: *Plessy v. Ferguson.* Similarly a number of anti-subordinationists, myself included, have lamented the formalist insistence, now made law by the Supreme Court, that the equal protection clause, intended to promote the eradication of the subordinating effects of racism, is now the weapon of those who would fight efforts to do precisely that. Again, from the anti-subordinationist perspective, the clause, while intended as a tool to dismantle racism and inequality, is being used by formalists instead to promote such evils.

Thus, what has only now become clear is that the formalist interpretation of equal protection now embraced by the Supreme Court and the anti-subordinationist interpretation endorsed by the Court’s

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dissenters and academic critics are not simply different and equally plausible interpretations of a concededly vague constitutional phrase — a phrase inevitably, and perhaps intentionally, open to multiple claims of meanings. The problem is not simply that one view is somewhat broader or narrower than the other, such that what is constitutional under the first interpretation is unconstitutional under the second, or vice versa; nor is the problem that under the first view the constitution forbids what under the second view it permits. Rather, the contrast between these two understandings of equal protection is more fundamental than that: under the first view, the Constitution forbids what under the second it seems to require, not simply permit: race-conscious, state, city, or congressionally-initiated affirmative action designed to undo the effects of wide-scale private and quasi-private subordination of African-American citizens. The affirmative action problem has thus fully exposed the fundamental contradiction between these two interpretations of the nature of the equality mandated by the equal protection clause. The color-blindness required by the phrase, according to the formalists, is profoundly incompatible with the affirmative actions necessary to eradicate subordination, the nub of the same phrase, according to the anti-subordinationists.

Furthermore, the protestations of theorists from both camps notwithstanding, neither position can be decisively refuted by reference to either the language or history of the phrase, nor by reference to fundamental, unassailable principles of political morality. It is surely possible to understand “equal protection of the laws” as requiring of the state a “blindness” to the race of its citizens. How better to rectify an historical unwillingness to protect citizens of a particular color than by insisting that state legislators be blind to such factors? Requiring, in effect, that legislators don John Rawls’ veil of ignorance24 with respect to all racial characteristics, whatever the circumstance, whatever the motive. It is impossible not to concede (or insist) that the formalists’ insistence on colorblindness is not out of line with the language and history of the phrase. Nor, for that matter, is it out of line with at least one dominant theme of Western

liberal thought, at least since the American Civil War — to wit, that it is our status as human beings that renders us worthy and entitled to protection by the state, and we do not lose that entitlement by virtue of racial, gender, or ethnic characteristics.

It also seems incontrovertible, however, that the framers of the Amendment intended to rectify and reverse the subordination of African-Americans effectuated by over a century of slavery and that “equal protection of the law” can be read as requiring affirmative efforts to do precisely that. Similarly, it is not at all implausible to argue that principles of compensatory and distributive justice require any decent liberal society to undertake action that ameliorates rather than exacerbates the substantive inequalities still endured by those living with the legacy of that past. Thus, the same constitutional phrase, no matter what the interpretive methodology used, can seemingly be read so as to require diametrically opposed obligations. If we view the Constitution as imposing mandatory obligations, as we surely should, we have a huge problem: it seems to require of us a massive contradiction, a classic case of impossibility. If the Constitution were a contract, we would void the phrase.

Although, as I will argue in a moment, it may be a mistake, it is surely neither cynical, nihilist, or even overly skeptical to infer from this example of the confusion caused by the equal protection clause that which has been urged in the last fifteen years by large numbers of critical legal scholars: that the Constitution has no pre-given, “already present” meaning awaiting discovery by fair-minded readers of the document.\(^\text{25}\) The presence of flagrantly contradictory mandates emanating from the same constitutional phrase seems to perfectly insubstantiate the central “indeterminacy claim” of the deconstructionist wing of the critical legal studies movement: that the law in general, and certainly the phrases of the Fourteenth Amendment in particular, are so radically indeterminant that they should be viewed as nothing more than repositories of the pre-formed and arbitrarily embraced political commitments of our utterly cha-

otic selves — "selves" and "political commitments" that are formed essentially randomly. Those selves and commitments cannot be formed or even influenced by the meanings of the given texts of our culture for the simple reason that there are no meanings or any given texts to have such an influence. When formalists and substantive anti-subordinationists see in the equal protection clause diametrically opposed mandates, they are simply reading into that phrase their own political commitments: again, an essentially arbitrarily-chosen-from, one-or-another conception of equality as the best means of organizing social life. From this realization it is just a short step to the conclusion that the constitutional phrase itself (as well as its history) is serving as, at most, an anachronistic pleading requirement, and that we would all be better off if we simply dispensed with the requirement and proceeded, so to speak, directly "to the merits" of the underlying debate: whether we should or should not rectify the subordination of African-Americans through affirmative action — whether we should or should not insist on a colorblind state as a matter of political morality. To be blunt, the Constitution, its supposed plain meaning, and its uncontested history (to say nothing of its contested history) have nothing to teach us. The Constitution is at best a vehicle, and a clumsy vehicle at that, for political argument; it neither constrains the substance nor adds anything of value to what we would say in its absence.

Make no mistake about it, there is something undeniably liberating, even intoxicating, in freeing oneself and political debate from the constraints of constitutional text and the political history that the text tenuously records and celebrates. The political history of the United States that culminated and is reflected in the constitutional text is in large measure a history of almost unthinkable brutality toward slaves, genocidal hatred of Native Americans, racist devaluation of non-whites and non-white cultures, sexist devaluation of women, and a less than admirable attitude of submissiveness to the authority of unworthy leaders in all spheres of government and public life. Why should we bind or constrain our political argument,

to say nothing of our political choices, by the texts produced by this history of ruthlessness, of brutality, and of mindless, infantile, and at times, psychotic, numbing wrath? Surely a part of the motive, if not the sole motive, behind affirmation of the indeterminacy thesis among critical legal theorists (unlike, it is worth noting, among critical literary theorists) is a desire to expand the scope of our current political and constitutional imagination beyond not so much the false constraints, but rather beyond the pernicious constraints of a less than admirable past.

There are, however, serious problems with the critical scholars’ aspiration of atextuality and ahistoricity, this urge to shed an ignoble history. First, of course, it may simply not be possible — or at least it has been the burden of a great deal of recent neo-pragmatist and literary-legal scholarship to so claim. Our “selves” and our political dispositions are far from being the chaotic, randomly chosen bundles of inclinations insisted upon by at least some advocates of the indeterminacy thesis; in fact, our “selves” and political dispositions may be exhaustively constituted by precisely the history, with all its horrors, ambiguities, and contradictions that we aim, through claims of indeterminacy, to shed.

The second problem (and to my mind the more telling) with the atextual and ahistoric aspirations of the indeterminacy thesis is that the history and text being shed, although no doubt in large part a succession of waves of brutality and oppression, may also contain moments of real nobility and courage, and the text that is the culmination of those moments may embody and express part of a profoundly moral social vision. If we turn our backs on history and text, in short, we may be turning our backs on imaginings more worthy than our own. The Fourteenth Amendment, in fact, may be just such a text; its passage may have been just such a moment, and its normative implications just such a vision. If we abandon

the history and text of the Fourteenth Amendment as possible guides to at least its possible meanings, whether or not those meanings exhaust the possibilities and whether or not we should regard them as "authoritative," we may be abandoning a source of moral insight and a vision of the just society that is superior to those visions our current ahistoric and parochial "selves" have managed to envision.

