INALIENABLE RIGHTS SERIES

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The Invisible Constitution

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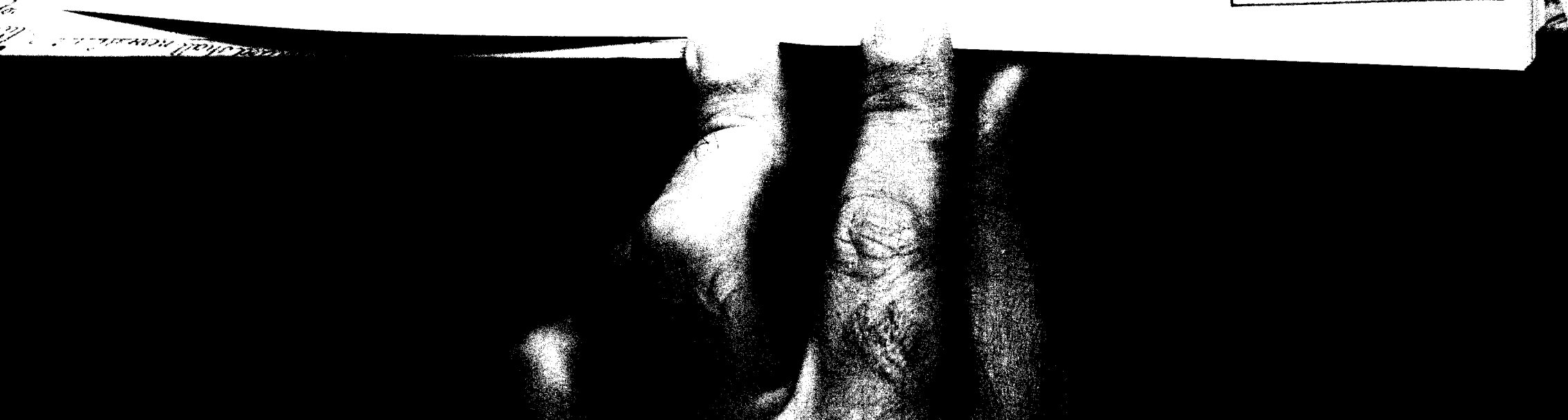

The Jagged Road to Equality

NOT ONLY DOES THE CONSTITUTION lack a textual basis for imposing on Congress a broad equality requirement that goes beyond a demand for equality in the deprivation of life, liberty, or property. Beyond that, the Constitution lacks a textual basis for much of what is commonly attributed to the very notion of "equal protection of the laws." Early judicial decisions interpreting the U.S. Constitution and the even older Constitution of the Commonwealth of Massachusetts—which contains the capacious declaration that all men are "born free and equal"—tended to regard such equality guarantees as commanding nothing about the substantive *content* of legislative enactments but as requiring only that, whatever the laws might be, they must be *applied and enforced* equally. The "equal protection *of the laws*" was taken to mean less than the "protection of *equal laws*." And to be "born free and equal" was likewise taken to mean nothing about the *kinds* of laws in respect of which equality was to be enjoyed. It was on that reading of the Massachusetts Constitution that the state's highest court ruled in an 1849 case,

Roberts v. City of Boston, that racial segregation by law in the public schools implicated no equality principle as long as the law segregating the races was not itself so transparently irrational as to constitute a deprivation of liberty without due process—a ruling that foreshadowed the U.S. Supreme Court's quite similar pronouncement in its now infamous "separate but equal" decision of 1896, *Plessy v. Ferguson*.

Depending on the level of generality at which one examines the understanding of those who wrote and ratified the Fourteenth Amendment, one can find historical evidence for a wide range of possible understandings of the equality concept that the amendment was meant to enshrine. At the level of specific expectations of what the amendment would do, there is little evidence to support the claim that people understood it to bar, for example, racial segregation by law in railroad cars of the sort involved in *Plessy* or racial segregation by law in schools of the sort involved more than half a century later in *Brown v. Board of Education*. On the other hand, at the level of more general and abstract understandings of what the amendment meant, a powerful case can be made that the use of law to subordinate one race to another was to be forbidden.

But, levels of generality apart, it is difficult on any view to credit the proposition, advanced from time to time by jurists as distinguished as Supreme Court Justice Scalia (during the oral argument of the *Parents Involved* case), that the Equal Protection Clause of the Fourteenth Amendment states an "absolute restriction" against any government consideration of race in the treatment of individuals, whatever the purpose. For unlike the Fifteenth Amendment, which expressly prohibits racial disenfranchisement, the Fourteenth says not a word about race, making it all the more remarkable not only that Justice Scalia could have said what he did but also that Chief Justice Roberts, writing in 2007 for a plurality of the Supreme Court in *Parents Involved* striking down voluntary public school integration