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PUTTING "PROTECTION" BACK IN THE EQUAL PROTECTION CLAUSE: LESSONS FROM NINETEENTH CENTURY WOMEN'S RIGHTS ACTIVISTS' UNDERSTANDINGS OF EQUALITY

by LUCINDA M. FINLEY*

INTRODUCTION

In the summer of 1998, I had the invaluable opportunity to dialogue across the centuries with nineteenth century women's rights activists about the meaning of and vision for gender equality. I gathered in Seneca Falls, New York as one of a group of sixty distinguished women invited to celebrate and learn from the 150th anniversary of the 1848 Declaration of Sentiments adopted at the first U.S. Women's Rights Convention held in Seneca Falls. My 1998 group was convened as part of a series of events called Forum '98, organized by the Susan B. Anthony Center at the University of Rochester, and Hobart and William Smith Colleges. The delegates of Forum '98 were convened to "assess . . . women's accomplishments since 1848 and craft . . . an agenda to serve as a modern framework for continuing the work started by the women at the 1848 convention." Our charge included renewing the spirit of the landmark 1848 Declaration, reaffirming its principles, and drafting a Declaration of Sentiments for the twenty-first century to chart the course that was still necessary to continue progress towards achieving meaningful full equality for women.2

In order to accomplish this charge, we had to ponder and engage with the words and principles of the 1848 Declaration of Sentiments. We had to consider the 1848 Declaration not simply as an historical artifact, but as a document with a conception of human rights and equality, and an assessment of the causes of and prescriptions for eradicating gender inequality, that still provided relevant contemporary insights.

Before delving into our "modest" task of assessing the achievements of women's equal rights advocacy over the preceding 150 years and fashioning principles and an agenda for achieving full equality in the twenty-first century, we went as a group to visit the Women's Rights National Park in Seneca Falls. On the site of the Methodist meeting house where the 1848 delegates convened, the words

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2. Id. at 2, 8.
of the 1848 Declaration are now inscribed on a granite wall. When we arrived at this solemn and inspirational monument, we saw a tow-headed toddler tracing the words with her hand, as her parents told her that because women who lived long ago had fought for the changes called for in these words, she could now do anything and grow up to be anything she wanted. This moment crystallized a complex shock of recognition as we read the words with the perspective of 150 years. The struggles enunciated in the 1848 words felt contemporary and recognizable to us. We were awestruck by how radical the sentiments were for their times, and we were inspired both by the radicalism and by the knowledge of how much had been accomplished to address many of the grievances and blatant inequalities. But we were simultaneously sobered by the realization that we still shared many barriers to full equality for women with our nineteenth century sisters.

For example, while the Declaration’s call for women to be allowed to exercise their “inalienable right to the elective franchise” has been achieved, its complaint that men have compelled women “to submit to laws, in the formation of which she had no voice” still has contemporary resonance. Although women have the right to vote, too few women can afford to run for or achieve political office, especially on the federal level, so largely male legislatures continue to adopt policies that greatly impact women’s bodily and sexual autonomy, family relationships, and economic security with little regard for their gender equality implications. The photograph that recently ran in the nation’s newspapers of a row of grim faced white men surrounding the male president as he signed into law a ban on physicians performing a type of abortion, even when the doctor deemed the procedure necessary to protect a woman’s health, is one notable recent example.

While the 1848 grievance that the law condoned a husband’s power “to administer chastisement” to his wife is no longer true as a matter of official legal policy, the legal remedies and social support available to battered women remain inadequate, often constraining women to stay in violent relationships just as in the

3. Elizabeth Cady Stanton, one of the organizers of the 1848 Convention, writes in her autobiography of the derision and outrage heaped upon her and other signatories to the 1848 Declaration of Sentiments. She writes, “[s]o pronounced was the popular voice against us in the parlor, press and pulpit that most of the ladies who had attended the convention and signed the declaration, one by one, withdrew their names and influence and joined our persecutors.” ELIZABETH CADY STANTON, EIGHTY YEARS AND MORE: REMINISCENCES 1815-1897 149 (Northeastern Univ. Press paperback edition 1993)[hereinafter STANTON, EIGHTY YEARS].


5. The President was signing into law the Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531. Syndicated columnist Ellen Goodman wrote a widely reprinted op-ed article commenting on the photographs and decrying this bill signing as “an all male chorus line of legislators . . . making laws governing something they will never have: a womb . . . . This is simply a mistrust of women as moral decision makers.” Ellen Goodman, Out of the Picture on Abortion Ban, BOSTON GLOBE, Nov. 13, 2003, at A19.

6. The 1848 Declaration of Sentiments states: “In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming to all intents and purposes, her master – the law giving him power to deprive her of her liberty, and to administer chastisement.” THE BIRTH OF AMERICAN FEMINISM, supra note 4, at 86-87.
days of legally condoned domestic violence. While the divorce laws on their face no longer rest "upon the false supposition of the supremacy of man,"7 in their administration they still significantly economically and socially disadvantage many women, especially homemakers. The 1848 Declaration's complaint that the male has "monopolized nearly all the profitable employments,"8 though greatly reduced and no longer official legal policy, remains a problem manifested in an enduring wage gap between men and women and in the phenomenon known as "the glass ceiling." Women's position in many churches is still subordinate, and several major world faiths continue "claiming Apostolic authority for [women's] exclusion from the ministry and... from any public participation in the affairs of the Church."9 "Public sentiment" still sometimes prescribes a "different code of morals for men and women,"10 under which men who abandon or fail to support their offspring are ignored, while women who do so are jailed or scorned, and women who become pregnant out of wedlock are still fired from jobs or blamed for many societal ills, while the male role in the woman's condition is rendered invisible.

Yet another insight from our dialogue across the centuries was the recognition that male power holders in the nineteenth century legal system declared many of women's grievances to be beyond the purview of a formalistic notion of legal equality, and the same stunted vision of legal equality can still impede legislation or legal action to better achieve substantive gender equality.11 As I reflected on how the concept of formal legal equality so often seems to function as a barrier to achieving a more meaningful substantive social, economic, and political equality, I realized that we may have more to learn from the 1848 Seneca Falls convention participants than just an appreciation of shared struggles.

I. THE RELEVANCE OF THE NINETEENTH CENTURY MOVEMENT FOR WOMEN'S RIGHTS FOR CONTEMPORARY INTERPRETATIONS OF THE EQUAL PROTECTION CLAUSE

The women's rights activists of the nineteenth century were actively engaged

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7. The Declaration proclaims that men have "so framed the laws of divorce, as to what shall be the proper causes of divorce, and in cases of separation, to whom the guardianship of the children shall be given, as to be wholly regardless of the happiness of women -- the law, in all cases, going upon a false supposition of the supremacy of man, and giving all power into his hands." Id. at 87.

8. Id.

9. Id.

10. Id. The Declaration states that men have "created a false public sentiment by giving to the world a different code of morals for men and women, by which moral delinquencies which exclude women from society, are not only tolerated, but deemed of little account in man." Id.