Let me just put the point autobiographically: my reason for embarking on this project is that the vision of a just society expressed by the equal protection clause, and advocated by some of its proponents, may be superior to both the formalist and anti-subordinationist understandings of the phrase that dominate current debate and case law. Even if we assume, or insist, that the intended meaning should not be regarded as the only possible meaning — that there may have been several and conflicting intended meanings, and that the historical meaning carries no modern legal mandate — the possibility that the originally intended meaning is normatively superior to modern interpretations is surely a sufficient reason to reacquaint oneself with the text and origins of the constitutional text. The indeterminacy theorists' usually implicit and sometimes explicit suggestion might at least on occasion be false: that although the appearance of contradiction counsels the abandonment of text and history, that need not be viewed as troubling in the case of legal and constitutional texts because the text being abandoned is for the most part the recordation of a violent and oppressive history, which not only cannot, but also should not, constrain modern moral and political imagination. In the case of the Fourteenth Amendment, this argument seems to me to be false: the vision expressed in the Amendment, and advocated by some of its proponents, is stronger than both the formalist and anti-subordinationist position that dominate modern debate, or at least I will so argue.

There is one other purely pragmatic and explicitly political reason for seeking out a new paradigm of meaning for the equal protection clause. The affirmative action debate in this culture, I think, has come to a dead-end. Like the debate over abortion, the affirmative action debate has reached the point where further persuasion is not possible. That fact alone is unfortunate enough, but it is doubly tragic if, as a consequence of that impasse, the evolution of our
understanding of the equal protection clause to say nothing of the application of the clause, ceases: if because of the impasse over affirmative action, the equal protection clause ceases to become, in effect, a part of the living Constitution. That may well happen, if it has not happened already. The formalist objection to affirmative action may be an unanswerable objection to an anti-subordinationist view of the Fourteenth Amendment. Further, the anti-subordination objection to viewing the Fourteenth Amendment as a limit to affirmative action may be an unanswerable objection to the formal, colorblind interpretation of its mandate. If so, then neither side, in effect, can move past affirmative action: it is the end of the debate, the end of reasoned discussion, the end of constitutional progress. It may be time, in effect, to start over, to go back to the beginning, and to construct a new paradigm. It may be time, in other words, to change the subject.

III. TOWARD AN ABOLITIONIST UNDERSTANDING OF THE FOURTEENTH AMENDMENT

In a recent, remarkable essay entitled *The Rule of Law as a Law of Rules*, Justice Antonin Scalia describes the basic idea behind the formalist interpretation of the equal protection clause by use of an analogy to family life, and as patriarchically offensive as the idea of such an analogy may initially appear to be, a contrasting familial analogy may be the best way to describe the basic idea behind the abolitionist interpretation as well. Children, Scalia opines, can endure all sorts of rules that limit their freedom; in fact, although he does not say as much, children need and thrive on such rules. What they absolutely cannot and will not endure are rules that are unequally applied. A curfew for a fifteen year old is tolerable. What is not tolerable is that a younger sibling must abide by a curfew even though an older sibling, at the same age and therefore similarly situated, did not. Restriction to one’s room or house is a tolerable punishment, but only if all who did the crime must do the time. A parent who breaks this sacred covenant (and, let’s face it, it happens fre-

29. *Id.*
quently) will find herself or himself faced with the fury of a child who feels herself to be, and who in fact is, suffering a fundamental, incomprehensible, unspeakable injustice. A similar scenario can be seen with regard to the equal protection clause. Citizens will not tolerate breaches of formal equality any more than will children. Rules must be even-handedly applied to all; departures from this norm must be grounded in well-reasoned distinctions.

Scalia's metaphor has no doubt accurately captured the nub of a requirement of formal, equal justice. Formal, equal justice requires that rules be applied evenhandedly to all similarly situated persons within the scope of the rule. But as noble or central as the ideal of formal justice may be, the Fourteenth Amendment does not speak of equal justice; it speaks of equal protection. Perhaps, then, a better familial analogy for understanding the mandate of equal protection might be this: imagine not the Partridge family, with generally well-behaved children who occasionally must be punished and with generally well-intentioned parents who occasionally lapse from the norm of equal justice. Instead, imagine an island with children who are more along the lines of those portrayed by William Golding in his horrific dystopia Lord of the Flies. On this island, the children have three basic instincts: to survive, to attain personal glory, and to dominate. They generally achieve the first two ends by cooperatively converting the island’s natural bounty into food and shelter through their labor, and then engaging in the competitive acquisition, alienation, barter, trade, and ownership of various goods. In their spare time, and because they are nasty and aggressive creatures, they engage in fistfights, inflicting as much damage as possible on each other, all toward the end of establishing not just comparative glory, but actual physical dominance over each other.

Further imagine, however, that on this island, unlike on Golding's, there are parents present, and that these parents are a central authority whom the children generally obey on fear of sanctions if they do not. The parents on this Golding-esque island, though, are peculiar. They usually intervene in their children's economic lives to

ensure that promises are kept, so that all the children can withstand natural threats to survival and have equal opportunities in the quest for glory. In addition, the parents intervene in their children’s physical battles to protect each child against the violence and dominance of the others. They accomplish this latter goal by laying down a mandate prohibiting all intra-familial violence and then punishing offenders. But for some perverse reason, they bestow this protection of parental authority on every child but one. Whether through neglect, sadism, or complicity, the parents consistently deny the protection to one of the siblings that they grant to the others.

The consequence of the denial of parental protection against private sibling violence and betrayal to one child but not the others — this denial of equal protection — is not simply the sufferance of unequal justice, although it is assuredly in part that. It is more pervasive, more disabling, and more insidious. The child denied equal protection of the parental authority, no less than the citizen denied equal protection of the state authority against private violence and violation, lives a very different life than her siblings. The child, who alone must endure the violence of the others and isolation from the economic life of the community, all with no recourse or remedy, in effect becomes the slave, subject, or subordinate of the other children against whom she has no rights. Put differently, because she has no rights against them, because she lacks parental protection, she becomes the object of the other childrens’ will. The potential unchecked violence and material deprivation which she will endure if she disobeys their commands will instill in her, if there is no escape, a pattern of obedience, submission, and subordination. One way to express the difference between her life and the lives of the other children is that the other children live with only one familial authority: the parents whose will must be obeyed, against whom they have no rights and against whose violence there is no recourse. The child denied equal protection, by contrast, lives under the thumb of two sovereigns: the parents and the violent siblings who become, no less than the parents, an authority who must be obeyed: the source of commands that must be followed. She becomes not just a victim of injustice. She becomes a slave.

This scenario, the family that denies equal protection, rather than simply equal justice, is harder to imagine than the first because, while
loving parents may occasionally (even often) lapse from the ideal of equal justice, loving parents (and most parents are loving) do not even on occasion deny equal protection. The instinct to protect and to parent are too inextricably intertwined to expect these sorts of lapses in judgment or fairness, although it does sometimes happen; think of the younger sibling who suffers, and who is allowed by the parents to suffer, from sexual violation and abuse inflicted by a family relative. But generally, parents do not deny to any of their children their protection against the violence of their siblings or, to the extent possible, of their peers. States, however — the intuitive appeal of Scalia’s patriarchal metaphor notwithstanding — are not families, and governments are not loving parents. States do from time to time withhold protection against private violence and private violation from a citizen or group of citizens. What then is the consequence when they do?

If the denial is complete, sweeping, and universal in scope, if the state utterly refuses to protect one group against the organized violence and violations of trust of a second, such that the violence is real and the threat of violation and betrayal is always credible, a not unexpected outcome is the institution of slavery itself. Indeed, the master-slave relationship can be defined, and often has been defined,31 as a private relationship in which the violent assault by the master of the slave is not a criminal offense (but not vice versa), such that the assaulted slave has no recourse against the assaultive master, no rights that were violated. And, in a market economy, the withdrawal of the state’s assurance that private trusts will not be violated, of course, leaves the slave unprotected against natural threats to survival, just as the withdrawal of the state’s protection against private violence leaves the slave unprotected against physical threats. Unlike the citizen who is protected against such violence, betrayal, and violation, the only way for the slave to avoid the violence of the master or the threat of starvation attendant to his betrayal and violations of trust is for the master’s command to be obeyed, his will to be accommodated. This denial of protection against the vi-

violence and violation of a master is what defines, to say nothing of legitimizes, the master-slave relationship.

Once that relationship is established, one way to express the difference between the slave and the citizen is this: the citizen lives under the rule of only one sovereign — the state — while the slave lives under the rule of at least two sovereigns — the state and the master — the commands of both to be endured under the threat of unchecked violence. The citizen must abide by the commands of the state if he wishes to avoid its violent sanctions, but must not abide the commands of any other. He is protected by the state and more specifically by its criminal law against all non-state violence; this protection is certainly a part of what it means to have rights. The slave, in marked contrast, must abide by the commands of two sovereigns, the state and the master, if he wishes to avoid violence or deprivation; this is what it is to be denied the protection of the state’s law. Where one citizen, but not others, is denied protection, then protection is obviously unequal. The inequality of protection, unlike the unequal application of general laws decried by Scalia, gives rise not only to the evil of formal injustice but to the much more concrete, pervasive, and pernicious evil of slavery.

The message that I suggest we should take from the island metaphor is that the plainest possible meaning of the Fourteenth Amendment mandate that no state shall deny to any citizen “equal protection of the law” is that no state may deny to any citizen the protection of its criminal and civil law against private violence and private violation. Put differently, no state may, through denials of protection, permit any citizen to live in a state of “dual sovereignty.” The equal protection clause on this reading is at root a guarantee not of equal justice nor of substantive equality, but of sole sovereignty: the state, and only the state, shall be sovereign over each and every citizen. Only the state shall have access to the use of unchecked and uncheckable violence to effectuate its will (and then, of course, only with due process). No citizen shall be subject to uncheckable violence by anyone other than the state; no citizen shall be under the will and command of anyone other than the state. Inversely, no entity, no individual, no group, no race, no gender, and no class other than the state shall have recourse to uncheckable violence as a means of
effectuating his, her, or its will. No one other than the state shall have the power, backed by the credible threat of violence, to command and dominate the will of others. The equal protection clause is thus a guarantee of sole state sovereignty. Any relationship of sovereignty between a subject and master, other than that between state and citizen, that exists through state acquiescence — a refusal of the state to deter the credible threat of violence on which sovereignty depends — is evidence that the state has violated this guarantee of protection.

Although the master-slave relationship is the most logical outcome of a massive, universal, blanket denial of the protection of the law to one group of persons, the traditional relationship of slavery, with its economic meaning and consequences, is not the only possible outcome, for at least two reasons. First, it may be that the privileged, sovereign citizen in a state characterized by the denial of equal protection to others does not want the subject’s labor, but, rather, wants something else. Perhaps he only wants from the subject class a general pattern of obedience, acquiescence, and subservience. Perhaps, rather than labor, he wants something very different from the unprotected subject, such as her sexuality, a theme to which I will return.

But the economic relationship of master and slave may not be the outcome of a massive denial of equal protection for a rather different reason that brings us directly to the history of the Fourteenth Amendment. Enslavement may not be the result of a denial of equal protection if slavery itself, but not the unequal protection of the law which facilitates and defines it, has been outlawed. If only slavery is outlawed, but not the denial of equal protection of the laws which is its logical underpinning, then it would not be surprising if the result of the prohibition of slavery was the subservience, acquiescence, and obedience of the subject, even if not formally enslaved, class. Indeed, in the post-Thirteenth Amendment and pre-Fourteenth Amendment world, the pattern of subservience,

32. This is the general thesis of Catherine MacKinnon’s work. See, e.g., CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).
acquiescence, and obedience of the freed slaves to the commands, will, desires, or values of whites, all grounded in a fully justified fear of unchecked violence and unchecked violations of trust, was the clearest evidence one could possibly require that the states had denied to one class of its citizens the equal protection of the law.

In his powerful and justly influential book *The Antislavery Origins of the Fourteenth Amendment*, first published in the early fifties, and re-released in the mid-sixties, Professor Jacobus tenBroek of the University of California argued that precisely this understanding of the phrase "equal protection of the law" was the understanding of the clause held by many of the Amendment's framers: that the state must guarantee its "sole sovereignty" to each citizen and must accordingly protect each citizen against the threat of both private violence and private violation. Simply put, tenBroek's history suggests that this was the understanding the abolitionists and their supporters, from the 1830's through passage of the Fourteenth Amendment, embraced, pleaded, propagated, and advocated — the claim that every state must guarantee to every citizen the "equal protection of the laws." The abolitionists, above all else, understood that it was precisely a denial of the protection of the state against private violence and private violation of trust that facilitated and even defined the status of the slave. After the passage of the Thirteenth Amendment, it became apparent to the abolitionists, their advocates, and fellow travelers in Congress that although a denial of equal protection is a necessary condition of slavery, eradication of slavery is not tantamount to a guarantee of equal protection. The wave of Ku Klux Klan violence of whites against blacks and abolitionists, the refusal of the southern states (and in many instances the northern states), to punish, check, or deter that violence, and the states' refusal to extend to the freed slaves the legal forms of contract and property that were essential to their participation in the community's economic life, which was in turn the only genuine protection against natural threats to survival, engendered precisely the relationship of sovereign and subject, dominance and subser-

33. JACOBUS TENBROEK, supra note 5, at 4 (now re-titled: EQUAL UNDER LAW).
34. Id. at 116-134.
vience, command and obedience, which the unchecked violence and violation of one group against another can predictably insure. One could not have more vivid proof that the formal abolition of slavery will not necessarily guarantee the sole sovereignty of the state, and hence the true “citizen’s equality,” promised by the phrase “equal protection of the law.”

Thus, the need for yet another amendment: one outlawing not just the symptom of slavery but the disease itself — the denial of the protection of the state against private violence and violation, of which slavery is one, but only one, possible manifestation. The equal protection clause of the Fourteenth Amendment was thus intended by the abolitionists, and at least some of its proponents, to abolish not only slavery per se, but also the “dual sovereignty” which facilitates it; such “dual sovereignty” which in turn is engendered by a state’s refusal to grant to one group of its citizens protection of the law against private violence, economic isolation, and violation, and which leaves citizens profoundly and thoroughly unequal.

As far as I can tell, this particular history is not controversial; indeed, this can fairly be called the uncontested meaning of the Fourteenth Amendment. Given the degree of discord among legal theorists regarding the meaning of the equal protection clause, it is, at first blush, somewhat remarkable that there is such widespread consensus among historians, including those same legal theorists when wearing their “historian” hats, that this abolitionist meaning, or something closely akin to it, is the meaning of the equal protection clause which was embraced by those who most actively campaigned for its inclusion in the Constitution, from the 1830’s all the way through the passage of the Amendment itself. Indeed, that this abolitionist understanding was precisely the meaning intended by the Fourteenth Amendment’s most influential framers is often given as an argument by both intentionalists — against modern, supposedly broader, interpretations of the clause, such as that embraced by the Warren Court in Brown — and anti-intentionalists — as a defin-