11. For example, when Cady Stanton and other women's rights activists lobbied for marriage and divorce law reform, some male legislators and other influential male political actors denied that these laws were proper areas of concern for women's rights, since the laws applied equally to men and women. STANTON, EIGHTY YEARS, supra note 3, at 218-19. This formalistic reasoning is echoed in the Supreme Court's rationale, in the late twentieth century, for concluding that denial of benefits to pregnant women posed no issue of sex-based inequality under the Fourteenth Amendment, because the law applied equally to all non-pregnant women and men. Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974).
in the societal debates about the meaning and implications of principles of human rights, equal citizenship, and the federal government’s obligation to provide equal protection of human rights that played a crucial formative role in the wording, intent, and adoption of the Fourteenth Amendment. We can learn a great deal about the understood meanings of terms in the Fourteenth Amendment by contemplating the ways in which Elizabeth Cady Stanton, Susan B. Anthony, and other nineteenth century women’s rights activists framed issues of gender equality. They initially assumed that the Fourteenth Amendment, with its recognition in Section One of the “citizenship” of all persons born or naturalized in the United States, and with its edict that no state shall deny the “privileges and immunities” of citizenship, nor shall deny the “equal protection of the laws,” would apply to women and would form the basis for redressing many of the grievances about women’s inequality spelled out in the 1848 Declaration. Although the men in Congress who had been their abolitionist allies enraged Stanton and Anthony by adding the word “male” to Section two of the Fourteenth Amendment, and by repeatedly emphasizing during the congressional debates that the amendment would not require sex equality, the women’s rights activists believed that once it became understood that the constitutional guarantees of equality to all citizens did extend to women, the equal human rights vision of the amendment would usefully apply to help redress the particular reasons for women’s social and legal subordination. In other words, the problem that Stanton and other women’s rights activists had with the Fourteenth Amendment was not with the meaning of the terms “privileges and immunities of citizenship” and “equal protection of the laws”—they saw these concepts as sufficiently encompassing their vision of equal human rights for women. Their problem was with the failure to extend the principles embodied in these terms to women. Consequently, it is useful for understanding the Fourteenth Amendment, and for gaining an appreciation of how its contemporary meanings could be made more faithful to the broad human rights vision of its founders, to consider the experiences and understandings of its founding mothers as well as its founding fathers.

The “neglected stories” of the grievances of the nineteenth century women’s rights activists, as expressed in the 1848 Declaration of Sentiments and other documents and speeches, are just as relevant and important to enrich our understanding of the meaning and potential of the Fourteenth Amendment as the “neglected stories” of slaves and anti-slavery activists, which have been so eloquently recounted and applied to contemporary Fourteenth Amendment jurisprudence by Peggy Cooper Davis. If we take seriously the historical lessons

13. This section addressed how to determine the number of representatives to Congress from each state, and in order to ensure that the secessionist states would comply with Reconstruction and extend the franchise to black men, provided that a state’s representation would be reduced if the right to vote was “denied to any of the male inhabitants of such state” over the age of 21. U.S. CONST. amend. XIV, § 2.
15. See PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 5 (1997) (arguing that the country’s commitment to family freedom is motivated by the political discourse
of the gender equality vision of the nineteenth century founding mothers, they teach us that the formalistic "equal treatment" model of gender equality that pervades contemporary Equal Protection Clause jurisprudence is not only woefully insufficient to appreciate and redress causes of gender inequality, but is also historically impoverished.

I am not making a call for or endorsement of the method of constitutional interpretation known as originalism—at least not the stultified form of originalism espoused by the majority in the reviled decision in Dred Scott v. Sanford, which advocated adhering to the practices of the slaveholding founding fathers rather than the meaning of their expressed ideals and principles. After all, the clearly expressed intent of the Reconstruction Congress that women should be excluded from the Fourteenth Amendment's guarantees stands as a forceful repudiation of a form of originalism that looks only to expressed intentions rather than to the ideals and principles embodied in the text. In asserting that nineteenth century women's rights activists' understandings of the meaning of "citizenship," "privileges and immunities," and "equal protection," should be relevant to contemporary interpretation of these terms used in the Fourteenth Amendment, I am calling for a method of interpretation that might more appropriately be called "historically

and stories of enslaved families that have enriched family rights jurisprudence); Peggy Cooper Davis, Neglected Stories and the Sweet Mystery of Liberty, 13 TEMP. POL. & CIV. RTS. L. REV. 769, 770-76 (2004) (discussing the neglected stories of slavery and its relationship to the current debate surrounding homosexual marriage).


17. See Christopher L. Eisgruber, The Story of Dred Scott: Originalism's Forgotten Past, in Constitutional Law Stories 151 (Michael Dorf, ed., 2004) (arguing that Justice "Taney maintained that the Framers' words should be measured by the Framers' actions, rather than by their aspirations" and "refused to assume that the Framers wanted their constitutional principles to transcend the shortcomings of their own conduct.") Id. at 162-63. On the contemporary Court, Justice Scalia's version of originalism comes closest to this debased Dred Scott type of originalism. For example, in sex discrimination and family rights cases, he has argued that a history of discriminatory traditions and practices should prevail over principles. See DAVIS, NEGLECTED STORIES, supra note 15, at 164, 215-17 (discussing Michael H. v. Gerald D., 463 U.S. 248 (1983)). See also U.S. v. Va., 518 U.S. 515, 566 (1996) (Scalia, J., dissenting) (arguing that the "long tradition" of male military colleges should put such institutions beyond the reach of the Equal Protection Clause, and contending that by applying more contemporary understandings of gender equality the majority has engaged in "not law—but politics smuggled into law.").

18. See generally Farnsworth, Women Under Reconstruction, supra note 14 (presenting evidence from legislative history of the Reconstruction Amendments that Framers intended to exclude women, and noting the dilemma this poses for adherents of originalism). Susan B. Anthony, Victoria Woodhull, and Virginia Minor, nineteenth century women's suffrage activists, tried to persuade courts that because women were "citizens" and thus included in Section One of the Fourteenth Amendment's invocation of the "privileges and immunities" of all citizens, and that voting should be regarded as a privilege and immunity of citizenship, the Fourteenth Amendment prohibited barring women from voting. They failed in this argument, because the courts looked to the practice of barring women from voting, and to the expressed intent of the Fourteenth Amendment male framers that it would not require female suffrage, to hold that voting was not a privilege and immunity of citizenship. See Minor v. Happersett, 88 U.S. 162, 176-77 (1874) (noting that when the Constitution was ratified by nine states in 1788 and by the thirteen original states in 1790, the right of suffrage was specifically granted to men only); Adam Winkler, A Revolution Too Soon: Woman Suffragists and the "Living Constitution," 76 N.Y.U. L. REV. 1456, 1473 (2001) (discussing the suffragists abandonment of the original intent argument because women's right to vote was clearly purposefully omitted from the Fourteenth Amendment).
enlightened applications of principles informing the text.” As Adam Winkler has argued in examining the efforts of nineteenth century women’s suffrage activists to use the Fourteenth Amendment, these women were the first to adopt a method of constitutional interpretation that became the prevailing interpretive method in the latter part of the twentieth century—a method he dubs “living constitutionalism.”

They criticized the Dred Scott form of originalism that deferred to traditional discriminatory practices even when those practices blatantly conflicted with foundational principles, and argued that textual terms should be interpreted in accordance with their underlying principles and ideals, informed by changing societal needs and contemporary understandings of how those principles now encompassed groups previously discriminated against. Now that constitutional jurisprudence does regard the Fourteenth Amendment’s guarantees as extending to women, our understanding of what constitutes a gender-based denial of equal protection of the laws should be informed by the understandings of those advocating for an end to gender subordination at the time the Fourteenth Amendment was adopted.

In my “historically enlightened textualism” based on the neglected stories of the nineteenth century women’s rights activists, I am going to focus on the “Equal Protection” Clause of the Fourteenth Amendment. Others have engaged in compelling examinations of what history can teach us about resuscitating the “Citizenship” Clause or the “Privileges and Immunities” Clause in ways that can be helpful to the quest for gender equality, or about the historical soundness of grounding protection of marriage, family, and procreative rights, which are so important for women’s equality, primarily in the “liberty” guarantee of the Due Process Clause.