35. Id. at 201-39.
36. Id.
37. This argument has its origins in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, (1873),
itive *reductio ad absurdum* argument against intentionalist modes of constitutional interpretation: if that is what the phrase meant historically, then history just cannot matter all that much, because whatever it means today, it means something much broader than *that*. For example, Richard Posner has argued against Robert Bork's intentionalism that no one, including Bork himself, can truly be an intentionalist regarding the equal protection clause because it is clear that all the equal protection clause was intended to do was to insure that freed slaves would no longer be denied the protection of the state against Klan violence. Given that fact, under a truly intentionalist approach to constitutional meaning, *Brown* is surely wrong. Why? Because ensuring protection against Klan violence obviously has nothing to do with school segregation or desegregation. However, *Brown*, for whatever reason, is not surely wrong; in fact, it is surely right, a conclusion with which Bork himself does not quarrel. Therefore, Posner concludes, *quod erat demonstrandum*, neither Bork nor any other *Brown* sympathizer can possibly be an intentionalist.38

In a moment, I want to argue that Posner's view represents a cramped understanding of the abolitionist position, as well as of intentionalism. I disagree with Posner's implied charge that under an abolitionist approach, the Fourteenth Amendment has no modern content because there simply are no modern analogues to either slavery or the unchecked Klan violence and private violation of freed slaves that triggered the passage of the Thirteenth and Fourteenth Amendments. It is actually remarkably easy to find modern examples of the states' denial to one group of citizens of the protection of criminal and civil law against private violence and violation. In fact, in the next section, I will suggest five such modern applications. First, I will contrast this "abolitionist" understanding of the core

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*Id.* at 407. See generally Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977) (arguing generally against Warren Court interpretation of the Fourteenth Amendment, as outside the perimeters of its intended meaning).
guarantee of the Fourteenth Amendment with the understanding of the history of the Amendment relied upon by formalists and anti-subordinationists, respectively.

If the abolitionist understanding is right, then the formalist insistence on a colorblind Constitution simply understates by half the nature of the evil at which the Fourteenth Amendment is aimed. Slavery was indeed bolstered by a false and invidious theory of racial difference and racial inferiority, as was the subordination facilitated by the denials of equal protection that followed its abolition. But that theory of racial difference is surely not all that is wrong with either the enslavement or the subordination of African-Americans in the nineteenth century. Otherwise, it would be a complete response to the mandate of the Fourteenth Amendment, assuming for a moment that there had been no Thirteenth Amendment, to insist upon a colorblind system of slavery, to concede, so to speak, that there is indeed a "bad" form of slavery that rests on a false theory of racial difference, but if we abandon that false theory, and just enslave "natural slaves" without regard to their race, the institution is "rational," and thus constitutional, because it no longer falsely categorizes people on the basis of irrelevant racial characteristics. Colorblind slavery, in other words, is fully constitutional under the interpretation of the equal protection clause put forward by formalists. But surely it is peculiar to think that colorblind slavery, unconstitutional under the Thirteenth Amendment, is not a violation of the Fourteenth Amendment as well. Indeed, it is not only peculiar, it is absurd. Yet it is precisely this absurdity to which the formalist interpretation leads us. A colorblind institution of slavery would still be both slavery in its purest form and a denial of equal protection to one group, the slaves, against the private violence of the other group, the masters. This would be true not only because there are no "natural slaves" such that the categories, no matter how drawn, could never be rational, but also because the thing itself, the slave, is not a category that even exists in nature: it is one half of a relationship, and it is defined by precisely that which the Fourteenth Amendment explicitly prohibits: the unequal protection of law. However the categories are drawn, whether color conscious or colorblind, slavery is a violation of the Fourteenth no less than the Thirteenth Amendment because it evidences a massive denial of the
equal protection of the law. Colorblindness, although perhaps a condition of formal, equal justice, is simply not the nub of equal protection. Rather, protection is.

More generally, any state of "dual sovereignty," whether or not it results in economic slavery, is a violation of equal protection, regardless of whether the distinctions between superior and inferior, sovereign and subject, dominant and subordinate, are drawn in a colorblind fashion or along lines that track any other so-called suspect class. If we return for a moment to the hypothetical family or the small scale society on the Golding-esque island, even if the subservient class from whom the protection of the parent or state is denied is divined in a perfectly rational or perfectly random fashion, in a way that is utterly blind to race, gender, ethnicity, or religion, even if the subject and master classes are composed of perfectly representative cross-sections of every "suspect class" imaginable (some are old, some young, some black, some white, some women, some men, some gays, some straights, etc.), the result would still be a denial of equal protection. One group, the ethnically, racially, sexually diverse subject group, is denied the protection of the law granted the other group. The result is that the subject group lives under the rule of two sovereigns, the state and the other group. This result obviously holds regardless of the composition of either class. The moral is simply that rational categorization, no less than the colorblind mandate that is implied by the requirement of rationality, is not the nub of equal protection. Protection is the nub of equal protection. The state must protect, and it must protect equally.

If this abolitionist understanding of equal protection is correct, then the problem with the anti-subordinationist interpretation of equal protection is clear: just as the formalist approach only addresses a part of the evil, the anti-subordinationist account overstates the evil. The nub of equal protection is surely not rationality or colorblindness, but neither is it substantive equality. Again, the nub is protection. Just as the formalist interpretation seems to imply the constitutionality under the Fourteenth Amendment of a colorblind institution of slavery, and therefore seems under-inclusive, so the anti-subordinationist interpretation seems to imply the unconstitutionality of an incredibly over-inclusive array of inequalities, whether
or not the product of the dual sovereignty forbidden by the guarantee of equal protection. The state’s failure to rectify and reverse virtually any unequal distribution of power, not just between whites and blacks or women and men but between anybody and anybody, so long as the underlying cause of the inequality is a factor which is or should be morally irrelevant, would, on this view, be a denial of equal protection and therefore be unconstitutional. One need not be a libertarian or a free marketeer to see that this would be an unattractive world in which to live. About thirty years ago, Kurt Vonnegut, no regressive neo-conservative he, described a fictional and dystopic world in which buzzers go off in the inner ears of persons of exceptional intelligence, talented dancers wear weights, singers have their vocal chords scarred, and tall people learn to slump so as not to be intimidating on the basketball court, all in the name of a vision of equality that is very hard to differentiate from the anti-subordinationist approach. A world in which all have equal power would be a world not only free of the malign inequalities that stem from the states’ failure to protect, but also free of the far broader array of benign inequalities and differences that constitute not just our own, but virtually any social world. The anti-subordinationist understanding of equal protection, when severed from the focus on the states’ duty to provide protection, is fatally vague and over-general. If what is prohibited by equal protection is truly any and all “subordination” that stems from inequalities in power which themselves are rooted in morally insignificant determinants, then it seems that what is prohibited is simply social life.40

Finally, from an abolitionist perspective, it is clear that both the formalist and the anti-subordinationist models are partial truths. A false racial theory of black difference and black inferiority is indeed the target of the Fourteenth Amendment when that false theory is used to justify the states’ withdrawal of its protection from blacks and thereby facilitate the enslavement or subordination of blacks to the will of whites. But the cure for that evil is surely not “color-

blindness." A false racial theory is not necessary to such subordination. And subordination of blacks by whites (or women by men) is indeed the target of the Fourteenth Amendment when that subordination is the consequence of a system of dual sovereignty occasioned by the states' withdrawal of its protection against private violence or violation from one group of citizens. But the cure for that evil is not the eradication of all inequalities of power.