The “Privileges and Immunities” Clause is not the only part of the text of the Fourteenth Amendment that has been interpreted into oblivion: the concept of “protection” embodied in the phrase “equal protection of the laws” is ignored in contemporary Fourteenth Amendment jurisprudence. According to modern

20. Id. at 1479-83.
22. DAVIS, NEGLECTED STORIES, supra note 15, passim (analyzing the evidence that protective marital, family, and procreative liberty of the newly freed slaves was a central purpose of the Fourteenth Amendment).
23. As Robin West has argued, both the formal “equal treatment” interpretation and the “substantive
Supreme Court jurisprudence, one would think the text set forth an “equal treatment” clause rather than an “Equal Protection” Clause. Judging from the gloss the Court has read into the text in many race and gender equality cases, one would think this clause of the Fourteenth Amendment says that: No state, through direct action, and intentionally motivated by class-based discriminatory animus, may deny facially equal treatment of the law to any person, nor may a state enact laws or regulations that create facially different classifications for similarly situated persons without compelling justification if the classification is based on race or ethnicity or alienage, or without significantly important justification if the classification is based on gender, or without a legitimate rational basis if the classification is based on some other ground, such as age, economic or social class, mental or physical disability.

The nineteenth century women’s rights activists’ identification of the sources of gender subordination, and their understanding of the multi-faceted ways the state denied women the equal protection of the laws, can help us put the concept of equality interpretations that dominate contemporary Fourteenth Amendment jurisprudence and scholarship.

share one feature, and it what they share that 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.


24. See, e.g. Washington v. Davis, 426 U.S. 229, 245-47 (1976) (finding that a law that has a racially disproportionate impact is not therefore automatically unconstitutional regardless of whether it reflects a racially discriminatory purpose); Feeney v. Pers. Adm’r of Mass., 445 U.S. 901, 901 (1980) (finding that the Fourteenth Amendment does not prohibit facially neutral state policies and laws that have a disparate impact on blacks or women).


26. See, e.g., Nyquist v. Mauclet, 432 U.S. 1, 11-12 (1977) (finding that state classification determined by alienage are subject to strict scrutiny judicial analysis); Graham v. Richardson, 403 U.S. 365, 381-82 (1971) (finding that state-imposed residency requirements were subject to strict scrutiny judicial analysis).

27. See, e.g., U.S. v. Va., 518 U.S. 515, 555-56 (1997) (finding that Virginia’s justifications for excluding women at military college do not satisfy the heightened burden on the state to justify laws that classify based on gender); Craig v. Boren, 429 U.S. 190, 197-98 (1976) (applying the rule that gender-based classifications must serve important governmental objectives and be substantially related to achieving those objectives to an Oklahoma statute that prohibited the sale of alcohol to males under twenty-one and women under eighteen).

28. See, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000) (holding that the Fourteenth Amendment does not require states to make special accommodations for the disabled as long as actions taken by the state towards the disabled are rational).

29. See, e.g., Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 347 (2001) (finding that the Fourteenth Amendment requires states to provide a rational basis for enacting statutes that classify based on age); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47 (1985) (finding that state classifications based on mental retardation violate the Equal Protection Clause if there exists no rational basis to impose the classification).
“protection” back in the “Equal Protection” Clause, and thus interpret the Fourteenth Amendment in ways more faithful to its history and ideals than the laughably convoluted and qualified “equal treatment” doctrine that pervades contemporary jurisprudence.

II. THE NINETEENTH CENTURY WOMEN’S RIGHTS ACTIVISTS’ CONCEPT OF THE HUMAN RIGHTS OF CITIZENS AND THE SOURCES OF WOMEN’S SUBORDINATION

The delegates at the 1848 women’s rights convention met two decades before the adoption of the Fourteenth Amendment to the Constitution, and more than a century before U.S. law became embroiled in debates about whether legal equality meant only eradicating formal legal race-or gender-based classifications so as to extend formally similar legal treatment, or whether it meant eliminating facially neutral legal structures that had the effect of perpetuating subordination. They also met long before “feminism” was a political or philosophical term, and thus were unconstrained by later debates that polarized feminist activists and legal scholars about whether equality for women meant formal legal “equal treatment,” or whether such a standard was flawed as inextricably linked to a male norm such that the law needed to take women’s differences or particular needs into account. They felt no need to choose sides in the debate over whether “difference” or “dominance” was the root of women’s legal and social inequality.

What they were rooted in, and informed by, was the prevailing Lockean republican liberal theory of their times, and in particular the abolition movement’s understandings of the meaning of the natural and inalienable rights of humans and the concomitant principle of substantive equal protection of the laws. The abolition movement sought to hold the republic to its ideals, as expressed in the Declaration of Independence, that all men were created equal and entitled to equal and full enjoyment of natural rights. Abolitionists frequently invoked the Declaration, with its emphasis on the fundamental humanity and rights of all people, and used it as the source for potent criticisms of the practices that rendered some humans chattel outside the protection of the law, deprived of the fundamental rights of bodily security, self-determination, familial association, free thought and education. Abolitionists who became leading members of the Reconstruction Congress and key drafters of the Fourteenth Amendment, including Charles

32. See JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (New York: Collier Books 1965) (documenting the influential roles that the natural rights ideology of the abolitionist movement had on the drafters and proponents of the post-Civil War amendments). This landmark and influential book, originally issued as THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (Univ. Calif. Press 1951), is well worth frequent study by anyone who professes an interest in the history of the Fourteenth Amendment.
33. See DAVIS, NEGLECTED STORIES, supra note 15, at 224-25 (discussing family values—as they pertain to the effects of slavery on the marital and family ties of African-American Families—and the protection that the Fourteenth Amendment eventually provided to these families).
Sumner, John Bingham, and Thaddeus Stevens, characterized their task as fulfilling the letter of the Declaration's "self-evident truths" and "regenerating the Constitution and laws of this country... according to the principles of the Declaration of Independence." As Jacobus tenBroek explains in his landmark history of the original meaning of the Fourteenth Amendment, the abolitionists regarded the Declaration, more so than the Constitution, as the crucial foundational document for the American republic, one which brought the concept of a natural and inalienable individual right to life, liberty, and the pursuit of happiness into the constitutional law of the nation.

Many of the women who became key architects of the nineteenth century women's movement, including Sarah and Angelina Grimke, Elizabeth Cady Stanton, Susan B. Anthony, and Lucretia Mott, first were active in the abolition movement. The rhetoric of abolition, with its emphasis on natural human rights, provoked the realization in these activist women that the principles of equal enjoyment of inalienable rights applied fully to women. As Peggy Cooper Davis notes, the notion of "a human entitlement to basic, natural rights was the ideological link between the antislavery struggle and the struggle to extend civil rights... to women. American women embraced this underlying human rights commitment in abolitionism and then refashioned it to do the work of women's liberation."