For all their differences, the formalist and anti-subordinationist interpretations of the equal protection clause share one feature, and it is what they share which renders them both problematic: they are both interpretations, albeit conflicting ones, of equality, rather than of equal protection. They both read the phrase in the clause as though the word protection were not in it: formalists, as though the phrase demanded equal justice, and anti-subordinationists as though it demanded substantive equality. By removing the word protection from the phrase, they leave it a general mandate of equality and thus susceptible to straightforward political debate about the meaning of that illusive promise. There is no question but that we need to debate the meaning of equality and the extent to which our commitment to equality obligates us to undertake pervasive social and economic reordering. But equality, whether formal or substantive, is not the mandate of the Constitution: equal protection is. By removing the promise of protection from the equal protection clause, our modern constitutional interpreters have taken from that phrase, and hence from the Amendment to which it is pivotal, its specific, distinctive, and constitutional contribution to political debate. For it is the idea of equal protection and not equality, the idea that the state must and should promise each citizen protection against the violence of others if it is truly to be a constitutional state under the rule of law, that is the distinctive contribution of the Fourteenth Amendment to our collective moral knowledge which continues to guide, however tenuously, our modern political choices.

IV. The Conservative Court and Congressional Responsibilities Under the Fourteenth Amendment

What then might an abolitionist understanding of the equal protection clause of the Fourteenth Amendment tell us about our mod-
ern world? The abolitionist understanding, which I have elsewhere called a "pure protection" model, or which might be called a "single sovereignty" model, primarily guarantees that every citizen will be subject to only one sovereign, the state. Accordingly, and minimally, at least according to the abolitionists and framers who advocated the phrase "equal protection of the law," no state shall, through the withdrawal of the protection of its criminal law, permit any other group or individual to establish a relationship of sovereignty over any other through the medium of unchecked violence. Also, no state, through the withdrawal of the protections and empowerments of its civil law, shall permit any group to establish sovereignty by isolating one group from the shared, cooperative, and competitive economic life of the whole, thereby exposing that group or individual to natural threats to survival. What, if anything, does such a vision tell us about modern life or our modern problems?

First, some comments about the question itself. As James Boyd White has argued in his recent book, *Justice As Translation*, one generation cannot simply "apply" a legal formulation, no matter how broad, to the problems of another. Any such "application" requires something akin to an act of translation from one language to another: what we must do, when we do this sort of thing, is translate the message articulated in one culture, in this case pre- and post-Civil War America, to the problems of another, late-twentieth century life. For that reason, any sort of pure intentionalist approach to the Constitution or any other legal problem, no matter how desirable, is simply impossible; it cannot be done. But it hardly follows that the original understanding has no meaning, relevance, or tells us nothing, any more than the complexities and difficulties of translation render works written in another language meaningless. What it does mean, I think, is that both the abolitionists' overall philosophical principles, as well as their particular agenda, might usefully suggest what aspects of our modern lives may be within the gambit of the sorts of concerns which the Fourteenth Amendment was intended to rectify. If we can specify, to use Ronald Dworkin's helpful

distinction, both their *particular conception* of equal protection and their *general concept* of the problems they were attempting to address, we may be able to specify both the "minimal content" and the contested margins of a modern protectionist understanding of the equal protection clause. The "minimal content" will be drawn by analogy to the abolitionists' specific conception of equal protection and the "contested margins," by analogy to their general concept.

Very baldly, at the most general or conceptual level, according to the abolitionists, the equal protection clause has both a negative and an affirmative meaning. Negatively, the clause requires that the state insure that every individual is equally free of all conditions which could potentially subjugate his will to some sovereign power other than the state. The clause prohibits a state of "dual sovereignty." The state must insure that no citizen lives under more than one sovereign. The clause affirmatively requires the state to protect each individual's *positive liberty*: to guarantee to every individual the freedom to direct his own life and work. To use the language of the time, the equal protection clause requires the state to affirmatively protect each person's exercise of his *natural rights* or human rights.

There were, according to the abolitionists, at least two specific natural rights which the state is required to protect. Those specific natural rights, which must be protected equally, constitute the abolitionists' *particular conception* of equal protection. The first specific "natural right" which must be protected is the right to physical security. Each citizen must be protected against private violence perpetrated against him by others. The equal protection clause guarantees that protection through the evenhanded application of the criminal law; thus, Richard Posner is right to note that, in an important sense, the wave of Klan lynchings and private violence undeterred and unpunished by the state that characterized the post-Civil War era is the paradigmatic equal protection violation, not Jim Crow laws or segregated schools.  

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42. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977).
43. See Posner, supra, note 38, at 1374-75. Indeed, Congress immediately passed the Ku Klux Klan Act of 1871, 17 Stat. 13, for the express purpose of ensuring Fourteenth Amendment rights.
The citizen’s second specific natural right is to have available to him the legal means to fashion a livelihood to ward off natural threats to survival. The equal protection clause protects against such threats by guaranteeing that the legal means of sustaining a livelihood in a market economy through ownership, acquisition, alienation, and trade of one’s labor, capital, and property are available to all. It is important to remember that a primary immediate political purpose of the amendment was to ensure the constitutionality of the Civil Rights Act of 1866. The equal protection clause was minimally designed to protect against, then, was private violence and material deprivation occasioned by isolation from the cooperative economic life of the community, through which individual livelihoods could be fashioned. What then does the state have a duty to protect, and to protect equally? Minimally, for the abolitionists, the state must protect that which is absolutely essential to a free life: first, physical safety, and second, freedom from want — forty acres and a mule or its equivalent and access to the means of participation in the community’s economic life.

Later, I will explore possible modern ramifications of the abolitionists’ general concept that equal protection requires the state to protect our natural rights, or our positive liberty, equally. First, though, I want to urge that even from this minimalist, specific conception of equal protection, it is not hard to see some modern violations of the equal protection mandate as understood by the abolitionists who argued for it. Let me briefly mention four. The first two derive from the state’s obligation to protect against private violence, and the second two from its obligation to protect against natural threats to survival.

First, as I have argued at length elsewhere, the marital rape exemption still in force, albeit in an attenuated form, in several states constitutes as literal a modern withdrawal of the states’ pro-

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44. 14 Stat. 27. The Civil Rights Act of 1866 was later re-enacted after passage of the Fourteenth Amendment as Section 18 of the Enforcement Act of 1870, 16 Stat. 140. See generally, TBROR, supra note 5, at 202-03.
46. Id. at 46-48.
tection against violent assault as did the states' failure to protect against murder during the heyday of Klan violence. The consequences are also not dissimilar. A woman who can be forcibly and physically intruded upon without recourse to legal protection or remedy is not a victim of crime, with the remedies and rights pertinent thereto; rather, she is, and will most likely regard herself, as subject to the sovereign whim of he who can, without fear of state reprisal, coerce her consent through legitimate threats of force and violence. Such a woman, unlike unmarried women and unlike all men, lives under the will of two sovereigns rather than one: the state and her husband against whose violence there is no recourse. Consequently, the husband's commands must be obeyed if violence is to be avoided. The marital rape "exemption" is in a very literal sense a denial of the state's promise of protection against violent assault and, as such, given an abolitionist understanding of the phrase, is clearly and unproblematically unconstitutional.

Second, the reluctance, delay, or outright refusal of some urban police forces to enter high crime neighborhoods 47 similarly constitutes a literal withdrawal of the state's protection against violence, and hence this too is a violation of the guarantee of equal protection. Again, this withdrawal of police protection leaves large numbers of citizens subject to the authority of two sovereigns rather than just one: the state, against whose legitimate forms of violence there is no recourse, and the crime lord or drug lord, against whose illegitimate but undeterred violence there is similarly no recourse. Drastically unequal police protection quite directly implies drastically unequal protection of the laws, drastically unequal sufferance of private violence, and drastically unequal subjection or enslavement to the whims, will, desires, and manipulations of one's fellow citizens.