The innovation of the women's rights activists was to take the prevailing concepts of human rights, privileges and immunities of citizens, and full and equal protection of the law, which abolitionists endorsed, and apply them to the situation of women. They drew explicit comparisons between women's status and slaves' status, and made arguments about their own fundamental humanity and entitlement to rights and equality. In 1860, Elizabeth Cady Stanton addressed the annual meeting of the American Anti-Slavery Society and spoke eloquently of the connections between the sexual and physical degradation of slaves and women, their confinement to separate spheres and their subjugation to the whims and violations of their white male masters. The women abolitionist activists wrote letters and pamphlets in which they drew explicit comparisons between the legal regime for women founded in Blackstone's Commentaries, and the laws enacted by

34. Id. at 225.
35. TENBROEK, supra note 32, at 62, n.20, 96, 102, 210-11.
36. ELLEN DuBois, ed., THE ELIZABETH Cady STANTON/SUSAN B. ANTHONY READER 8-9, 18-22 (Northeastern Univ. Press rev. ed. 1992)[hereinafter STANTON/ANTHONY READER]. Male abolitionists criticized women, including the Grimke sisters, for publicly speaking and becoming too active in the abolition movement, and tried to exclude them or limit their role to auxiliary work. This prompted the women antislavery activists to think more explicitly about the connections between their subordinated status and that of the slaves, and to start advocating for women's equality. Id. at 8-9.
37. DAVIS, NEGLECTED STORIES, supra note 15, at 27.
slaveholders to govern and subjugate slaves.40

Just as the abolition movement looked to the Declaration of Independence and its articulation of the nation’s founding republican ideology as the basis for its understanding of human rights, for the need to include slaves within the principles of equality, and the obligations of government to fully and equally protect the human rights of all citizens, so too did the women’s rights proponents who signed the Declaration of Sentiments. While today we might look at the 1848 document’s explicit paraphrasing of the Declaration of Independence as merely a clever rhetorical device for highlighting the hypocrisy of male lawmakers, to thedrafters and signatories of the 1848 Declaration it was meant to signify their motivating philosophy of human rights and equality and to place their demands for women’s equality firmly within the familiar founding principles of the nation.

The drafters and signatories of the 1848 Declaration, like the abolitionists, were deeply committed to the principle that all human beings had “inalienable rights,” and that equality was both part of these natural rights and a necessary condition to enjoying them. As an abolitionist member of the Reconstruction Congress explained, in advocating for the adoption of the equal protection clause, its natural rights foundation was implicit:

Is it not the undeniable right of every subject of the government to receive “equal protection of the laws” with every other subject? How can he have and enjoy equal rights of “life, liberty, and the pursuit of happiness” without “equal protection of the laws”? How indeed? Or without the protection of the laws? The Declaration of Independence, natural rights, protection, equal protection—all this is tied together in one neat little package in the equal protection clause of section 1 of the Fourteenth Amendment.41

The conception of equality and the means for achieving it embodied in the Declaration of Sentiments cannot be isolated from its underlying vision of human rights and the obligation of government to protect those rights.42 The rights of men, which the 1848 Declaration claimed for women as well, included more than just the phrase “the right to life, liberty and the pursuit of happiness.”43 The motivating conception of natural rights held by both the abolitionists and the women’s rights activists included those rights that would actualize life, liberty and the pursuit of happiness.44 They included the “inalienable right to one’s own body” and personality—ownership of one’s self, one’s labor and property, and the right of self-determination, including the right not to be degraded or rendered dependent in a way that left one subject to abuses of private as well as public power.45

41. TENBROEK, supra note 32, at 210.
42. Id.
43. Id.
44. Id.
45. Id. at 103.
family was the locus of subordination of women, just as the master-slave relationship and its denial of family rights was the source of subordinating dependency for blacks. From this flowed the right not to be reduced to chattel status, the right to contract, to hold and dispose of property, to not have one's labor coerced, to pursue the education that would enable one to be a free thinker and to pursue whatever professional pursuits one's free mind wished, to worship freely and to learn and preach the gospel. It also included the right to personal security, and to be free from private violence without legal recourse as well as from state imposed violence. It included the right to form family relationships without state interference, as well as the right not to have the state disrupt or tear apart one's family against one's desires and will.

Equality in the view of the abolitionists and the women's rights activists was not merely a concept of comparative similarity of legal treatment, but was a more substantive notion of the right to have government provide equal protection for each person's ability to exercise their rights. In order to have equal enjoyment of these rights, given that the fundamental purpose of government was to secure and protect inalienable human rights, the government had to do more than avoid racial or gender classification or extend formal equal treatment of existing laws that might leave conditions of social degradation through private action unchecked. Indeed, providing effective federal remedies for victims of the violence of the Ku Klux Klan, which the states tolerated, encouraged, or ignored, was one of the central concerns of the drafters of the Fourteenth Amendment. As Jacobus tenBroek explains the fundamental concept of equal protection:

\[\text{[t]he proposition was nothing more nor less than this: because every person living in a social state needs, desires, and has a right to the protection of the law – for which governments are instituted among men, and to which human beings are entitled by their humanity, slaves and free negroes [and women] must receive legal protection in their fundamental rights along with all other human beings . . . . The equal protection of the laws is violated fully as much, perhaps even more, by private invasions made possible through failure of government to act as by discriminatory laws and officials . . . . The fact that such protection is supplied to others makes the failure to supply it to the victims an abrogation of the standard of equality in the provision of legal protection.}\]

The concept of equal protection would be offended both by discriminatory state action, and by state inaction "that fails to supply protection against private

47. TENBROEK, supra note 32, at 97-98.
48. Id. at 96.
49. Id. at 162-63. See also West, supra note 23, at 131-32 (describing the impact of KKK activity on the creation of the Fourteenth Amendment).
50. TENBROEK, supra note 32, at 97-98.
inroads." It included both the notion of "full" enjoyment of rights, and that of "equal" enjoyment:

So "full enjoyment of the right of person and property" is the same as "equal enjoyment" of those rights; and the "full enjoyment" of such rights depends on first, the absence of discriminatory state legislative or other official action, and second, the presence of adequate affirmative protection to prevent or cope with individual invasions. This, then, is equal protection.

As Robin West has noted, the historical evidence that the equal protection clause was meant to obligate the federal government to protect people against private violence, especially when the states failed to do so, is extensive and uncontroversial. She concludes that among historians, the application of the equal protection clause to reach private violence is an uncontested meaning.

Moreover, the concept of equal protection of human rights was both comparative and an absolute individual right. Based on the abolitionist understanding of rights and equality that was shared by the women's rights delegates and signatories of the 1848 delegation and later by the drafters of the Fourteenth Amendment, to say that the rich and the poor, black and white, men and women have equal rights to protection is "not saying that the poor man would have no complaint if neither he nor the rich man received protection." And, by modern extension, if women by virtue of their social situation and differential responsibilities or vulnerabilities need forms of protection for rights—such as the right to bodily self-determination, or the right to be free of violence within the home—that men do not need, it would be a violation of the equal protection of the laws to deny women the affirmative protection for their right simply because the form of protection did not pertain to men.

We see these conceptions reflected throughout the Resolutions and the Declaration of Sentiments adopted by the delegates to the 1848 women's rights convention, starting at the outset by explicitly invoking the language and principles of the Declaration of Independence, with the crucial addition of the words "and women":

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed.