From these two examples and the premise on which they rest — that the state's protection against private violence is the central, minimal guarantee of the equal protection clause — it follows that

a number of the Court's recent decisions, whether grounded in the Fourteenth Amendment's equal protection clause or not, are wrong, or, if not wrong in their outcome, wrong in some aspect of their reasoning. The major premise of the Court's recent decision in DeShaney v. Winnebago County Department of Social Services,48 and the sizeable number of similar cases that followed and preceded it,49 that there is no constitutional right to a police force,50 is squarely wrong. The right to a police force, or, more specifically, the right to the state's protection against the subjugating effects of private violence, are the paradigm Fourteenth Amendment rights. It is precisely these rights which make us "equal" in the eyes of the law. Given our right to police protection against private violence, we are equally subject to the commands of only one sovereign, the rule of law, and given that right we are equally free because we are equally free of subjection to the commands of any other. It follows that little Joshua DeShaney, brutally, repeatedly, and privately assaulted by his father, suffering massive and permanent brain damage as a result, did indeed suffer a constitutional violation. This violation was not because the state had sufficiently intervened into the family's life so as to satisfy the state action requirement as (indirectly) argued by the dissent51 but, rather, because it did not intervene enough. Through its inaction, not its action, the state failed to provide equal protection of the law.

The background inequality that gave rise to the Court's decision three years ago in McCleskey v. Kemp52 (the statistical likelihood that the murder of a white victim will result in a greater punishment than the murder of a black victim, as well as the related and similar devaluing of black rape victims over white rape victims reflected in the prosecution and punishment of rape) also has constitutional dimensions, although not necessarily those litigated in the case itself.53

50. DeShaney, 489 U.S. at 197.
The relative withdrawal of protection, and correlatively greater vulnerability to violence reflected in that differential, again is a literal denial of the equal protection of the criminal law against private violence. Similarly, the background conditions that gave rise to *Washington v. Davis*\(^\text{54}\) — an insufficiently integrated police force in a nearly all-black city, where the "neutral" criteria by which black applicants were excluded from the force were unrelated to job performance — also raises at least a suspicion, if not a presumption, of a denial of equal protection of the law.\(^\text{55}\) A too-white force in a nearly all black town, one might hypothesize, will very likely provide a police service so far removed from the felt needs and interests of those served as to constitute a denial of the police protection against violence which the Fourteenth Amendment guarantees.

It also follows from the abolitionists' minimalist understanding of equal protection that the so-called "state action" requirement, at least as presently understood by the Court, and according to some of its various definitions, is drastically misconceived. The equal protection clause, under an abolitionist interpretation, targets states' refusal to protect citizens against profoundly private action which results in insubordination or enslavement. The "state action," then, which is the object of the Amendment, is the breach of an affirmative duty to protect the rights of citizens to be free, minimally, of the subordinating, enslaveing violence of other citizens. The act of "discrimination" that triggers equal protection analysis is the *private* violence and violating act which, unremedied and untouched by state law, creates a private sovereignty, separate from state sovereignty forbidden by the equal protection clause. The state breach that constitutes the violation may take the form either of action or inaction, feasance or malfeasance: the state may simply fail to protect one group from the violence of others (as in the case of unpunished and undeterred Klan or domestic violence), or the state may do something far more visible, such as pass legislation explicitly removing one group from the reach of the state's protection against the violence of others (such as in the case of marital rape exemption

\(^{54}\) 426 U.S. 229 (1976).

laws). Whether the state's failure to protect constitutes an action or inaction, however, is not determinative. What is determinative are the consequences of the state's conduct: whether by virtue of the state's action or inaction there exists a separate state of sovereignty in which one citizen is subjected to the will of another citizen as well as to the sovereignty of the state.

Are there other private actions, beyond physical violence, that have the effect of enslaving one group of citizens to another? Put differently, are there other natural rights beyond the right to be free of private violence that the state has a duty to protect? Although the Supreme Court ultimately confused and aborted the issue in the *Slaughterhouse Cases* and the *Civil Rights Act Cases*, the framers of the Fourteenth Amendment unambiguously believed there were such rights: the 1870's Civil Rights Acts, largely constitutionalized by the Fourteenth Amendment, sought to ensure that the state would protect all citizens not only from private violence, but also from the economic isolation, deprivation, dependence, and ultimate economic subjugation that would inevitably result from the withdrawal of the state's private law. The latter goal was no less important than protecting citizens from the direct physical subjugation resulting from the withdrawal of the protection of the state's criminal law. Arguably, we must stretch a little farther to find modern analogies to this second but equally central purpose of the Fourteenth Amendment. But here as well, I think, analogous modern situations do exist, particularly if we do not read back into the Civil Rights Act, and the Amendment that was intended to constitutionalize it, modern conceptions of equal protection.

The abolitionists and at least some of the framers of the Amendment argued that the states have a duty to ensure equal access to the mechanisms of private law, but the *reason* for that obligation was not simply a concern for the symmetries of abstract justice. Rather, the state's duty arises because it is by using those mechanisms of contract and property law that a livelihood can be maintained, and the utter dependence upon others and the state of

56. 83 U.S. (16 Wall.) 36 (1873).
57. 109 U.S. 3 (1883).
subjection to which that dependency leads can be avoided.\textsuperscript{58} It is easier to see modern analogues if we generalize the multiple purposes and ambitions of the original Civil Rights Act in this way: the states have a duty to protect the natural rights of the citizen to engage in the economic life of the community through the purchase, sale, and ownership of property and in one’s own labor, thus ensuring liberty by avoiding the dependency that results from deprivation. Let me just mention two possible modern applications of this duty, although surely the list could be longer.

First, an abolitionist understanding of the Fourteenth Amendment provides at least some support for the claim that the equal protection clause guarantees minimal welfare rights, not only to shelter, food, and clothing, but also to a liveable minimum income or job. Furthermore, an abolitionist approach clarifies what an anti-subordinationist approach toward the same conclusion obfuscates: the source of the right to welfare, if there is one, is not in the Amendment’s avowal of equality, for there is none, but rather, its promise of protection.\textsuperscript{59} Simply put, the state has an obligation to protect citizens from abject subjection to the whims of others occasioned by extreme states of poverty, no less than to protect citizens from vulnerability to the threats of physical violence from others. Indeed, chronic, multi-generational homelessness, for example, shares in many, although certainly not all, of the features of post-slave life that not only prompted the passage of, but also framed the meaning of, the Amendment: for both the nineteenth-century freed slave and the twentieth-century homeless person, the total dispossession of property which defines the condition of the latter, and which was a central feature of the condition of the former, entails a similar lack of privacy, an inability to manage one’s own life, a dependency upon others for material survival, the difficulty or impossibility of selling one’s own labor, and ultimately the impossibility or near impossibility of ever achieving the state of self sovereignty, rather

\textsuperscript{58} See \textit{TenBroek}, \textit{supra} note 5.

than subjection to others, which is the underlying goal of the re- construction amendments taken in their entirety.

This abolitionist, "pure protection," or "single sovereignty," understanding of the equal protection clause also provides a way of thinking about the constitutionality of the so-called "traditional" division of labor in the most private of private spheres: the home. As numerous feminist writers from various disciplines have pointed out, the vast numbers of women who perform huge and disproportionate amounts of unpaid domestic labor, from childcare to housekeeping, often preventing their acquisition or development of labor skills compensable in the "real" or paid labor market, are, like slaves, rendered subject to the whim of a separate sovereign, the check-bearing spouse upon whom they depend for material survival. Whether viewed through the lens of the direct prohibition of slavery provided in the Thirteenth Amendment, or through the lens of the equal protection mandate of the Fourteenth Amendment, the state has failed to protect these women against the resulting state of servitude. The state has failed to ensure that no group of citizens lives under the mastery of two sovereigns rather than only under the mastery of state sovereignty. The state has failed to provide equal protection of the law.