51. Id. at 179.
52. Id.
53. West, supra note 23, at 131-32.
54. Id. at 132.
55. Id. at 176.
56. THE BIRTH OF AMERICAN FEMINISM, supra note 4, at 85-89.
The accompanying Resolutions also passed at the convention state:

Whereas, the great precept of nature is conceded to be "that man shall pursue his own true happiness." Blackstone, in his commentaries, remarks, that this law of nature being coeval with mankind . . . is of course superior in obligation to any other . . . . No human laws are of any validity if contrary to this . . . . Resolved, that such laws as conflict, in any way, with the true and substantial happiness of woman, are contrary to the great precept of nature and of no validity. Resolved, that all laws which prevent woman from occupying such a station in society as her conscience shall dictate, or which place her in a position inferior to that of man, are contrary to the great precept of nature, and therefore of no force or authority. Resolved, that woman is man's equal . . . and the highest good of the race demands that she shall be recognized as such.57

The Declaration then goes on to list several specific examples of men's and the law's usurpations and injuries towards women. The listed grievances are not only about laws that overtly exclude on the basis of gender, but also encompass nongovernmental actions within the private realms of family, church, employment, and school. The Declaration of Sentiments recognizes that women were deprived of their human rights and equality of economic, political and civil rights by operation of law, by entrenched institutional structures, by social practice, and by private, familial violence without effective remedy or legal protection. The list includes: her exclusion from the elective franchise; her consequent lack of voice in the formation of public laws and policies; her "civilly dead" chattel status upon marriage and the legal sanctioning of "chastisement," no matter how violent and harmful, by the husband; the laws that deprived her of rights to her property and wages; divorce laws drawn only from the perspective and for the benefit of men; women's exclusion from higher education and the "most honorable" and remunerative professions, including the teaching of law, medicine, and theology; women's official subordination within the Church; the application of moral double standards to women; and the overarching undermining of women's self-confidence and self-respect that could lead women to accept "a dependent and abject life."58

Thus, the signatories of the 1848 Declaration understood the falseness of the public/private dichotomy long before contemporary feminist theorists deconstructed it. Through their lived experience and political philosophy they understood that the locus of domination, degradation, and oppression can just as often be private realms, where the domination operated not by explicit command of the public realm of law, but because of the failure of the laws and government action to provide recourse and protection against unbridled private usurpations of women's fundamental human rights. In calling for change in women's condition, the Declaration does not single out only "unjust laws" that treat women differently from men, but it goes further by including "social and religious degradation" as among the conditions that must be eliminated. It then "insist[s] that [women] have

57. Id. at 82.
58. Id. at 86-88.
immediate admission to all the rights and privileges which belong to them as citizens of the United States." Note the expansiveness of this call; they do more than insist on all the rights and privileges that men currently have. Obviously, the signatories wanted that, but they also wanted full protection for women’s human rights.

While intentionally invoking notions of citizenship, human rights, and equal protection of rights that were familiar from the Declaration of Independence and frequently invoked by the abolitionist framers of the Fourteenth Amendment, the women’s rights Declaration was also a radical challenge to current understandings about the reach or inclusiveness of these principles to women and the proper social and political roles for women. Women’s exclusion from the vote, from public affairs, and from the full rights of citizenship was justified, as John Adams wrote, “because their delicacy renders them unfit for practice and experience in the great businesses of life, and the hardy enterprises of war, as well as the arduous affairs of state. Besides, their attention is so much engaged with the necessary nurture of their children, that nature has made them fittest for domestic cares.” During the Congressional debates on the Fourteenth Amendment, representatives similarly argued that women did not need the vote because of their family roles, and because their husbands would take their interests into account when casting their ballots. Blackstone’s Commentaries, the most influential legal text of the late eighteenth and early nineteenth centuries, justified women’s exclusion from legal protection and the rights of citizenship because of the rule of coverture, the merging of the wife into the husband, thus eradicating any separate legal identity for the woman. Interestingly, the most widely used American edition of Blackstone in the early nineteenth century, the Tucker edition of 1803, had footnote commentary by Edward Christian that scathingly criticized the rules of coverture for their profound lack of “respect and favour to the female sex.” Many of Christian’s criticisms were picked up and cited by the Grimkes and other abolitionist/women’s rights activists, and are echoed in the Declaration of Sentiments: the taxation of women without representation; married women’s deprivation of their property and inheritance rights; legal sanctioning of a husband’s violence against his wife, even murder.

By directly challenging the prevailing notion that men were naturally superior to women, and claiming for women full humanity and entitlement as man’s equal to all the human rights of citizenship, the Declaration of Sentiments challenged society and the law to live up to its own professed ideals and foundational principles. Thus, the Declaration demands elimination of overt gender classifications in law, or formal equal treatment with men, and also recognizes that women may need unique recognition and protection to enjoy full human rights,
such as particular consideration of the “happiness of women” in the laws of
divorce, or protections fashioned to eliminate the “dependent and abject” lives so
many women were constrained to lead.

The Declaration and its resolutions also argue that society as a whole could be
improved by greater injection into the public realm of women’s values, experiences
and perspectives, Society—and thus its laws—had an obligation to protect work in
the supposedly private sphere of home and family, not only for societal well-being,
but also to eliminate women’s degradation and lack of self-confidence and self-
respect. Whereas the notions of “Republican motherhood” advanced by many
women and men in the early nineteenth century to laud women’s virtues and
advance their role as inculcators of civic values “articulated a social power based
on [women’s] special female qualities rather than on general human rights,”63 the
Declaration of Sentiments advances a public, political, and social role for women
based on both their special qualities and on their essential human equality to men,
resting securely in general human rights principles.

An examination of the activist work, legislative reform efforts and speeches
by Elizabeth Cady Stanton, Susan B. Anthony, and other nineteenth century
women’s rights proponents that followed the Seneca Falls convention further
highlights that their analysis of women’s inequality was based on far more than
overt disparate treatment embodied in gender classified laws. The women’s rights
conception of gender inequality, like the abolitionists’ understanding of racial
inequality, rested on social, economic and personal subordination. In their view,
the need to amend the Constitution or pass new laws to realize the human rights
principles of the Declaration of Independence and the Declaration of Sentiments
was about ending both the formal legal denial of political and civil rights to
women, such as the right to vote and sit on juries, or to contract and own property,
and the subordination that flowed from the disparate impact of seemingly neutral
laws, as well as from governmental tolerance of private oppressions and violence
against women within the home.

Stanton focused on women’s role within the family and the institution of
marriage and the laws governing divorce and child custody as central to women’s
subordination.64 She spoke as often about the marriage and divorce laws, rape law
and marital rape, domestic violence, sexual and reproductive autonomy, and the
regime of coverture, as she did about the right to vote and other civil rights. For
her, winning the right to vote was partly a means to an end. When male
abolitionists gained control of the Reconstruction Congress, they told the women’s
rights activists that they would have to postpone their demands for women’s
equality lest extending the franchise and family rights to women would jeopardize
the more urgent goal of securing equality for recently freed male slaves.65 Enraged

63. NANCY F. COTT, THE BONDS OF WOMENHOOD: “WOMEN’S SPHERE” IN NEW ENGLAND 1780-
64. Ellen DuBois, Introduction to STANTON, EIGHTY YEARS, supra note 3, at xvii–xviii.
65. See, e.g., Elizabeth Cady Stanton, “Gerrit Smith on Petitions,” STANTON/SUSAN B. ANTHONY
READER 119-124, supra note 36 (noting that an abolitionist refused to sign a petition extending
universal suffrage for men and women because to demand protection for women against her oppressors
would jeopardize the Black man’s chance of securing protection against his oppressors).
by this abandonment, Stanton and others realized that men would never willingly give up their privilege and power within the family and economic world by passing laws aimed at ending gender subordination. As Stanton noted in one of her post-Civil War public lectures, the source of "opposition to woman's equality in the state...[is that] men are not ready to recognize it in the home. This is the real danger apprehended in giving women the ballot, for as long as man makes, interprets, and executes the laws for himself, he holds the power under any system." If women could vote, she assumed that they would gain sufficient political voice and power to make the necessary legal changes, and that the increased public responsibility of the franchise would encourage women to challenge the confines of the family realm and become more politically aware and publicly active.