The abolitionist history of the passage of the equal protection clause of the Fourteenth Amendment might then leave us with this minimal formulation: we have an absolute, incontrovertible right not to be subject to any sovereignty other than the state. From this absolute right are derived subsidiary rights and obligations: we have a right to be free of those conditions which, if unchecked by the state, generate separate sovereignties, including, at least, a right to be free of private violence and extreme material deprivation. Both unchecked private violence and material deprivation engender dependency upon others and subjection to their whims, desires, and commands, which is constitutive of the state of slavery. Correlatively, the state has an affirmative duty to protect our natural rights to physical security and economic participation. If the state fails to

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grant or extend that protection to some subgroup of the community, it has failed to grant equal protection of the laws.

Finally, and still from just this minimalist "sole sovereignty" interpretation of equal protection, we can generate answers to the three modern dilemmas of Fourteenth Amendment law that have so badly split the constitutional community into its formalist and anti-subordinationist camps. First, the very general mandate of integration and the prohibition against state-sponsored segregation that is articulated, albeit ambiguously, in Brown\(^61\) is supportable under a protectionist, no less than formalist or anti-subordinationist, approach although the reason is somewhat different: where either private or state-sponsored segregation subjugates one class of citizens to the sovereignty of another class, and where the state acquiesces in that subjugation, the state has violated its promise of equal protection. It could surely be argued that radically unequal state segregated public schools had both that intent and effect. Second, where a state law, rule, or criterion adversely impacts the interests of one class of citizens, whether or not intentionally, and that adverse impact has the effect of subjugating one class of citizens to the will of another, the equal protection clause is violated. The use of neutral criterion in Washington v. Davis\(^62\) to exclude blacks from the city's police force may or may not be such a violation, depending on the effects and history of non-black police forces in nearly all-black cities. If a too-white force is incapable of providing protection to a black community, then the unprotected citizen is effectively subjected to the sovereignty of both the state and the unchecked will of the local crime or drug lord. If so, then Washington v. Davis is a quite literal denial of equal protection of the law.

And third, under a "protectionist" or "sole sovereignty" understanding of equal protection, affirmative action of the sort ruled impermissible in Croson\(^63\) is clearly permitted because the color consciousness that is intrinsic to affirmative action is not intended to nor does it have the effect of subjugating whites to the command

\(^{62}\) 426 U.S. 229 (1976).
\(^{63}\) 488 U.S. 469 (1989).
of blacks, and is constitutionally required wherever the failure to undertake affirmative action would perpetuate the continuing subjugation of the freedom of blacks to the will of whites. From the perspective of the problems which our formalist-anti-subordinationist debate has highlighted, then, a "protectionist" approach is somewhere between the two poles. A protectionist approach is more permissive of affirmative action than a formalist approach: for the formalist, any race consciousness is irrational and therefore unconstitutional, while for the protectionist, race consciousness is only unconstitutional if it is part of a pattern of subjugation that elevates one class of citizens to a state of virtual sovereignty over another. On the other hand, a protectionist approach is less demanding than an anti-subordinationist approach: while the anti-subordinationist reads the Amendment as requiring a very broad egalitarianism, the protectionist reads it as requiring liberty, and while the anti-subordinationist targets subordinating conditions as constitutional violations, the protectionist targets only those subordinating conditions that are so extreme as to confer upon one group a sovereign status, and upon the other, a correlative denial of freedom.

If this is the "minimal content of the equal protection clause," what are its outer reaches, as understood by the abolitionists? What, to return to Dworkin's fruitful formulation, is implied by the very general concept of equal protection they advocated rather than the particular conception of it they urged, that is, freedom from separate sovereignties and a right to be protected against the subordinating effects of private violence, economic isolation, and material deprivation? What should be, or what might be, our modern conception of equal protection if we are to remain true to the general concept intended by the abolitionists? At the very concrete level, and the protestations of intentionalist constitutionalists notwithstanding, history can provide little guidance, as it has been the burden of the constitutional interpretivists, pragmatists, and other anti-intentionalists to demonstrate. Nevertheless, the abolitionists' very general understanding of constitutionalism, of politics and, in brief, their

64. See, e.g., Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (1980); Dworkin, supra note 42, at 131-50.
moral philosophy, does at least suggest a way to ask the question that brings into focus modern problems and modern solutions. Their formulation of the relevant questions also reveals, however, at least three reasons why the abolitionist understanding never dominated judicial interpretation of the clause during the twentieth-century: it rested upon a way of thinking about natural rights that is dramatically at odds with modern modes of thought; it rested on a moral and social vision largely unamenable to judicial enactment; and finally, it rested on and presupposed a sense of civic responsibility and obligation to others that is foreign to our modern conception of citizenship. Let me suggest what the abolitionists’ general concept required and then explore the obstacles to its modern realization.

To know what the equal protection of the law requires under an abolitionist understanding of the phrase, we need to know what is meant by our very general right not to be subjugated to the commands of any non-state sovereign, or, put affirmatively, our right to be free. A right not to be subjugated to the whims of a sovereign other than the state rests on (or implies, or simply restates) a positive right to be free of bondage. The Fourteenth Amendment, then, might profitably be viewed as a sort of charter of positive liberty or a charter protecting our right to be self-governing, autonomous, free of other rulers, masters, or superiors, within the confines of the rule of law. As the abolitionists themselves realized, such a guarantee requires for its full enunciation and realization a theory of natural rights and some sort of teleological account of human nature. What does it mean to be free? What, beyond physical and material security, must be protected if we are to be truly free? What needs must be met? What wants satisfied? What is so central to our human essence that only if it is protected, nurtured, or furthered, can we be called free? The central question, then, posed by the original understanding of the equal protection guarantee, is what natural rights do we possess, and possess equally, that must be protected if we are to enjoy the equal protection of the law, and hence enjoy the liberty which is its fundamental promise?

If we could answer that question, if we could specify the natural rights we each hold in the contemporary world, we would know the
current reach of the abolitionist understanding of the equal protection clause. Do we have, for example, a natural right to education, for the distinctively abolitionist reason that only with an education do we have any hope of self-sufficiency, independence, or self-sovereignty? Is participation in culture and the world of knowledge so central to our humanity that unless that potential is protected and nurtured, we are not, in some important sense, truly free, but are rather enslaved by ignorance? The compulsive insistence by whites on maintaining the illiteracy and ignorance of slaves in the pre-Civil War south is some negative evidence, of course, that education is indeed essential to self-sovereignty or positive liberty — that it is, in short, a natural right. Might not pregnant women have a right to obtain an abortion for an unwanted pregnancy for the distinctively abolitionist reason that without such a right, the woman is enslaved against her wishes to not only the pregnancy, but also, very likely, at least for a large portion of her life, to the unwanted and unpaid labor that unwanted motherhood entails? Is power over one’s body and one’s reproductivity, as well as choice of one’s life work, so central to human identity, that without those powers and choices protected, we are in some sense unfree? Might not gay men and lesbians have a right to state laws which protect their intimate and sexual orientations equally as those of heterosexuals, for the distinctively abolitionist reason that such choices and orientations are a necessary part of a free life, and without such protection, the individual is subjugated to the whims and desires of an unchecked and heterosexist cultural mandate? Might not members of distinctive cultural subgroups, such as Native Americans, Spanish-speaking Americans, or the Amish, have a right to state laws that protect the integrity and cohesiveness of their culture, for the distinctively abolitionist reason that identification with such a group is for many an essential part of a free life, and without such protection, they are subjugated to the mandatory mores of an unchecked, hostile, and hegemonic majority culture? These are difficult questions for which I do not have answers. To answer them requires a normative account of human nature: who are we, who should we be, what does it mean to be human, what might it mean to be free?

On the other side of the coin, an abolitionist concept of equal protection requires a teleological and normative account of sover-
eighty. What natural duties does the state owe its citizens, by virtue of its, and their, allegiance to the notion of a rule of law and their shared commitment to the state’s sole sovereignty? Against what evils must the state provide protection if each citizen is to be free? The abolitionist held that the state must provide protection against private violence and economic isolation, but this is clearly not the only possible response. Must it also protect, for example, against the disappearance of subcultures? Must the state protect against mandatory and unpaid childbirth? Must it protect against that institution that Adrienne Rich provocatively calls “compulsory heterosexuality” — compulsory, not only because its mandates are as often as not backed by violent sanctions, but also because it is falsely presented as necessary, natural, and as part of the inevitable order of things? Against what private, natural, or cultural constraints on our positive liberty, our right to be self-governing, our right to be free of nonstate sovereign entities, does the state have a duty to protect us?

These too are difficult questions which I will not here attempt an answer. I do though want to notice one feature shared by all of them. Answers to these questions I submit about the duties of the state to provide equal protection to its citizens in a constitutional democracy in which “the state” is in some sense us, requires not just a view of human nature, and not just an understanding of our natural rights, but also a deep appreciation of our civic obligations, our natural commitments to others, and our shared responsibility for their well-being. For to ask, in this culture, what “the state” must protect or whether “the state” must protect against violence, hunger, heterosexual oppression, and cultural annihilation is not to ask what some other entity, a distant monarch or legislature, must do to protect the weak, but what each of us must do to protect each other as well as to protect ourselves. If protection against subjugating conditions is the essence of the equal protection clause, and if we are serious about understanding our state and ourselves as a constitutional democracy, if we are the “sovereign,” then that clause

is incontrovertibly about our obligations to protect each other, not simply our right to protection from a reified state. In their political activities, the abolitionists proclaimed themselves to be, and in fact became, their brothers’ keepers. In their victorious insistence on equal protection of the law for all, they constitutionalized the obligation as well as the right. Through the mandate of equal protection, the insistence that we the people protect each other against the private subordination of some by others, the Constitution became not just a charter of rights but a charter of citizen responsibilities.

If all of this is right, then it is not hard to see several reasons why the abolitionist understanding of equal protection has not flourished in this century and what we need to do if we are to take the abolitionist interpretation seriously. The first reason has to do with current mores of intellectual thought. Substantive, normative, and teleological theories of natural rights, the philosophical underpinning of the abolitionist’s constitutional theory, simply do not resonate with our modern ways of thinking about political morality. The conceit in contemporary political thought, buttressed by ambitions of scientism as well as fashions of post-modernism, is that we either should or must dispense with theories of nature, human nature, and natural rights in political thought. Relatedly, most (but certainly not all) modern political and constitutional thinkers view the citizen’s possession of rights, not his possession of responsibilities, as of the essence of constitutionalism. For both reasons, the abolitionists’ claim that each of us collectively and individually is constitutionally obligated to protect the natural rights or the central humanity of each other to guarantee each others’ freedom does not rest easily with twentieth century political and moral theory.

The third reason that even a minimalist version of the abolitionist interpretation may not have prevailed is structural. As the Court has always been quick to point out, the federal judiciary is ill equipped to remedy the structural, institutional, and social inequalities, practices, and attitudes that result in constitutionally problematic states of affairs, such as unequal sentences for killers of white victims and black victims, or the unequal participation of blacks on the Washington, D.C. police force. The federal judiciary is similarly ill equipped to fashion the massive restructuring of our market
economy that would be necessary to end the millennium-long era of unpaid domestic labor and the subsequent undervaluing of women’s work in the market economy. The judiciary could, of course, do some things: it could easily declare marital rape laws unconstitutional; it could reverse itself and affirm our right to protection by a police force; and it could insist that the state compensate victims of violence such as Joshua DeShaney, who are now denied that protection. But it could do little or nothing to redirect our community resources so as to guarantee the funds necessary to meaningfully effectuate that promise, to actually create the programs needed to deter domestic violence, to provide additional support for police forces assigned to high-crime neighborhoods, or to insure that the social services agencies charged with protecting Joshua DeShaney would become a reality for the community at large, rather than for the rare individual who can marshall the funds and fortitude to file a law suit. The conservative Court and conservative theorists are probably right to insist that the re-ordering of priorities and redirecting of collective resources necessary to make these programs a reality must originate with legislative, not judicial action. They are wrong, though, to imply from that structural limit the non-existence of the background constitutional right.

The last obstacle I want to mention to modern implementation of interpretation of the equal protection clause is jurisprudential: it concerns the nature of the “law” discovered or created by courts, as contrasted with the nature of “law” created by legislative process. Here, a quick contrast with the formal equality model presently adopted by the current Supreme Court is helpful. To determine whether or not a statute violates the equal protection clause under the formal equality model, the Court must essentially decide whether the legislature is “treating like groups alike.” Whatever may be the shortcomings of this model, and I think there are many, it has one unassailable strength: the formal equality model of equal protection that requires rational categorization in legislation demands of the Court what might be called “adjudicative virtues.” The work required of the Courts under the formal equality model in deciding whether a rule treats like cases alike converges perfectly with the essential core of the judicial task. Deciding whether a precedent or a rule treats like cases alike is what courts do all the time, and,
moreover, it is what courts should do all the time. To do this well, to decide whether rules and decisions are rational in precisely this way, is the mark of a good judge. The rationality and the conception of formal justice on which it depends, and which is the central demand of the formal equality model, is itself an "adjudicative virtue": to treat like cases alike is the ideal of good judging toward which judges aspire. It is not at all surprising that judges gravitate toward an understanding of the equal protection clause that in turn rests on an understanding of equality that in turn requires of them the exercise of precisely this familiar virtue.

By contrast, the general concept of equal protection advanced by the abolitionists (as well as modern anti-subordinationists) requires the exercise not of this adjudicative virtue but of citizen and legislative virtues. To know what the equal protection clause requires us to protect, and what it requires us to protect against, requires a view, articulated or not, widely accepted or not, debated and debatable or not, of the content of liberty, of human nature, of natural rights, and, given our commitment to democracy, of human and citizen obligation. We need to know who we are and how we should distribute our collective resources: what we owe to whom. It ultimately demands a theory of distributive, not equal or formal, justice. These distributive and redistributive questions may not be questions that judges can or should answer. They are precisely the questions, however, we need to ask of ourselves and of our representatives.

If we are to make sense of the equal protection clause as understood by the abolitionists, and as understood by at least many of its framers, we need to do two things. We need to reacquaint ourselves with old ways of thinking about our human nature and the natural rights that follow. We need to suspend our post-modernist doubts that this is a sensible and fruitful way to think about political morality. Secondly, and to my mind of greater importance, if we are to take seriously the view of the equal protection clause intended by its framers and advocates, we need to quit asking what that clause requires of our courts, what it directs our judges to do or refrain from doing, and how much of its vision is compatible with judicial review — whether it does or does not accord with our
tr iptite common-sensical conception of individual rights, majority rule, and judicial role. We need to ask instead what the clause demands of us as legislators, as citizens, as lawmakers, and as members of a community. When we ask what we are required to do to guarantee to each of us the equal protection of the law, rather than what judges are required to do, we may see very different answers. The answers to that question urged by the abolitionists well over a century ago, to which we may have blinded ourselves through our peculiarly modern intellectual focus on equality and rights rather than equal protection and responsibility and our peculiarly historic insistence on judicial enforcement rather than the congressional enforcement called for by the Amendment itself, may be more progressive, more astute, more just, and more caring than either the colorblind or egalitarian charter of equality that we currently read into the clause, and which has stalemated debate and stalled our constitutional, as well as moral, progress.