Stanton regarded the facially gender neutral laws prohibiting divorce that prevailed in many states as a particular source of women's subordination and inequality. She urged that divorce law reform, to permit marriages to be freely dissoluble at the behest of either party, be adopted as part of the platform of the women's rights convention, and she advocated for divorce law reform before the New York State legislature. She argued that a prohibition on divorce, or limiting divorce to certain reasons, put disproportionate burdens and inequalities on women. Social, economic and legal arrangements forced women to marry even if they held no love for a man, and then made wives economically dependent on their husbands, forced them to submit to their husbands' sexual will, and left them vulnerable to domestic violence without sufficient legal redress. In this sort of world, the inability to get out of a marriage often left women trapped in a life of degradation, physical harm, and complete economic dependence. Stanton cited examples where prominent men had abandoned their wives and children, and the state neither allowed the woman to divorce, nor bothered to enforce the man's support obligations. She regarded laws prohibiting divorce as a necessary step "in order to establish man's authority over woman." She analogized "marriage as an indissoluble tie" to "slavery for women." "There is no other human slavery that knows such depths of degradations as a wife chained to a man whom she neither loves nor respects, no other slavery so disastrous in its consequences on the race, or to individual respect, growth and development." She argued that the right to divorce was a human right, because "it is a sin against nature, the family, the state for a man or woman to live together in the marriage relation in continual

67. Ellen DuBois, Introduction to STANTON, EIGHTY YEARS, supra note 3, at xix; see also Siegel, She the People, supra note 46, at 987-993 (discussing how the movement for women's suffrage repudiated prevailing conception of women's relationship to the state as emanating from her family role).
68. STANTON, EIGHTY YEARS, supra note 3, at 215-25.
70. Id. at 133.
71. Id.
antagonism, indifference, disgust.”

Stanton’s advocacy of divorce law reform ran into a powerful “formal equality” critique. A male delegate to the 1860 New York National Woman’s Rights Convention moved to strike any provisions regarding divorce law from the platform, on the ground “that as marriage concerned man and woman alike, and that the laws bore equally on them, women had no special ground for complaint.” Horace Greeley, a noted editorialist and legal reformer, took the same position. Stanton wrote a powerful letter to the New York Tribune, arguing against this cramped formal legal equality view.

[A]n immense difference rests in the fact that man has made the laws cunningly and selfishly for his own purpose. From Coke down to Kent, who can cite one clause of the marriage contract where woman has the advantage? . . . . The contract of marriage is by no means equal . . . . In entering this compact, the man gives up nothing that he before possessed, he is a man still; while the legal existence of the woman is suspended during marriage, and, henceforth, she is known but in and through her husband. She is nameless, purseless, childless—though a woman, an heiress, and a mother . . . . If the contract be equal, whence come the terms “marital power,” “marital rights,” “obedience and restraint,” “dominion and control,” “power and protection,” etc.? The laws on divorce are quite as unequal as those on marriage; yea, far more so. The advantages seem to be all on one side and the penalties on the other. In the case of divorce, if the husband be not the guilty party, the wife goes out of the partnership penniless.

Stanton and Anthony also regarded the state’s inaction against domestic violence, and the awarding of custody over children to violent men, as causes of women’s subordination. In 1869, the nation became riveted by the trial of Daniel McFarland for shooting Albert Richardson, who wanted to marry McFarland’s estranged wife, Abby. Daniel McFarland had been an abusive husband, and while she was seeking a divorce, Abby sought the solace of Richardson, a family friend. After the divorce was finalized, and Richardson and Abby prepared to marry, McFarland shot him. At his murder trial, he argued that the divorce should be nullified because it was against his will, and that he was justified in shooting to protect his marital property. McFarland was acquitted of murder by reason of insanity, because another man’s interest in his wife was just provocation. Further, the court awarded him sole custody of his and Abby’s son, because of her indiscretions. Stanton and Anthony organized meetings and protests of women about this decision, and used it as the vehicle for criticizing the laws regarding marriage, divorce, custody, and the lack of legal redress for abused wives. They also criticized the legal system, because “neither women nor slaves can testify against their supposed masters,” and thus Abby’s tale of her abusive marriage was

72. Elizabeth Cady Stanton, Speech to the McFarland-Richardson Protest Meeting (May 1869), in STANTON/ANTHONY READER, supra note 36, at 129.
73. STANTON, EIGHTY YEARS, supra note 3, at 218-19.
74. Id. at 221-23.
kept out of court. Their critique of the law went far beyond notions of formal equality:

[H]ow comes it that a man who by our courts has been declared so insane that he may commit murder without being morally responsible to the state is let loose on society to repeat such depredations while the helpless victim of his hate and lust still lives and is liable at any moment to be sacrificed by his hand . . . . Although by the revised statutes of this state the mother is the equal guardian of her child today, yet in the late trial we have the anomaly of a criminal acquitted on ground of insanity, walking out of court with his child by his hand, its natural protector, while the mother of sound mind capable of supporting it, is denied the custody of its person.75

Stanton and Anthony’s critique of marriage and divorce was also connected to their concerns about domestic violence, marital rape, and forced pregnancy within marriage. They advocated sexual “sovereignty” for women as a natural right, and argued for a legal allocation of rights that entitled a woman’s wishes regarding sex and reproduction to outweigh her husband’s.76 That the law did not protect such sexual autonomy, was also a central reason for women’s subordination. Anthony’s concern about domestic violence led her to become active in the temperance movement, and to critique the disparate impact of seemingly gender neutral laws regarding alcohol. She also connected alcohol abuse, domestic violence, and the need for divorce, and advocated for laws that made drunkenness a grounds for divorce.77

While Anthony, Stanton, and other nineteenth century women’s rights activists achieved some of their goals, such as divorce law and marital property law reform, by articulating their understanding of natural rights and the multiple public and private causes of women’s subordination to legislators, they also attempted to use the recently enacted Fourteenth Amendment to achieve others, such as the right to vote. When they turned their attention to the Fourteenth Amendment, rather than making an argument that rested on the framers’ intent, which was to extend the vote only to black men and not to women,78 they invoked the principles that were understood at the time to be behind the words such as “privileges and immunities of citizenship,” and “equal protection.” They argued that the principles embodied in the meaning of these words, combined with evolving societal understandings about women’s rights, meant that women, as citizens, had the right to vote, since it was a quintessential privilege and immunity of citizenship. If states did not recognize this right, Congress had an affirmative obligation to do so, in order to

75. Elizabeth Cady Stanton, Speech to the McFarland-Richardson Protest Meeting, (May 1869), in STANTON/ANTHONY READER, supra note 36, at 127.
76. STANTON/ANTHONY READER, supra note 36, at 96-98.
77. Id. at 15-17, 42, 174.
78. See Farnsworth, supra note 14, at 1234 (stating the framers’ intent as establishing equality among the races and giving Blacks all the rights enjoyed by white people); Winkler, supra note 18, at 1473 (finding that the right to vote for women was “purposefully omitted from the guarantees of the Fourteenth Amendment”).
provide equal and full protection of the right.\textsuperscript{79} They were ultimately unsuccessful in convincing courts that voting was a privilege and immunity of national citizenship that automatically extended to women, since judges resorted to the expressed intent of legislators who drafted and voted on the amendment that it would not extend the vote to women.\textsuperscript{80}

While their specific argument about the right to vote was rebuffed on original intent grounds, their articulation of the natural rights ideology that informed the Privileges and Immunities Clause and the meaning of equal protection was never repudiated. Indeed, in these regards theirs was a shared understanding of principles with the abolitionist framers, differing only in the extent these principles would apply to particular women’s demands.

In 1872, acting on her conviction that women as citizens had the constitutional right to vote, Susan B. Anthony went to her local Rochester, New York Board of Registry, persuaded the voting inspector that as a citizen she did have the right to vote, and registered to vote. She and several other women then went to the polls on Election Day and cast their ballots.\textsuperscript{81} The federal government charged her with the crime of fraudulent voting under an 1870 statute enacted to prevent southern opponents of black rights from diluting the black vote by casting multiple ballots.\textsuperscript{82} To muster public support for her position in the hope of influencing jurors at her trial, Anthony traveled around the Rochester area giving public speeches articulating her understanding of the Fourteenth Amendment. As historian Ellen DuBois notes in her introductory commentary to this speech, “[i]nnalienable natural rights, irrespective of sex, was Anthony’s major theme, and the dominant political ideology of the period.”\textsuperscript{83} Going well beyond the right to vote, Anthony encapsulated many years of thought by her and Stanton, arguing that the laws and conditions governing marriage made it a condition of involuntary servitude for many women. She noted that the first clause of the Fourteenth Amendment applied to all “persons,” thus undoubtedly including women, while the second clause, containing the principles of privileges and immunities, due process, and equal protection, meant that all legal forms of discrimination against women were now null and void.\textsuperscript{84} She also argued that laws and practices that condoned or excused domestic violence, deprived women of the custody of their children, rendered women destitute upon the end of a marriage, did not give women rights in their wages, did not permit them to sue, be sued, or to testify, all violated women’s right to equal protection of the laws.\textsuperscript{85} In articulating her constitutional understanding, Anthony made it clear that the Fourteenth Amendment established both a

\textsuperscript{79} See Winkler, \textit{supra} note 18, at 1482-87, 1499-1501 (describing the movement’s new argument in the 1870s that the Constitution had evolved and required women’s suffrage).

\textsuperscript{80} \textit{Id.} See Minor v. Hapersett, 88 U.S. 162, 176 (1874) (noting that women were excluded from suffrage in nearly all the States by the express provision of their constitutions and laws and that if suffrage was intended to be included within its obligations, language better adapted to express that intent would most certainly have been employed).

\textsuperscript{81} Winkler, \textit{supra} note 18, at 1506.

\textsuperscript{82} \textit{Id.} at 1506-07.

\textsuperscript{83} \textit{STANTON/ANTHONY READER, supra} note 36, at 152.

\textsuperscript{84} \textit{Id.} at 158.

\textsuperscript{85} \textit{Id.} at 153-65.
prohibition of class-based discrimination, and an affirmative obligation of
government to protect the full and equal enjoyment of natural rights:

There is and can be but one safe principle of government—equal rights to
all. Discrimination against any class on account of color, race, nativity,
sex, property, culture, can but embitter and disaffect that class, and
thereby endanger the safety of the whole people. Clearly, then, the
national government must not only define the rights of citizens, but must
stretch out its powerful hand and protect them in every State in this
Union.

....[T]he one grand principle settled by the war and the reconstruction
legislation, is the supremacy of the national government to protect the
citizens of the United States in their right to freedom and the elective
franchise....

We ask the judges to render unprejudiced opinions of the law, and
wherever there is room for doubt to give the benefit to the side of liberty
and equal rights for women, remembering that, as [Senator] Sumner says,
“The true rule of interpretation under our National Constitution,
especially since its amendments, is that anything for human rights is
constitutional, everything against human rights unconstitutional.”

By quoting Charles Sumner, a leading member of the Reconstruction
Congress and architect of the post-Civil War amendments, Anthony was
demonstrating that women’s understanding of the principles of the newly amended
Constitution was the same as the abolitionist thought that influenced the drafters.
By arguing that women were citizens entitled both to be free from discriminatory
classifications in law and to affirmative protection by Congress of the full and
equal enjoyment of human rights, Anthony was not articulating a radical new
vision of the Fourteenth Amendment. She was simply arguing that the principles
applied directly to women’s legal and social situation just as much as they did to
the newly emancipated former slaves.

The nineteenth century women’s rights activists, in their analysis of the
sources of women’s subordinate inequality, and their efforts to demonstrate how
the principles of the Fourteenth Amendment applied to women, teach us many
things about the contemporaneous understandings of the amendment’s key terms
and principles. Like the abolitionist framers, they understood “privileges and
immunities of citizenship” to refer to inalienable natural rights. Protection of all
persons, male and female, in the full and equal enjoyment of their human rights
was the fundamental concept of the equal protection clause. The requirement of
equal protection meant that Congress could overturn facially discriminatory state
laws, but it also meant much more. It imposed an affirmative duty on government
to protect rights, whether the encroachment derived from the unequal impact of
facially neutral laws, or from the state’s tolerance of or failure to provide adequate
remedy against private abuses, violence, and harm. The amendment did not
establish any realms that were quintessentially matters for the state, such as family,

86. *Id.* at 161, 163-64 (emphasis in original).
while placing others within federal power. Since the family and state laws affecting it were an important locus for the exercise and realization of fundamental human rights, and for the denial of them, the federal government had an affirmative obligation to protect women's full and equal enjoyment of family and personal rights, and thus could undo state legislation, or enact positive legislation touching on matters such as marriage, divorce, childrearing, bodily security and sexual autonomy. Thus, facially neutral state laws, such as a prohibition on or limitations of the right to divorce, were a violation of equal protection. Similarly, other facially neutral laws such as spousal tort immunity and marital rape laws, which left victims of domestic violence without a damages or criminal remedy, also violated equal protection. Interpretations of facially neutral laws such as those defining just provocation and insanity, or awarding custody to the morally more fit parent, that had the effect of condoning male violence within the family, as in the McFarland case, were also violations of equal protection. Laws that failed to recognize or protect a woman's right to refuse a husband's sexual advances or to control her fertility also violated equal protection. Governmental inaction or inattention to persistent problems of private violence inflicted on women, such as violence within the family, also violated equal protection. While some of these particular applications to women's situation, such as Stanton and Anthony's analysis of marriage as a condition of servitude, were controversial at the time, the principle of an affirmative governmental obligation to protect citizens in the enjoyment of familial rights and from private violence were well accepted and widely understood as core principles of equal protection.

When we examine contemporary Supreme Court gender equality jurisprudence in light of this historical understanding of the meaning of equal protection as applied to women, it is apparent that the Court has strayed far from the history and meaning of the principles embodied in the text. When the views of the abolitionist framers of the Fourteenth Amendment and the women's rights activists who extended their anti-slavery human rights principles to women are taken into account, the decision in *United States v. Morrison*, holding that Congress lacked power under Section five of the Fourteenth Amendment to enact the civil rights remedy part of the Violence Against Women Act, is about as wrong, historically and textually, as a decision can get. Another decision dealing with intrafamily violence that is equally wrong from the perspective of the historical meaning of equal protection is *DeShaney v. Winnebago County Department of Social Services*, which held that the state had no affirmative obligation to protect a child, who had been placed in his father's custody by the state court, and who was supposed to be monitored by the Department of Social Services, from violence by his father. Robin West, *Toward an Abolitionist Interpretation*, supra note 23, at 142. The plaintiff in this case, the child's surviving mother, based her

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87. See TENBROEK, supra note 32, at 97-98, 102-03, 177-79 (stating that Congress is authorized to supply protection to all men and the states have an affirmative duty not only to protect but also to not pass discriminatory legislation). See DAVIS, NEGLECTED STORIES, supra note 15, passim (analyzing the intention to protect the personal, family, sexual and procreative autonomy of the newly freed slaves). Davis points out that it was the unsuccessful opponents of the Fourteenth Amendment who argued that family rights should remain an exclusive matter for the states, beyond the scope of federal protection. *Id.* at 243.


90. Another decision dealing with intrafamily violence that is equally wrong from the perspective of the historical meaning of equal protection is *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), which held that the state had no affirmative obligation to protect a child, who had been placed in his father's custody by the state court, and who was supposed to be monitored by the Department of Social Services, from violence by his father. Robin West, *Toward an Abolitionist Interpretation*, supra note 23, at 142. The plaintiff in this case, the child's surviving mother, based her
Fourteenth Amendment does not reach private acts of violence, so that Congress' voluminous evidence of the failure of many states to provide effective remedies for violence against women was essentially irrelevant to the Fourteenth Amendment issue. Moreover, the Court exalted federalism concerns over gender equality by emphasizing that since legislating for the family sphere was traditionally reserved for the states, and was thus "truly local," there was no national federal interest in protecting this realm of life.

The record in Morrison reads like a textbook example of the denial of equal protection of the law, when the concept of "protection" is properly restored to the Fourteenth Amendment. The Court acknowledged that Congress passed the Violence Against Women Act based on a "voluminous record" demonstrating "that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions" "often result[ing] in insufficient investigation and prosecution of gender motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence." Yet the Court was dismissive of the contention that this amounted to a form of state sponsored gender discrimination that denied equal protection of the laws. Robert Post and Reva Siegel accuse the Court of failing to openly grapple with the evidence that systemic gender bias in state fora could leave a victim of violence without a remedy, and thus without equal protection of the law. They contend that "[t]o have faced this question openly would have been to acknowledge the civil rights remedy, not as a species of family or criminal law, but as an antidiscrimination statute with deep roots in the Court's own Section 1 jurisprudence." Even more importantly, to have faced the history of the Fourteenth Amendment openly, informed by the women's rights activists' understanding of how its terms and principles could apply to practices that subordinated women, would have led to an acknowledgement that VAWA had equally deep roots in the uncontested historical meaning of Section 1, in particular the concept of equal protection of the law.

As the abolitionist framers of the Fourteenth Amendment made clear, and the women's rights activists reiterated, the Equal Protection Clause was intended to allow Congress to provide for effective redress against private acts of violence when the states did not. Moreover, since women's role in the family, including argument on the Due Process clause, rather than on equal protection. The Court held that the Due Process clause imposed no affirmative obligations on government. While it may not have made a difference to the Court, which by this time was locked into its comparative equal treatment understanding of the Equal Protection Clause, and has rarely ruled based on the clause's true history, a state ignoring and failing to redress private violence, especially when it placed the child in the hands of the abuser and then overlooked evidence of the mounting damage, is about as clear an instance of a denial of any protection of the law, as well as equal protection, as one can find.

91. 529 U.S. at 621 (discussing U.S. v. Harris, 106 U.S. 629, 639 (1883)).
92. Id. at 619. See Robert C. Post and Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel, 110 Yale L.J. 441, 482, 524 (2000) (arguing that by classifying claims under the Violence Against Women Act as a matter of domestic relations, the Court weighed federalism over gender equality).
93. Morrison, 529 U.S. at 620.
94. Id. at 620-24.
95. Post & Siegel, supra note 92, at 524.
their unique susceptibility to violence within the home, was a central reason for women's inability to fully and equally enjoy their inalienable human rights, including the rights to self-determination and bodily security, the Equal Protection Clause was intended to upset the previous balance of federalism in this area and gave the federal government an affirmative obligation to intervene.

**CONCLUSION**

So why has contemporary sex equality jurisprudence strayed so far from the historical understanding of the meaning of equal protection that a decision like *Morrison* commanded not a single dissenting vote to its holding that Congress lacked power under Section five to provide a federal remedy against gender-motivated violence? One reason is that there has been a general erasure of the true abolitionist, anti-slavery history of the Fourteenth Amendment from Supreme Court jurisprudence, starting with the infamous *SlaughterHouse* and *Plessy v. Ferguson* cases. Similarly, the contemporaneous understandings of the nineteenth century women's rights activists have never previously been appreciated as a valid and valuable source for understanding the meaning of equal protection and its applicability to women. By the time the Supreme Court acknowledged, in the 1970's, that the Equal Protection Clause did apply to women, the Justices and the advocates drew on the racial classification cases emanating from the 1950s and 1960s civil rights movement, which had already enshrined the equal treatment principle. More fundamentally, another reason may be that even today, the conservative majority on the Court is no more ready to take the thinking of Stanton and Anthony to heart than were their abolitionist friends who drafted the Fourteenth Amendment. If we take seriously the true meaning of the obligation of government to provide equal protection, and fully apply that meaning to gender relations, the necessary socio-legal transformations of the supposedly private realm of domestic relations may be more than many are ready for. Elizabeth Cady Stanton was a radical visionary for her time, and the contemporary implications of her ringing words in the Declaration of Sentiments still radically challenge us today.

But, if we could truly dialogue across the centuries with Stanton, she would counsel us not to despair. She would remind us that many of the grievances in the Declaration have been alleviated, although not without much hard and long work. She would look at us with either indulgent or frustrated curiosity if we asked her to

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96. The dissenters focused on the Commerce Clause holding; see 529 U.S. at 668. Justice Breyer, in a separate dissent, indicated that there was no need to have reached the Fourteenth Amendment issue, and then argued that the Court's reasoning was flawed. *Id.* at 668. Thus, perhaps the dissenters might well rule differently if they felt it necessary to squarely face the question of whether Congress could legislate against state failure to protect against private violence.

“choose sides” in contemporary feminist equality debates. Equal treatment or special treatment; not being treated the same, or not having ones differences recognized and supported? Formal equality that seeks only to eliminate overt gender-based classifications, or anti-subordination conceptions? She might answer “all of the above.” But then she would go on to explain that these are the wrong questions, that these are not polarities, but strategic policy choices in response to particular forms that a deprivation of women’s equal rights may take. And then she would firmly remind us that one cannot diagnose a problem and propose a solution for achieving full equality for women without reference to an underlying vision of human rights and recognition of the obligation of government to secure and protect those rights both equally and fully. If a practice, whether a public act of state officials or a legal restriction or classification, or private actions such as violence, or public indifference to private oppressions, impairs women’s ability to enjoy all their human rights both equally and fully, then the practice presents an equality problem. She would remind us that achieving our vision of both equal and full human rights for women will not come easily, without opposition, derision, and constant hard work. We must not look simplistically only to what can be achieved through the limited framework of litigation (although we must not give up on trying to persuade the Court to revive the true historical meaning of the Equal Protection Clause). As she declared in the Declaration of Sentiments, we must “use every instrumentality within our power to effect our object. We shall employ agents, circulate tracts, petition the State and national legislatures, and endeavor to enlist the pulpit and the press in our behalf.” I only hope that by doing so, delegates at a Forum 2048, convening to celebrate the 200th anniversary of the Seneca Falls Declaration, will be able to say that “protection” has already successfully been read back into the Fourteenth Amendment.

98. Inspired by the human rights vision of the 1848 Declaration of Sentiments, the 1998 Declaration of Sentiments drafted by the Forum '98 delegates, myself included, explicitly invoked human rights principles embodied in international documents. It proclaims that “women's rights [must] be defended as human rights and that governments, private institutions, and communities be accountable for promoting and upholding the human rights of all.” FORUM 98, supra note 1, at 12.

99. THE BIRTH OF AMERICAN FEMINISM, supra note 4, at 88.